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THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL CRIMINAL LAW

By

Yvonne McDermott

A thesis awarded the degree of Ph.D. in Law by the National University of Ireland, Galway

July 2013

Irish Centre for Human Rights
School of Law
College of Business, Public Policy and Law
National University of Ireland Galway

Supervised by Professor William A. Schabas OC MRIA
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DECLARATION OF ORIGINALITY

I, Yvonne McDermott, do hereby declare that this work that is submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.
ACKNOWLEDGEMENTS

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I am greatly indebted to the following individuals who read and offered feedback on chapters of the work: Dr. Aoife Daly, Dr. Michelle Farrell, Dr. David Keane, Dr. Éadaoin O’Brien and Dr. Evelyne Schmid. Special thanks to Dr. Osian Rees who cheerfully proof-read the entire thesis and offered untrammelled moral support. I would also like to thank all of my friends from the Irish Centre for Human Rights for their camaraderie, especially Niamh Hayes, Joe Powderly, Tara Smith and Helen McDermott.

A special word of thanks is owed to my brothers, Ronan and Conor, my sister-in-law Jane, and my parents, Desmond and Gabrielle. My parents have never wavered in their faith in me, love and encouragement, and it is my great pleasure to dedicate this thesis to them.
ABSTRACT

Starting with the Nuremberg and Tokyo tribunals after the Second World War, international criminal law experienced a renaissance in the late 20th century, culminating in the creation of a permanent International Criminal Court in 1998. The corpus of international criminal law is now so developed that its procedure may be considered a distinct area of law and scholarship. This work seeks to examine the potential of international criminal tribunals to set the highest standards of procedural fairness for the conduct of criminal proceedings domestically. The procedure embraced by contemporary international criminal tribunals represents a sui generis system, underpinned by human rights standards and borrowing procedures from a variety of legal systems through their rules of procedure and evidence.

This work points to a number of reasons why international criminal procedure ought to act as a beacon of fairness for domestic legal systems. First, international criminal tribunals have an accepted goal of spreading the rule of law in post-conflict states, which should include a role in demonstrating the highest fair trial standards. Second, there are a number of practices which involve international criminal tribunals’ assessment of whether domestic jurisdictions adequately guarantee due process norms, including the principle of complementarity before the International Criminal Court and transfers to domestic states under Rules 11bis before the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Third, the need to ensure the continued legitimacy of international trials is hinged on the fairness of their proceedings. Relatedly, there are clear dangers inherent in complying with anything less than the highest standards of fairness.

International criminal procedure has embodied a number of positive precedents and has largely served in granting the accused a fair trial in an extraordinarily challenging context. Positive procedural developments include the very fact that trials are being conducted in a manner cognisant of the importance of the right to a fair trial; the implementation of witness protection measures in a manner consistent with the rights of the accused; some nuanced approaches to self-representation; the way in which disruptive accused have often been dealt with without violating their rights, and the move from having provisional release
as an exceptional measure to its being the default position at the pre-trial stage of proceedings.

In spite of these notable advances, the author identifies a number of shortcomings that indicate that contemporary international criminal tribunals have not fully embraced their standard-setting function and which have left the potential to set the highest standards of procedural fairness unrealised. These shortcomings include: the extension of fair trial rights to parties other than the accused, such as the prosecution. Another shortcoming is the length of trials and the causes of delay, coupled with a failure to acknowledge breaches of the accused’s right to trial without undue delay. On occasion, the accused’s right to trial without undue delay has been used as a bar to the assertion of other rights or as an excuse to deny defence motions, in which an acceptance of any delay was clearly implicit. This thesis also posits that the move towards allowing untested written testimony as evidence of the acts or conduct of the accused is a cause for concern, and attempts to prove that, despite claims to the contrary, admissibility decisions do have a bearing on the weight given to written evidence in the final judgment. The International Criminal Tribunal for the Former Yugoslavia’s liberal approach towards corroboration and cross-examination stands to jeopardise the accused’s right to test witness evidence, and a decision of the International Criminal Tribunal for Rwanda to the effect that untested written evidence would bear weight if the defence had not rebutted it calls the burden of proof into account.

The work concludes by drawing some overall themes from the substantive chapters. A number of barriers that have hindered the full realisation of international criminal procedure’s standard setting function are identified, including internal fragmentation — that is, a lack of uniformity between tribunals and even between disparate chambers of the same tribunal; the unique context of international criminal proceedings; and a clash of competing goals. It is hoped that international criminal procedure’s standard-setting function will be taken into account by international criminal law practitioners, judges, scholars and policy-makers in the future.
### Abbreviations Used

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<th>Abbreviation</th>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>Am Crim LR</td>
<td>American Criminal Law Review</td>
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<td>Am J Comp L</td>
<td>American Journal of Comparative Law</td>
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<td>Boston Coll LR</td>
<td>Boston College Law Review</td>
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<td>Brit J Criminol</td>
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<td>Brooklyn JIL</td>
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<td>Buff LR</td>
<td>Buffalo Law Review</td>
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<tr>
<td>California LR</td>
<td>California Law Review</td>
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<td>California Western Int’l L J</td>
<td>California Western International Law Journal</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<tr>
<td>Case Western Res JIL</td>
<td>Case Western Reserve Journal of International Law</td>
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<td>Columbia Hum Rts LR</td>
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<td>CLF</td>
<td>Criminal Law Forum</td>
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<td>Criminal Law Quarterly</td>
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<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<td>Drake Law Review</td>
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<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<td>Duke J Comp &amp; Int'l L</td>
<td>Duke Journal of Comparative and International Law</td>
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<td>ECCCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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EHRR European Human Rights Reports
EJIL European Journal of International Law
Fordham Int’l J Fordham International Law Journal
GC Grand Chamber of the European Court of Human Rights
Georgetown JIL Georgetown Journal of International Law
Georgia LR Georgia Law Review
GYIL German Yearbook of International Law
Harv Int’l L J Harvard International Law Journal
Harv LR Harvard Law Review
HRLR Human Rights Law Review
IACtHR Inter-American Court of Human Rights
ICC International Criminal Court
ICCPR International Covenant on Civil and Political Rights
ICLR International Criminal Law Review
ICLQ International and Comparative Law Quarterly
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the Former Yugoslavia
IJTJ International Journal of Transitional Justice
IMT International Military Tribunal
Ind L J Indiana Law Journal
Intl J Hum Rts International Journal of Human Rights
Int’l Rev Red Cross International Review of the Red Cross
Int’l Studies Rev International Studies Review
Isr LR Israel Law Review
J C & S L Journal of Conflict and Security Law
J Crim L & Criminol Journal of Criminal Law and Criminology
J Genocide Res Journal of Genocide Research
JICJ Journal of International Criminal Justice
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<td>Law and Philosophy</td>
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<td>Law and Contemporary Problems</td>
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<td>LJIL</td>
<td>Leiden Journal of International Law</td>
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<td>LPR</td>
<td>Law, Probability and Risk</td>
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<td>Max Planck Ybk UN L</td>
<td>Max Planck Yearbook of United Nations Law</td>
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<td>Northwestern University Journal of International Human Rights</td>
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<td>NYU LR</td>
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<td>MLR</td>
<td>Modern Law Review</td>
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<td>OJLS</td>
<td>Oxford Journal of Legal Studies</td>
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<td>Oregon Rev Int’l L</td>
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<td>OUP</td>
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<td>Pennsylvania State University Law Review</td>
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<td>RIDP</td>
<td>Revue Internationale de Droit Pénal</td>
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<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>S Cal LR</td>
<td>Southern California Law Review</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SFOR</td>
<td>Stabilisation Force in Bosnia and Herzegovina</td>
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<td>Stanford JIL</td>
<td>Stanford Journal of International Law</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<td>Texas Int’l L J</td>
<td>Texas International Law Journal</td>
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<td>UCLA J Int’l L &amp; Foreign Aff</td>
<td>University of California, Los Angeles Journal of International Law and Foreign Affairs</td>
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At the end of the last century, Franck observed that international law had reached its ‘post-ontological stage’.\(^1\) This meant that researchers could from thereon in move beyond the question of whether international law was actually law and were free to critically evaluate the body of law’s content. In a sense, international criminal procedure has reached a similarly advanced stage of development. Scholars have moved beyond questions of whether international criminal procedure is or should be most closely aligned with the adversarial or the inquisitorial legal tradition. Almost every international criminal law academic now agrees that international criminal procedure represents a *sui generis* system which incorporates elements of criminal procedure from a vast range of countries, and some elements which are truly unique. Procedure is no longer a chapter in international criminal law textbooks, but the subject of individual monographs,\(^2\) and many have attempted to enunciate the precise scope of this burgeoning body of law. For example, the ‘International Expert Framework on International Criminal Procedure’, comprised of a team of 43 expert researchers attempted to identify and enunciate ‘general rules and principles’ of international criminal procedure.\(^3\)

With the acceptence of international criminal procedure as a self-sustaining discipline and as the tribunals established to try the most serious crimes in the Former Yugoslavia, Rwanda and Sierra Leone\(^4\) begin to wind up their

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3. The fruits of this labour were published in Sluiter *et al* (eds.) (n 2).
4. The ICTY was established pursuant to United Nations Security Council Resolution 827 (1993) while the International Criminal Tribunal for Rwanda (‘ICTR’) was established by United Nations
activities,\textsuperscript{5} many see the time as being ripe for critical evaluation of these tribunals and their legacy.\textsuperscript{6} The International Criminal Tribunal for the Former Yugoslavia published a \textit{Manual on Developed Practices} in 2009, which noted Judge Pocar’s emphasis on the legacy of the Tribunal during his Presidency.\textsuperscript{7} The Special Court for Sierra Leone’s annual reports contained a distinct section on ‘legacy’ in the Court’s final years.\textsuperscript{8} Several seminal works since the beginning of the 21\textsuperscript{st} century have critically evaluated issues such as modes of criminal liability under international criminal law,\textsuperscript{9} the sentencing practice of international criminal courts;\textsuperscript{10} and the definitions of various crimes, including issues such as whether a

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\textsuperscript{6} Elena A. Baylis, ‘Rebuilding National Courts through Transnational Networks’ (2009) 50 \textit{Boston Coll LR} 1, 82-83.


\textsuperscript{8} \textit{Eighth Annual Report of the President of the Special Court for Sierra Leone}, May 2011, available online at: \url{http://www.scsl.org/LinkClick.aspx?fileticket=kK8RBeHGowQ%3D&tabid=53} (last accessed 2 December 2012) 47.


‘policy element’ is required for crimes against humanity\(^{11}\) and the agreement on the definition of the crime of aggression before the International Criminal Court,\(^{12}\) in detail. These scholarly works have emphasised the legacy of international criminal tribunals in setting precedents for the conduct of criminal proceedings for international crimes both internationally and domestically.\(^ {13}\) Quite apart from assessments of these substantive issues, the procedures espoused by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone also find themselves under the microscope.\(^ {14}\)

At the time that the International Criminal Tribunal for the Former Yugoslavia was established, the Secretary General of the United Nations stated that it was ‘axiomatic’ that criminal courts established by the international community should espouse the highest standards of human rights protection in their procedures.\(^ {15}\) The academic community was quick to call the same tribunal into account when early pronouncements both permitted the use of anonymous witnesses,\(^ {16}\) and likened international criminal tribunals to military tribunals in their operation.\(^ {17}\) Notwithstanding that military tribunals are expected to grant the same corpus of rights as regularly-constituted courts,\(^ {18}\) this association quickly

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\(^{14}\) See above (n 2).


\(^{16}\) Prosecutor v. Tadić, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, para 86.


\(^{18}\) Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007) para 22 (‘The provisions of Article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.’). See further, Evelyne Schmid, ‘A Few Comments on a Comment: The UN Human Rights Committee’s General Comment No. 32 on Article 14 of the
felled to the wayside, as did the use of anonymous witnesses in the practice of the International Criminal Tribunal for the Former Yugoslavia and its contemporaries. The idealism that fostered near-universal academic support for the end of impunity through international justice became tempered as commentators began to notice the rising costs and unwieldiness of these new institutions. A new wave of scholarship on international criminal procedure has begun to examine issues like evidence, the participation of victims, and the length of trials in greater detail.

These developments take place within a wider context of converging legal systems in domestic courts. Analyses of criminal law domestically have moved beyond the traditional civil law/common law dichotomy, and it is now widely accepted that there is no such thing as a purely adversarial or inquisitorial

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19 See further below, section 3.5. While it falls outside the scope of the present work, it must be noted that the Special Tribunal for Lebanon disappointingly reintroduces the use of anonymous witnesses as permissible, per Rule 93 of its Rules of Procedure and Evidence. This re-introduction was discussed by the Tribunal’s late President, who referred to the special nature of crimes of terrorism in its justification. See ‘RPE – Explanatory Memorandum by the Tribunal’s President’, Special Tribunal for Lebanon, 10 November 2009, para 35. However, Rule 159 states that such statements may be excluded if their probative value is substantially outweighed by the need to ensure a fair trial, and that a conviction may not be based solely or decisively on them.


domestic legal system. According to Jung:

\[W\]e have to reach beyond this popular dichotomy in order to get a more complete, and perhaps a more meaningful, picture of the convergence and diversity of procedure. The structural problems do not necessarily follow such superficial classifications, but rather run along the line[s] of such meta-principles and meta-conflicts as fairness, checks and balances, procedural transparency, democracy versus professionalism, and so on.

Some commentators traditionally argued that common law systems were better or worse than those of civil law, or vice versa, for ensuring respect for the rights of the accused. However, the more commonly-accepted view is not only that there is no system in existence which can be classified as a pure example of either tradition, but also that each code of criminal procedure and criminal justice system has its advantages and its disadvantages and that no system is inherently ‘fairer’ than any other. As eloquently stated by Summers:

That states are willing to ratify provisions such as Article 6 of the European Convention on Human Rights... is testimony... to the tacit belief that the theoretical principle of a fair trial is not dependent on a particular criminal procedural model, and it is on this basis that Article 6 attempts to regulate multiple criminal procedure systems ... In this sense the Court seems to subscribe to Harlow’s view that, ‘There is... no absolute advantage of adversarial over inquisitorial procedure; one is not inevitably more independent or inherently less

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29 See Abraham S. Goldstein, ‘Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure’ (1974) 26 *Stanford LR* 1009, arguing that neither the adversarial nor the inquisitorial paradigm is inherently better than the other.
arbitrary than the other; each can operate fairly.'

A number of notable alternatives to the adversarial/inquisitorial paradigm have been developed, with Packer’s ‘crime control’ and ‘due process’ models, and Damaška’s ‘hierarchical’ and ‘co-ordinate’ models being the most prominent. These models are unsuitable when discussing international criminal procedure, however, because of their focus on policing and state authority. These are missing elements in the structure of international criminal law, which relies on the cooperation of states for its full realisation. While deterrence is often mentioned in judgments, ‘crime control’ is not a paramount feature of international criminal law in the sense of Packer’s model. Nor does international criminal procedure fit neatly within the confines of Packer’s ‘due process’ model, as he envisioned a system that would construct an ‘obstacle course’ for police conduct. By contrast, the conduct of arresting authorities is broadly disregarded when it comes to the trial phase of international criminal proceedings, unless any breaches of the rights of the accused at the arrest stage were particularly egregious. Packer’s ‘due process’ model placed the rights of defendants before all other considerations. International criminal procedure refers to the rights of victims, witnesses, the prosecutor and the international community, as discussed further in Chapter 4, but also pursues goals outside of the due process model’s goal of ensuring that innocent people are not wrongly convicted, discussed further in Chapter 2 in greater detail.

Damaška’s ‘hierarchical’ and ‘co-ordinate’ models defined judicial structures according to ‘conflict-solving’ and ‘policy-implementing’ state forms. However, international criminal procedural forms do not fit neatly into either of these models. Some elements of the ‘hierarchical’ system, such as the absence of a jury and prosecutorial appeals are present, but other elements — such as the

34 Prosecutor v. Nikolić, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-PT, 9 October 2002, paras 112-114.
35 Damaška (n 32).
existence of a long-term professional service — are absent. Some elements of the ‘co-ordinate’ model, such as a lack of permanency in the rules of procedure, are present in some international criminal tribunals but crucial elements — including lay participation and ‘the desire for particularised justice’ — are missing.

Some authors have defined procedural models on the basis of ‘families’ of legal systems. Most prominently, David and Brierley classified the criminal justice systems of the world into four ‘families’: common law, Romano-Germanic, socialist, and those based on religious or philosophical principles. Vogler classified systems of justice as ‘adversarial’, ‘inquisitorial’ and ‘popular’, the latter of which included traditional justice mechanisms such as the Gacaca trials in Rwanda. It is difficult to classify international criminal procedure as fitting squarely into any of those models, unless it can be regarded as its own family. However, this is unlikely because the division of systems into families is based on two factors: whether lawyers trained in one tradition can transfer to another with relative ease, and the principles that underpin the system. Given that lawyers are not trained in international criminal procedure, but rather pass to the international criminal bar with relative ease from their own domestic systems, the ‘international justice as a new family’ theory does not fit perfectly, but may come closest to categorising the international criminal tribunals amongst the dominant theories of criminal procedure.

Perhaps what the difficulties raised in attempting to classify international criminal procedure within established models of legal systems teaches us most of all is that paradigms are shifting and one cannot limit their scholarly analysis of international criminal procedure to domestic legal constructs. Some comparative

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40 Vogler (n 28).
41 Vogler (n 28) 4.
legal scholars do reference the practice of the international criminal tribunals, but it is fair to say that this reference is fleeting and does not go to the heart of their classification of criminal justice systems.\textsuperscript{44} For example, Vogler dedicated eight pages of his \textit{World View of Criminal Justice} to the analysis of international criminal justice, remarking that there was an increased shift towards inquisitorial procedures in the international criminal tribunals, at a time when domestic legal systems seemed to be ever shifting towards incorporating traditionally common law elements.\textsuperscript{45} He suggested that these increasingly inquisitorial facets of international criminal procedure were devoid of the checks and balances present domestically, and stated that ‘these should be viewed with caution’, given that ‘international justice… is consciously intended to provide a blueprint for procedural reform around the world.’\textsuperscript{46}

On the point of convergence of criminal procedural models domestically, it could be argued that the influence of human rights, particularly the judicial oversight of certain minimum due process guarantees, has led in part to this development.\textsuperscript{47} In the home continent of the two major legal traditions, the European Court of Human Rights — whilst not classifying one legal system or tradition as better than any other for the furtherance of rights contained in the Convention — has pronounced judgments on the right to confront crucial witnesses,\textsuperscript{48} and the right to a reasoned judgment.\textsuperscript{49} These pronouncements have led to a ‘conceptual overhaul’\textsuperscript{50} of procedural systems, which has forced them to

\textsuperscript{44} E.g. Mirjan R. Damaška, \textit{Evidence Law Adrift} (New Haven [etc.]: Yale University Press, 1997) 1.
\textsuperscript{45} Vogler (n 28) 278-285.
\textsuperscript{46} \textit{Ibid}.
\textsuperscript{50} Jung (n 25) 153.
incorporate those elements of their procedure which would appear not to conform with human rights protections.\textsuperscript{51} The influence of human rights has expanded beyond those regions directly within the reach of judicial oversight by human rights tribunals, particularly where an international presence is involved. For example, Mégret described human rights law as ‘a legal corrective to some of the perceived limitations of Cambodia’s inquisitorial procedure, and some of that country’s judicial deficiencies’ when the rules of procedure for the Extraordinary Chambers in the Courts of Cambodia (ECCC) were being established.\textsuperscript{52}

Within Europe, a further change has driven convergence in legal systems — that is, the move within the European Union from being a purely economic union to one which concerns itself with matters of collective security, the apex of which was the creation of an area of freedom, security and justice.\textsuperscript{53} Inherent in the creation of this area is the presumption that EU member states will afford the same rights and freedoms to citizens who are extradited to face trial elsewhere within the European Union.\textsuperscript{54} This idea was strengthened by the entry into force of the Lisbon Treaty in 2010, which introduced provisions for the creation of the post of a European Public Prosecutor and the adoption by the Union of minimum rules on the rights of individuals in criminal procedure, mutual admissibility of evidence between Member States, and the rights of victims of crime.\textsuperscript{55}

\textsuperscript{51} Mirielle Delmas-Marty (ed.), \textit{The Criminal Process and Human Rights: Towards a European Consciousness} (Dordrecht [etc.]: Martinus Nijhoff, 1997) viii; Roberts (n 28) 385.
\textsuperscript{53} Treaty of Maastricht, Official Journal of the European Communities C 191, 31 ILM 253, 7 February 1992, created a Justice and Home Affairs Pillar, and the first provisions on police and judicial cooperation in criminal matters were introduced in Title VI. The first steps towards the creation of an Area of Freedom, Security and Justice were laid down in the Treaty of Amsterdam, Official Journal of the European Communities C 340, 37 ILM 56, 2 October 1997. The Tampere European Council of 15 and 16 October 1999 endorsed the principle of ‘mutual recognition of judgments’ between Member States, while Council Decision 2002/187/JHA of 28 February 2002 established Eurojust, the EU’s Judicial Cooperation Unit, ‘with a view to reinforcing the fight against serious crime’. Following the entry into force of the Treaty of Lisbon, Official Journal of the European Communities C 306, 17 December 2007, placed the Charter of Fundamental Rights, which includes fair trial rights in Articles 47-50. The Lisbon Treaty mentions Eurojust and its mission ‘to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States’ in Article 85, while Article 86 envisioned the establishment of a European Public Prosecutor to deal with cross-border financial crimes in the European Union. See further, Ester Herlin-Karnell, ‘The Lisbon Treaty and the Area of Criminal Law and Justice’ (2008) 3 \textit{European Policy Analysis} 1, 2.
\textsuperscript{54} In \textit{N.S. v. Secretary for State}, Case C-411/10, Judgment, 21 December 2011, a case on the Common European Asylum System, the ECJ stated that the ‘creation of an area of freedom, security and justice [was]… based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights’ (para 84).
\textsuperscript{55} TFEU, Article 82. At the time of writing, work was ongoing on these minimum rules: see e.g.
Furthermore, the Charter of Fundamental Rights, which was given legal footing by the entry into force of the Lisbon Treaty, contains in Article 47 a number of fair trial provisions, grouped with the right to an effective remedy. The provision reads:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Articles 48, 49 and 50 of the Charter enunciate the presumption of innocence, the ‘respect for the rights of the defence’, and the principles of legality, proportionality of punishment and *ne bis in idem*. In essence, these provisions extended the corresponding provisions of the European Convention on Human Rights to the remit of Union competence.

The procedure in modern international criminal tribunals commenced in the International Criminal Tribunal for the Former Yugoslavia with a set of rules of procedure and evidence broadly similar to the Federal Rules for Criminal Procedure used in the United States of America. This was not caused by any major debate on the most appropriate procedural rules, but rather by pragmatism as the American Bar Association had provided the fullest working draft when the judges first sat down to draft the first set of Rules of Procedure and Evidence. While the proposed draft was not adopted in full, it was used as a basis for the first set of Rules of Procedure and Evidence. As a result, Jackson has suggested that judges may have been more driven by the exigencies of agreeing upon a draft set of rules than they were by formulating a human rights-based approach to rules of procedure and evidence. The international criminal tribunals later moved

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56 This formulation is described in the Explanations to the Charter as being ‘the same as’ Article 6(3) of the ECHR, which enshrines a number of minimum guarantees. In any event, under Article 52(3) of the Charter, the meaning and scope of rights which correspond to ECHR rights ‘shall be the same as those laid down by the Convention’.

57 Jackson (n 22) 236-237.

58 See further Jackson (n 22) 236-237. See further, Zappalà (n 2) 2; Daryl A. Mundis, ‘From
towards incorporating more traditionally inquisitorial elements into their procedure, such as the creation of Pre-Trial Chambers and the participation of victims in the International Criminal Court, the relaxation of rules relating to non-oral evidence in the ad hoc tribunals, and a more managerial style of judging. International criminal procedure is now firmly established as a sui generis or mixed model.

According to Jackson, the fact that one of the tribunals’ most high-profile accused, Slobodan Milošević, died before his trial could be completed led commentators to call the adequacy of the primarily adversarial model into question. Perhaps it could be stated more broadly that the cost and duration of the unwieldy trial procedure began to test the patience of judges, funders and the international community, and that the introduction of procedural elements from a wide range of legal systems was inevitable where a cosmopolitan judiciary are permitted to make and amend the rules as they go along. Whether this fluid and ad hoc system of rule-making and rule amendment has empowered international judges to embrace the highest standards of fairness is questionable, as shall be


59 See William Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals’ (2006) 4 Int’l Commentary on Evidence Issue 1, Article 4, available online at: http://www.bepress.com/ice/vol4/iss1/art4, arguing that even more inquisitorial elements should have been adopted by the ad hoc tribunals. On the participation of victims, see (n 23) above; on the use of Pre-Trial Chambers in the ICC, see Jerome de Hemptinne, ‘The Creation of Investigating Chambers at the ICC’ (2007) 5 JICJ 402.


63 Jackson, ibid, 18.

64 On the responsive nature of rule-making in the area of evidence, see section 6.1 below. Byrne (n 42) 252 calls this a ‘solution-oriented approach’ to international criminal procedure.
discussed in Chapter 6 in particular.

There is some evidence of symbiosis between international and domestic criminal justice systems. For example, draft model codes have been formulated which use the rights afforded in principle to defendants before international tribunals as a template.\(^6\) Further, the international criminal tribunals often refer to decisions of domestic courts to inform their law and practice.\(^6\) While the reverse is not as common — presumably because domestic courts have a wealth of judicial practice within their own jurisdiction to rely upon — there have been some instances of reference by domestic states to the practice of international tribunals, particularly when international crimes are being tried.\(^6\) More dangerously, however, there have been a number of instances — in particular, in the United States at the turn of the 20th century — where international criminal justice’s shortcomings were used as a justification for states’ own derogations from international standards of due process.\(^6\)

In the light of the convergence of legal systems and the fact that criminal procedure both domestically and internationally has moved beyond the


\(^{66}\) These are far too many to mention, but a number of examples include *Prosecutor v. Tadić*, Appeal Judgment, Case No. IT-94-1-A, 15 July 1999, paras 205-220 (on domestic case law justifying the third form of joint criminal enterprise responsibility); *Prosecutor v. Erdemović*, Appeals Judgment, Case No. IT-96-22-Tbis, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah (on the defence of duress in a variety of jurisdictions); *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, paras 539-548 (on the nature of accomplice liability) and *Prosecutor v. Karadžić*, Decision on the Accused’s Holbrooke Agreement Motion, Case No. IT-95-5/18-PT, 8 July 2009, paras 75-79 (on the application of the abuse of process doctrine when immunity from prosecution has been promised).

\(^{67}\) *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] S.C.J. No. 39, 28 June 2005, para 126 (‘Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the Criminal Code, which expressly incorporate customary international law.’) See also, *Brown (aka Vincent Bajinja) and Ors v. Government of Rwanda and Ors* [2009] EWHC 770, paras 37-48 (discussing the ICTR’s decisions that refused to refer cases to Rwanda under Rule 11bis).

civil/common law dichotomy, a closer look at international criminal procedure as a *sui generis* legal system, its goals and aspirations, and, perhaps most importantly, the legacy of international criminal procedure and its potential future impact on the conduct of international criminal trials, is warranted.

1.2. **Research Question**

This thesis asks, first, whether international criminal procedure ought to bear a standard-setting function. It is hypothesised that there is great potential for international criminal tribunals to set the highest standards of fairness in their procedure. It is also argued that failure to do so may lead to a dilution of the international human right to a fair trial, and that as international legal institutions, the international criminal tribunals need to practically embody international fair trial standards to show states how they ought to work in practice.

The second core question asks whether international criminal law has fully espoused this standard-setting potential in its procedure by setting the highest standards of fairness. While acknowledging some areas of great progress in the right to a fair trial as interpreted by the international tribunals, a number of shortcomings suggest that they fall short of this standard-setting function. These areas that warrant further attention in order to reach the highest standards of fairness include: the expedition of trials, the use of written witness testimony, and the placing of the interests of the prosecution and other actors in a balance with the rights of the accused.

1.3. **Methodology**

The author has chosen doctrinal or ‘black-letter’ legal analysis as the primary method of research. Comparative, theoretical and human rights perspectives will be introduced throughout the study, although the study does not claim to be a comparative or theoretical work. This approach has been taken in other works on standard-setting in international criminal procedure.69

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some quantitative methodology in its analysis of evidence before the international tribunals. Arguably, some further empirical analysis might have added to the hypothesis put forward in this work. It would have been interesting, for example, to see whether judges in international criminal tribunals see their job as encompassing the need to set the highest standards of fairness. This was considered at an early point in the study but the idea was rejected in the light of the fact that not all judges would have made themselves available to talk to the author, and this might have lead to a skewing of the data. Furthermore, it was concluded that judicial perspectives on whether the tribunals should espouse the highest standards of fairness could be garnered from judgments and extra-judicial writings.

The scope of the present study is limited to the trial practice of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. There are, admittedly, two shortcomings in this scope. First, the emergence of newer ‘hybrid’ tribunals and the Special Tribunal for Lebanon have remained rather under-examined in academia and could have been looked at here. Second, the pre-trial practice could have been analysed as that undoubtedly has an impact on the conduct of trial proceedings, from expediency to disclosure to the presentation of the defence case. For example, the use of ‘intermediaries’ in the investigations of the Office of the Prosecutor at the International Criminal Court has raised concerns about equality of arms, reliability of witness testimony, and disclosure. The limitations in terms of word count and time meant that the study had to be limited, but these important international tribunals and pre-trial issues and their relation to the central hypothesis herein may be revisited in a later study. At the time of writing, the practice of the Special Tribunal for Lebanon, an undoubtedly ‘international’ criminal tribunal in the sense of its being separate from the country with which it is concerned, was too under-developed to form a basis for analysis in any real sense.

Many authors have grappled with the question of whether it would be appropriate to assess international criminal procedure through the lens of comparative criminal procedure, or through reference to a certain system or systems. Safferling, for example, looked at both United Kingdom and German procedural standards as well as those of the International Criminal Tribunal for the Former Yugoslavia in developing his theory on an emerging international criminal procedure. When assessing the fairness of procedures with reference to a certain domestic system or systems, however, one must be conscious of one’s own legal background and the bias towards certain practices which may result. Furthermore, as Roberts observed, comparative analyses may point out the pros and cons of a given procedure but will fail to elaborate the values that ought to underpin criminal procedure.

Human rights-based approaches to international criminal procedure, as perhaps most famously adopted by Zappalà, have also been criticised. Mégrét argued that human rights analyses are ‘under-determinative’, due to the following factors: (a) human rights treaties are not binding and have no formal status before international criminal tribunals; (b) the broad aims of human rights rarely prescribe a certain procedure; (c) human rights standards need to be contextualised within the broader goals of international criminal procedure; (d) human rights treaties are subject to a ‘margin of appreciation’ doctrine, which gives certain states leeway as to how to effectuate the standards therein; (e) there are internal inconsistencies in human rights treaties; (f) human rights case law depends on the actor claiming that their rights have been violated, and as a result, human rights courts do not have to deal with conflicting claims to rights as international criminal courts do when deciding between the rights of the accused.

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72 Safferling, *Towards an International Criminal Procedure* (n 2) 2: ‘the aim must be a truly international criminal procedure which should not be used as a test for the credibility of domestic penal systems, but stand solidly on the various traditions of criminal procedure’.

73 Mégrét (n 51) 44 (‘Judges associated with particular traditions have been known to, consciously or unconsciously, promote certain features of criminal procedure that they are familiar with.’) See also Summers (n 25) 11, referring to ‘legal nationalism’ and the jealous guarding that some practitioners and commentators tend to have over their own legal traditions.


75 Zappalà (n 2).
and other actors at trial; (g) human rights law pushes for the end of impunity at any cost, and as such, international criminal tribunals should not be limited by human rights standards in that shared quest for the end of impunity, and (h) human rights treaties allow for derogations in states of exception. Mégret ended his analysis by noting that the debate between various legal traditions often finds itself looking to human rights law for guidance, only to find human rights law, in turn, seeking guidance from domestic law.

A number of observations need to be made on this denigration of human rights law as a framework for analyzing the fairness of procedures in international criminal law. First, the ‘problem’ of symbiosis between domestic and human rights systems is a non-issue; the relationship between the two is by its very nature a two-way street; indeed, one would think that if human rights standards acted in a vacuum, it would be a better reason to disregard them as irrelevant to assessments of international criminal procedure.

In addition, while human rights treaties are not themselves binding before international criminal tribunals, the same fair trial standards are enshrined in the statutes of the international criminal tribunals, so it is not reasonable to disregard the standards originally laid down in human rights legal instruments as irrelevant to international criminal procedure. Article 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 20 of the Statute of the International Criminal Tribunal for Rwanda, Article 17 of the Statute of the Special Court for Sierra Leone and Article 67 of the Statute of the International Criminal Court are essentially reflections of Article 14 of the International Covenant on Civil and Political Rights. All five provisions embody the rights to equality before the law, to the presumption of innocence, and to a number of minimum guarantees that must be observed in practice. They also establish the permitted limitations on the right to a public hearing. Like the International Covenant on Civil and Political Rights, the Statutes of the Special Court for Sierra Leone, International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia lay out a total of seven minimum guarantees. The International Criminal Court’s Statute adds to these the right to make an unsworn statement, the right to the disclosure of exculpatory materials, and the

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76 Mégret (n 51) 49-58.
77 Ibid, 58.
right not to have the burden of proof or onus of rebuttal imposed on the accused.

There is some difference in opinion as to whether these norms are to be properly understood as minimum guarantees which the judiciary need to ensure, if the trial as a whole could be considered fair even if some elements are excluded. In Nikolić, for example, the ‘Chamber observe[d] that these norms only provide for the absolute minimum standards applicable’, whereas Judge Shahabuddeen, in a dissenting opinion before the International Criminal Tribunal for the Former Yugoslavia, stated that ‘the fairness of the trial need not require perfection in every detail. The essential question is whether an accused has had a fair chance of dealing with the allegations against him.’ It would seem that the former is the most preferable approach for ensuring full respect for the rights of the accused.

In spite of the lack of uniformity on this issue, some judges have indicated that the right to a fair trial, as embodied in several international legal instruments including Article 14 of the International Covenant on Civil and Political Rights is part of customary international law. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has stated that Article 14 reflects ‘an imperative norm of international law to which the Tribunal must adhere.’ The Special Court for Sierra Leone appears to have gone even further; it considered it superfluous to enter into a discussion as to whether Article 14(5) of the International Covenant on Civil and Political Rights (the right to appeal against a conviction) had reached customary status, but nonetheless remarked that the United Nations’ agreement to the terms of Article 20 of the Statute of the Special Court for Sierra Leone ‘offered some evidence that it has indeed reached the status termed by international lawyers “jus cogens”’. This may be something of a stretch of the jus cogens doctrine, insofar as it is accepted that rights that are derogable at times of emergency cannot be jus cogens. Indeed, the Chamber

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78 Nikolić Decision on Defence Motion Challenging the Exercise of Jurisdiction (n 34) para 110.
79 Prosecutor v. Milošević, Separate Opinion of Judge Shahabuddeen, Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, Case No. IT-02-54-AR 73.4, 30 September 2003, para 16. See further below, text to notes 139 – 142.
itself did not even appear convinced enough itself to conclude that the rights enshrined in Article 14 are in fact \textit{jus cogens}; it instead reasoned that others might find support for this viewpoint in the light of the agreement between the UN and Sierra Leone on the Statute of the Special Court.\textsuperscript{84} Regardless of whether the fair trial standards enshrined in human rights treaty body jurisprudence have reached \textit{jus cogens} status, there is a strong case to be made for their customary status, and this has been recognised by the ICRC study on customary international humanitarian law.\textsuperscript{85}

Lastly, Mégret’s reference to the principle that human rights law supports the end of impunity at any cost\textsuperscript{86} may be something of a stretch of the imagination. It is true that in \textit{X v. FRG}, the European Commission referred to the exceptional circumstances of post-World War II trials in stating that some of the fair trial principles were rendered inapplicable to those trials, stating that:

\begin{quote}
The exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission’s opinion, inapplicable the principles developed in case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences.\textsuperscript{87}
\end{quote}

However, since that case, the European Court of Human Rights has rejected the notion that society’s interest in prosecution could override certain individual

\begin{footnotesize}
\textsuperscript{84} Norman Stay of Proceedings Decision (n 82) para 19.
\textsuperscript{85} Jean-Marie Henckaerts and Louise Doswald-Beck (eds.) \textit{Customary International Humanitarian Law, Volume I: Rules} (Cambridge: CUP/ICRC, 2005) and Jean-Marie Henckaerts and Louise Doswald-Beck (eds.) \textit{Customary International Humanitarian Law, Volume II: Practice} (Cambridge: CUP/ICRC, 2005). Some of the customary fair trial rules have been criticised for their uncertain basis in customary international law; see Yutaka Arai-Takahashi, ‘Fair Trial Guarantees in Occupied Territory – the Interplay between International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noelle Quénévet (eds.) \textit{International Humanitarian Law and Human Rights Law – Towards a New Merger in International Law} (Leiden/Boston: Nijhoff, 2008) 449, 463 (‘It is by reference to the progressive twist provided by the IACmHR in its Report on Terrorism and Human Rights that the acquisition of the non-derogable status [of rights to defence counsel of one’s choosing under the ICRC’s Rule 100] can be confirmed.’) Clapham appears to agree that it would be excessive to expect non-state actors in non-international armed conflicts to be in a position to respect certain fair trial rights; see Andrew Clapham, ‘The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement’ (1 February 2010) available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 (last accessed 19 January 2013). Cf. Sandesh Sivakumaran, “Courts of Armed Opposition: Fair Trials or Summary Justice?” (2009) 7 \textit{JICJ} 489, 508-509 (arguing that some armed groups do have the capacity to conduct fair trials and therefore should not be excused of their obligations owing solely to their status.)
\textsuperscript{86} Mégret (n 51) 57.
\end{footnotesize}
rights of the accused. In *Saunders v. UK*, for example, where the CEO of the Guinness Company was accused of white collar crime, it was argued that derogations to right to silence were needed more in white collar criminal cases; this argument was rejected.  

This decision could be said to comport with Dworkin’s conceptualisation of ‘rights as trumps’, where individual rights should ‘trump’ collective goals. As Ashworth has pointed out, when a right is declared by a court to be ‘fundamental’, that same court cannot take it away again by showing that maybe it would be better if it didn’t exist in a certain limited situation.  

In spite of this critique of Mégret’s theory on the place of human rights in the analysis of international criminal procedure, the present author largely agrees with his assertion that international criminal procedure should be recognised as *sui generis* and should be examined through black-letter legal approaches as a self-sustaining discipline. As such, the standards by which international criminal procedure shall be assessed come directly from the statutes of the international criminal tribunals, which largely reiterate the fair trial standards in, *inter alia*, Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights.

Having thus established that human rights standards bear a definite weight when assessing whether international tribunals comport with international fair trial standards, we must ask to what extent they relate to the *highest standards of fairness*. It is submitted that the standards enshrined in Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, and related human rights jurisprudence, fall short of providing the only standards of assessment for a number of reasons. First, the jurisprudence only provides illustration on breaches of these rights, and by consequence, best practice is not enunciated. Second, assessments of whether the right to a fair trial has been breached take an approach based on the ‘overall fairness’ of the trial; therefore, these decisions do not enunciate the precise

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parameters of each individual component of the right to a fair trial, save in those rare cases where only one of the component guarantees is at issue. Third, by simply ruling on whether the right to a fair trial has been breached or not, human rights tribunals do not provide a great deal of guidance on the optimal conduct of criminal proceedings; indeed, a large margin of appreciation is given to states as regards their domestic criminal procedures.\textsuperscript{91}

Thus, the term ‘highest standards of fairness’ (alternatively called ‘international standards of fairness’\textsuperscript{92}) stretches beyond the limits of human rights provisions and related jurisprudence. The term is taken directly from the tribunals themselves,\textsuperscript{93} and is regularly referred to without full enunciation of its definition. However, it is submitted that ‘the highest standards of fairness’ can be defined as: a full implementation of all of the rights of the accused laid down in the tribunals’ statutes, interpreted in a uniform and consistent manner to the benefit of the accused, which are instructive as to the practical realisation of the universal standards of the right to a fair trial. This interpretation is tied to a larger theoretical framework, which values the principles of consistency, determinacy and coherence in international law.

1.4. \textsc{Theoretical Framework}

1.4.1. The meaning of ‘fairness’

In 1990, Franck published his seminal work on fairness in international law, which defined ‘fairness’ in that context as meaning ‘legitimacy’ in conjunction

\textsuperscript{91} E.g. \textit{Ruiz Torija v. Spain}, Application No. 18390/91, Judgment, 9 December 1994 (on the margin of appreciation doctrine as it relates to the right to a reasoned judgment); \textit{Colozza v. Italy}, Application No. 9024/80, Judgment, 12 February 1985, para 30 (‘The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 para 1... The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved’); \textit{De Cubber v. Belgium} (1985) 7 EHRR 236, 26 October 1984, para 35 (‘The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised.’) See further, Yutaka Arai-Takahashi, \textit{The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR} (Antwerp: Intersentia, 2002) 33-58.


\textsuperscript{93} See below, section 2.2.2.
with distributive justice.\textsuperscript{94} Franck’s earlier work on legitimacy adduced that determinacy; symbolic validation; coherence, and adherence were the four key properties of rule legitimacy in international law.\textsuperscript{95} The concept of determinacy requires that the message of a rule should be clear,\textsuperscript{96} and in the context of international criminal procedure, would necessitate reasoned decisions on the meaning of rules of procedure and evidence, where they are vague or parties require their further interpretation. Symbolic validation refers to ceremony (‘ritual’) and tradition (‘pedigree’) in establishing the rule-making authority of a body, and the use of the historic origin of that rule-making body or of the rule itself, to achieve compliance with a rule.\textsuperscript{97} The fact that judges wear robes and the manner in which court proceedings follow an established order may be seen as symbols of validation in the present context. Coherence, as may be obvious, relates to the degree to which a rule is applied consistently.\textsuperscript{98} Chapter 5 shall argue that any breach of the right to trial without undue delay has proven almost impossible to assert in practice, whilst on a number of occasions, the right is asserted by judges against the accused individual. This calls the consistency of rule application in this context into question. Adherence requires a consistency between primary and secondary rules of obligation,\textsuperscript{99} so it would require rules of procedure and evidence of the international criminal tribunals to adequately embody the standards set down in the tribunals’ statutes. Chapter 6 discusses the application of the rules of procedure and evidence in relation to written witness statements in the context of the primary rules on the right to examine witnesses against one, and finds the approach adopted, which looks at the ‘totality of the evidence’, to be lacking. The fact that the more liberal rules of evidence are predominantly utilised by the prosecution further raises questions about the equality of arms doctrine in practice.

Franck’s idea of legitimacy stands as a cornerstone to the present thesis. In

\textsuperscript{94} Franck (n 1).
\textsuperscript{96} Id.
\textsuperscript{97} Ibid, 92-94.
\textsuperscript{98} Ibid, 148. In his later work on fairness (see Franck (n 1) 77) however, Franck refined this position in asserting that the application of apparently straightforward rules resulting in patently unfair or absurd outcomes would require a balance to be struck between the legitimacy in doing so and the substantive justice at stake. For a discussion of this position, see Iain Scobbie, ‘Tom Franck’s Fairness’ (2002) 13 	extit{EJIL} 909, 914-916.
\textsuperscript{99} Franck (n 95) 184.
the same vein as the adherence, coherence and determinacy requirements, Fuller advocated eight attributes demanded of the law, and these included the principles of consistency, articulateness and concreteness. The idea of legitimacy as an imperative requirement for establishing international criminal law as a mature system of law, rather than an incoherent set of laws and rules which do not bind together as a consistent whole, is further inspired by the works of May, who stated that ‘[i]nternational criminal law will not come to maturity as a system of law unless protections of fundamental fairness… are put in place’. It is also influenced by Damaška, who warned against a process of picking and choosing divergent rules of procedure from domestic legal systems without having regard to the corresponding rules and principles that accompany them in their natural habitat.

It is argued throughout the present work that an inconsistent approach to procedural fairness has led to one of the greatest deficiencies of international criminal procedure — a lack of coherence, evidenced in gaping divergences in the way rules are applied between individual judges, distinct chambers, and tribunals. This idea is discussed in greater detail throughout the present work, but Chapters 4 and 5 on the extension of rights to other parties at trial and the ‘reverse application’ of the right to a fair trial are particularly instructive in this regard. Chapter 6 observes some incoherence in the application of rules of evidence. The themes of rule determinacy and adherence, or perhaps more accurately a lack thereof, are discussed further in Chapters 4 and 6.

1.4.2. Why procedure matters

Some might argue that this procedural approach is disrespectful of victims of atrocities, the international community and other actors who have an interest in the outcomes of trials at the international level, and that issues of ‘substantive fairness’ ought to be to the fore ahead of issues of procedure and their impact on

100 Lon L. Fuller, The Morality of Law (New Haven and London: Yale University Press, 1969) 33-39. In this regard, the author argued, ‘the word “procedural” should be assigned a special and expanded sense…’ (ibid, 96).


102 Mirjan R. Damaška, ‘Epistemology and Legal Regulation of Proof’ (2003) 2 LPR 117, 121 (‘In their natural habitat, each set of practices is part of a larger procedural whole, with its own internal coherence…. Creating a successful mixture is not like shopping in a boutique of detachable procedural forms, in which one is free to purchase some and reject others.’)
the accused. Both authors accepted that procedures were important, but for Hart procedures were secondary to the substantive law, while for Fuller, procedures went to the core of the validity of law.

May gave a most convincing twofold account as to why we should concern ourselves with procedure. First, he argued, one cannot be said to have rights at all, unless the procedures exist in which to claim them. That the implementation of rights depends on the proper administration of justice will be well-known to scholars of socio-economic rights, of which policy and law have recognised certain universal rights, like those of health and food, but the issue remains one of finding a method of enforcement and practical avenues for individuals seeking the realisation of the rights. In the context of a criminal trial, through which such substantive rights as liberty, employment, privacy and family life (and, in the case of those states which retain the death penalty, life) are at stake, the procedural side of the rights is somewhat more advanced.

The courtroom is both the place where substantive rights can be taken away and the avenue through which an individual can prevent these rights from being taken away from him or her without due process of the law. The bedrock principle of law that there can be no deprivation of liberty without due process was called into question by policies implemented by the United States government following the attacks on the World Trade Centre on 11 September 2001.
2001, which eroded core rights such as those of *habeas corpus* and the right to trial within reasonable time.\(^{109}\)

Taken on its own, the first half of May’s argument would appear to suggest that procedural rights are not rights in themselves, but capable of assertion only to the extent that a substantive right — such as the denial of liberty — can be relied upon.\(^{110}\) However, procedural rights are embodied in human rights treaties which have a claim to universality on the same footing as substantive rights. This is also true of countless constitutions. Without advocating any hierarchical position, it is worthy of note that questions of whether there is a hierarchy of rights rarely, if ever, place the right to a fair trial on the lower ranks of such a hierarchy.\(^{111}\) The right is, as the second half of May’s argument asserted, a fundamental element of the rule of law, and the procedure employed to realise that right acts as a bar to arbitrariness in the operation in the law.\(^{112}\)

The present work measures fairness through the process employed, as opposed to the outcome. Occasionally, it has been suggested the fairness of trials in international criminal law was evidenced by a number of high-profile acquittals, such as Schacht at Nuremberg.\(^{113}\) Summers argued against this ‘fairness as outcome’ approach, and pleaded that other ‘process values’ such as


\(^{111}\) E.g. the *dicta* of the Irish Supreme Court in *Donnelly v. Ireland and others* [1998] 1 I.R. 321, 22 January 1998, 348 (‘It is well established in our constitutional jurisprudence that an accused person's right to a fair trial is one of the most fundamental constitutional rights accorded to persons and that in so far as it is possible or desirable to construct a hierarchy of constitutional rights it is a superior right’); the Irish High Court’s decision in *H. S. E. v. Judge White* [2009] IEHC 242, 22 May 2009 (‘In particular, there is the well established principle that in the hierarchy of rights and interests engaged by the criminal justice process, the right of an accused person to a fair trial takes priority’).


\(^{113}\) In the same vein, the argument is often made that because the ICTY, ICTR and SCSL did not include the possibility of acquittal in their founding Statutes or Rules, a certain predisposition towards the guilt of all accused before the tribunals is shown. This author views the omission as an oversight, rather than evidence of the drafters’ opinion that no-one would ever be found innocent. As is widely known, the instruments were drafted using domestic criminal codes and codes of procedure as a template (see n 57 above). These codes rarely provide for acquittals, as it almost goes without saying that upon acquittal, the accused shall be released immediately. The drafters of the tribunals’ statutes most probably had not foreseen that the issue of post-trial release would not have been an issue, and perhaps they had been naive enough to think that the situations in the Former Yugoslavia, Rwanda and Sierra Leone would have returned to relative normalcy and facilitated easy repatriation of former suspects. In practice, only the ICTR has experienced major difficulties in repatriating acquitted persons; for further analysis, see Kevin Jon Heller, ‘What Happens to the Acquitted?’ (2008) 21 *LJIL* 663.
adherence, human dignity and rationality ought also to be taken into account.\textsuperscript{114} The present author agrees with this approach, with the proviso that the interpretation of Summers’s ‘process values’ (in which he included protection against torture, which many would see as an undoubtedly substantive right) in this work includes those not specifically mentioned in the original article,\textsuperscript{115} and should also include ‘pure’ procedural rights, such as the right to examine witnesses against oneself. Indeed, Summers recognised that certain rights which can rarely, when taken alone, have any effect on the outcome of the trial (such as the right to be present), do have an inherent value.\textsuperscript{116}

It has been argued that the way in which we treat violent murderers (seen to be the ‘worst’ members of society) reflects on society itself.\textsuperscript{117} By the same token, the way in which the international community treats those accused of the gravest crimes known to mankind could be said to reflect the humanism of an international legal order. By granting accused individuals the procedural guarantees expected in the criminal justice system of any civilised nation, the international community shows that the international criminal law exercise is not one of mere retributivism.\textsuperscript{118} If they were to enunciate the highest standards of procedural fairness, international criminal tribunals would exercise a dual instrumentalist function in advancing the rule of law: first, they would show that no-one is above the law by placing despots and those who were in positions of great power on trial; second, they would show that everybody is entitled to the strongest of judicial guarantees and the right to a fair trial, regardless of the charges against them or their resources.

1.4.3. The fair trial as a stand-alone concept*  

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\textsuperscript{115} See also Alexander (n 110).  
\textsuperscript{118} Cf. Immi Tallgren, ‘The Sense and Sensibility of International Criminal Law’ (2002) 13 EJIL 561, arguing that ICL is essentially a retributivist exercise and that it merely upholds the myth of having other goals, such as deterrence.  
* Elements of this section have been published in Yvonne McDermott, ‘The Judicial Duty to Ensure Fairness of Proceedings’ in Sluiter et al (eds.) (n 2).
\end{flushleft}
In a sense, the ‘fair trial’ stands quite apart from the nebulous concept of ‘fairness’, in that it can be defined as the sum of a number of crucial parts. Hildebrandt, for example, reduced the right to a fair trial down to six core guarantees: the right to a public trial, the right to test the evidence against one (the right of confrontation), the related right that judgments will not be based on evidence not heard in court, the right to equality of arms, the right to the presumption of innocence, and the right to an independent and impartial judiciary. Trechsel listed the following ‘universally recognized elements of fair trial or due process’: the right to an independent and impartial tribunal; the right to a public trial; the right to an expeditious trial; the right to the presumption of innocence and freedom from self-incrimination; the right to challenge the evidence of the prosecution and to present evidence in one’s defence; the right to be informed of the case against you; the right to appeal and the right to ‘be able effectively to present one’s arguments’. In a similar vein, Bayles painted procedural justice as comprising of a number of elements, most of which are reproduced in the present work’s conceptualisation of fairness in the context of the fair trial. These are: impartiality, the ability to have one’s side heard, and the ‘formal justice’ elements of consistency and adherence to precedent (which appear to be somewhat at odds with Bayles’s assertion that judges should be allowed flexibility in their reasoning).

The constituent elements of the right to a fair trial, as laid down in the statutes of the international criminal tribunals, include the accused’s right: to a public trial; to equality before the law; to counsel (and to legal aid, where

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119 Mireille Hildebrandt, ‘Trial and ‘Fair Trial’: From Peer to Subject to Citizen’ in Anthony Duff et al. (eds.) The Trial on Trial, Volume II: Judgment and Calling to Account (Oxford, Hart Publishing, 2006) 15, cited in Anthony Duff et al., The Trial on Trial, Volume III: Towards a Normative Theory of the Criminal Trial (Oxford, Hart Publishing, 2007) 51. Duff et al. added that these types of rights are found in both constitutional and human rights provisions which can be enforced by the individual against the state.


121 Michael D. Bayles, Procedural Justice (Dordrecht: Kluwer, 1990). It should be noted that employment disputes were the primary focus of Bayles’s analysis of procedural justice, so his study is not exactly relevant for our purposes.

122 Articles 19(4) and 20(2) ICTR Statute; Article 17(2) SCSL Statute; Articles 20(4) and 21(2) ICTY Statute; Article 67(1) ICC Statute.

123 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
applicable); to examine, or have examined, witnesses against him; to obtain the attendance and examination of witnesses on his behalf under the same conditions as adverse witnesses; to adequate facilities for the preparation of his or her defence; to the presumption of innocence; to trial without undue delay; to be informed of the charges against him; to silence; to be free from double jeopardy; to interpretation into a language he understands; and to be tried in his presence. This interpretation sees fairness in the context of the right to a fair trial as a legal concept which is comprised of a number of procedural guarantees.

By contrast, ‘fairness’ in its general sense can be seen as a theoretical concept which scholars have referred to in order to answer questions of natural justice, equality, non-discrimination, and equitable distribution of wealth. The remarks of the United Nations Secretary General at the time of the establishment of the International Criminal Tribunal for the Former Yugoslavia, where he referred to the tribunal’s conformance to ‘internationally recognised standards regarding the rights of the accused at all stages of it proceedings’, reiterate the

124 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
125 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
126 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
127 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
128 Article 20(3) ICTR Statute; Article 17(3) SCSL Statute; Article 21(3) ICTY Statute; Articles 66 and 67(1) ICC Statute.
129 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
130 Article 20(3) ICTR Statute; Article 17(3) SCSL Statute; Article 21(3) ICTY Statute; Article 67(1) ICC Statute.
131 Article 20(3) ICTR Statute; Article 17(3) SCSL Statute; Article 21(3) ICTY Statute; Article 67(1) ICC Statute.
132 Article 9 ICTR Statute; Article 9 SCSL Statute; Article 10 ICTY Statute; Article 20 ICC Statute.
133 Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 21(4) ICTY Statute; Article 67(1) ICC Statute.
134 Article 21(4) ICTY Statute; Article 20(4) ICTR Statute; Article 17(4) SCSL Statute; Article 63 ICC Statute.
137 Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (n 15) para 106.
interpretation that fairness in the sense of the rights of the accused can be taken to mean compliance with the standards laid down in international human rights law instruments and implemented in the domestic penal laws of states.\textsuperscript{138} It is with this conception of the right to a fair trial as a stand-alone concept that the present work is concerned.

There is some debate as to whether the above-listed guarantees are to be properly understood as minimum guarantees,\textsuperscript{139} and whether a trial could still be seen as unfair if one of the guarantees were to be denied.\textsuperscript{140} The latter would seem the more convincing point of view. The reality is that, besides the specific ‘fair trial’ provisions of the various statutes, rights of the accused sweep a much broader parameter, to cover principles such as the non-retroactive application of criminal law; rules on the gathering and presentation of evidence; guidelines on the formulation of the indictment, rules covering provisional release, and a number of rights extending beyond the reach of traditional conceptions of fair trial rights, such as the rights to privacy and peaceful enjoyment of property. Thus, it is argued that ‘fairness’ as a concept should be viewed as an umbrella notion, encompassing more than the sum of a number of minimum guarantees to ensure that justice is administered equitably. As stated in the Milošević trial:

The Trial Chamber reads Article 21(4) of the statute as setting out a bundle of rights, which are embraced within the principle that the accused must have a fair trial, which is itself set out in Article 21(2) of the statute. The concept of fairness not only includes these specific rights but also has a much wider ambit, requiring that in all aspects the conduct of the trial must be fair to the accused. Hence, the specific rights are described as ‘minimum guarantees’. Fairness is thus the overarching requirement of criminal proceedings.\textsuperscript{141}

This conclusion is further supported by authority from human rights law.\textsuperscript{142}

The other major conceptual hurdle on the meaning of the ‘fair trial’ pertains to absolutism in fair trial rights, and the question of whether one strand of

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\textsuperscript{138} These standards also include a range of pre-trial rights which fall outside the scope of the present work. For an analysis of the pre-trial stage of proceedings, see, \textit{inter alia}, Safferling, \textit{International Criminal Procedure} (n 2) 216-375; Zappalà (n 2) 29-80.

\textsuperscript{139} See above (n 78).

\textsuperscript{140} See above (n 79).

\textsuperscript{141} \textit{Prosecutor v. Milošević}, Reasons for Decision on Assignment of Defence Counsel, Case No. IT-02-54-T, 22 September 2004, para 29.

\end{flushright}
the right to a fair trial can be derogated from in order to satisfy another element. This is discussed in further detail in Chapter 5 below, where using Fletcher’s theory of autonomy and rights, the tribunals’ practice of sacrificing certain rights of the accused in the interest of the right to a speedy trial, in spite of the accused’s protestations to the contrary, will be criticised. Furthermore, it is argued that certain rights, such as the right to be tried in one’s presence, may be waived by the accused, and that such derogations will not render the trial as a whole unfair.

Therefore, outside of deeper questions on the meaning of the nebulous concept of fairness, an understanding of which is deeply founded in the concepts of legitimacy as developed by Franck and the importance of procedural fairness as understood by May, this thesis recognises that the notion of ‘fairness’ as part of the concept of the ‘fair trial’ may have a more concrete definition. It is a combination of a sum of a number of minimum guarantees found in human rights law instruments and a number of principles like equality before the law, access to procedures, coherence in the application of rules and determinacy of the applicable standards. It relates only to the accused — an argument developed further in Chapter 4 — and its component parts may be derogated from with the consent of the accused. This understanding of fairness in the context of standard-setting by international criminal tribunals runs throughout the present study.

It will be noted by this point that the term, ‘the highest standards of fairness’, is set to be used throughout the present work. This is a nomenclature which comes from the courts’ own jurisprudence and external statements of court representatives and the United Nations, as shall be seen in section 2.2.2 below. The term can be taken to mean full respect for the rights of the accused as established by international human rights standards and repeated in the statutes of the four tribunals studied in a manner that is consistent and clear. Whilst a trial might fail to respect a certain element of the right to a fair trial and still not be in breach of human rights standards, because the trial as a whole can be taken to be fair, the highest standards of fairness necessarily require a greater respect for

145 See especially the case law on breaches of Article 8 and their impact on the fairness of
the rights of the accused, and this is the standard that is expected of international criminal tribunals, for reasons set out in Chapter 2 below.

1.5. Outline of the Study

This thesis is based on the premise that international criminal procedure ought to bear a standard-setting function and set the best practice for trial procedure in accordance with international fair trial standards. Chapter 2 examines this hypothesis in greater detail, discussing the arguments both for and against this standard-setting role and concludes that setting the highest standards of fairness is closely related to the accepted goals of international criminal procedure. This chapter argues that the reasons why international criminal procedure should bear a standard-setting function far outweigh some of the disagreements that may arise on the basis of the context of proceedings or otherwise.

While the crux of this thesis is that the highest standards of fairness have not been achieved in number of areas, it is not argued that the procedure of international criminal tribunals has been unfair as a whole. In fact, international criminal procedure has set many positive precedents and these should not be overlooked. Chapter 3 examines some of those precedents in greater detail. They include the very fact that trials are being held on an international level in the first place; the approach taken toward witness protection, and the nuanced approach taken by some Chambers towards defendants’ self-representation. The lack of uniformity in these positive precedents in certain respects points to a wider hypothesis present throughout this work — that international criminal procedure is too inconsistent to live up to its standard-setting function.

Chapter 4 looks at the actors at trial to whom fair trial rights are said to attach, with a particular focus on the prosecutor’s alleged right to a fair trial. It is posited that the only holder of fair trial rights ought to be the accused, and the proceedings, e.g. Bykov v. Russia, Application No. 4378/02, Judgment, 10 March 2009 (Grand Chamber); Khan v. UK (2001) 31 EHRR 45, 12 May 2000; P.G. and J.H. v. UK, Application No. 44787/98, Judgment, 25 September 2001 (see especially the Partly Dissenting Opinion of Judge Tulkens on this matter). Outside the improperly-obtained evidence paradigm, examples include: Sievert v. Germany, Application No. 29881/07, Judgment, 19 July 2012 (where a violation on the right to examine witnesses against one was not sufficient to render the trial as a whole unfair); Imbrioscia v. Switzerland (1994) 17 EHRR 441, 24 November 1993 (on the right to legal assistance) and S.N. v. Sweden (2004) 29 EHRR 13, 2 July 2002 (on the right to cross-examination of witnesses).
extension of these rights to other actors such as the prosecutor, victims and the international community is an unwelcome development and falls short of the highest standards of fairness.

To say that the length of trials has been one of the challenges faced by the international criminal tribunals would be an understatement. Chapter 5 examines the place of expedience in international criminal procedure, with a focus on the strange phenomenon whereby the right to a speedy trial is sometimes used as a bar to the assertion of other rights of the accused at trial, while by contrast it has proven immensely difficult to show that one’s right to trial without undue delay has been violated.

In Chapter 6, the admissibility and weight of written witness statements in lieu of oral testimony is assessed. Using some quantitative analysis, the chapter assesses the admissibility of written witness statements in all trials conducted over an 18-month period, and the ultimate weight given to such statements. It will be seen that, while the more liberal rules on the admissibility of written witness statements theoretically apply to both sides equally, they have been used by the prosecution with far greater frequency, which may give rise to concerns on the equality of arms principle. It is concluded that while the admissibility of non-crucial witness testimony in written form is acceptable, the International Criminal Tribunal for the Former Yugoslavia has gone too far in allowing testimony which goes to the acts and conduct of the accused to be admitted in this form, thereby endangering the accused’s right to cross-examine witnesses. Chapter 6 argues that the ‘totality of the evidence’ approach taken by the tribunals in coming to their final judgments may risk giving disproportionate weight to untested or uncorroborated written statements. It is also noted that this problem is not universal, with the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone making much less use of the more lenient rules on written witness statements than the International Criminal Tribunal for the Former Yugoslavia.

The overall conclusions in this work are that while international criminal procedure has developed a number of positive precedents, it has failed to fully develop as a ‘coherent body of law’¹⁴⁶ and has yet to embrace the standard-setting

¹⁴⁶ This very fitting terminology was originally used in a volume edited by Sluiter and Vasiliev (n
function in practice. A number of reasons for these shortcomings are hypothesised in the concluding chapter. These reasons for the failure of international criminal tribunals in setting the highest standards of fairness include a phenomenon of ‘internal fragmentation’, whereby tribunal practice is not fully consistent, even across chambers of the same tribunal; the exceptional context of international criminal tribunals, and the judicial failure to prioritise the standard-setting function. It is suggested that setting the highest standards of procedural fairness is not an impossible goal, and the thesis concludes that the International Criminal Court might play a real role in the realisation of this goal in the future.
CHAPTER 2: THE NEED FOR INTERNATIONAL CRIMINAL TRIBUNALS TO SET THE HIGHEST STANDARDS OF FAIRNESS

Over the past number of years, scholarly works have examined the impact of human rights in general, and the European Convention of Human Rights in particular, on criminal procedure in domestic courts. Some authors have suggested that the fact that large numbers of state parties have agreed upon provisions in human rights conventions on how the accused ought to be treated should in itself serve as evidence of an existing shared set of values, in spite of very different procedural traditions. Within Europe, the creation of an Area of Freedom, Security and Justice which seeks to promote mutual recognition of judgments as well as a ‘high level of confidence between Member States’ regarding each other’s criminal justice systems illustrates some convergence between justice systems.

There is a strong case to be made that international criminal procedure, by representing a mixed procedural model which is (in theory, at least) acceptable to practitioners, judges, and perhaps most importantly, accused persons from across a broad spectrum of legal traditions, can best illustrate how to ensure the fairness of proceedings in the context of converging procedural traditions. This chapter


4 See e.g. Christoph J.M. Safferling, Towards an International Criminal Procedure (Oxford: OUP, 2001); Erik Møse and Joyce Aptel, ‘Trial without Undue Delay before the International Criminal Tribunals’ in Lal Chand Vohrah et al (eds.) Man’s Inhumanity to Man: Essays on International
asks whether the standards of fairness such international tribunals have developed can play an expository role for procedural standards to be applied in domestic courts, while later chapters in this work ask whether the standards developed should be applied domestically.

This chapter commences with a general discussion on the goals of international criminal law, and opines that setting the highest standards of procedural fairness ought to be one of the main goals of international criminal law. The second section of this chapter expands upon the case for standard-setting in international criminal procedure. The reasons why it is felt that international criminal procedure should indeed espouse the utmost of fair trial standards include the risk of wrongful conviction and the fact that the legitimacy of their judgments rest, at least in part, upon an external evaluation of fairness in the procedure leading to that judgment. Moreover, it shall be argued, practices like complementarity and referrals of cases to domestic states from the ad hoc tribunals under Rule 11bis grant international criminal tribunals the opportunity to examine the fairness of domestic procedures in comparison to their own, thereby implying that international criminal tribunals are themselves fair enough to pass judgment on the fairness of proceedings before domestic jurisdictions. In order to pre-empt some of the counter-arguments that may be raised, section 2.3 expands upon some of the arguments that may be set forth against this hypothesis and analyses them in detail. Having put forward the argument that international criminal tribunals ought to set the highest standards of fairness, subsequent chapters of this work will test whether or not they have been successful in this regard.

2.1. GOALS OF INTERNATIONAL CRIMINAL PROCEDURE

There are many declared and implied goals of international criminal law; indeed, some authors have argued that there is an ‘overabundance’ of goals,5 and that the

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absence of a clear hierarchy of goals has led to inconsistencies in their application.\(^6\) This point is perhaps illustrated in Chapter 4 on the actors imbued with fair trial rights and Chapter 5 on expedience. Therein, it becomes clear that there is a tension between all the boxes that international criminal procedure seek to tick: they want to do justice for the victims, and to do so in an expedient manner, while enshrining internationally-recognized fair trial standards, and keeping within allocated budgets. Occasionally, and not always persuasively, a trading-off exercise is entered into; this thesis argues that this is often at the expense of the accused. Arguably, the problem of competing goals is not unique to the international criminal realm; in domestic systems too, goals as diverse as ‘giving victims a voice’ and reinstating confidence in public safety are invariably put forward by governments.\(^7\)

What, then, are the accepted goals of international criminal proceedings? UN Security Council Resolutions 827 and 955, establishing the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda respectively, explicitly mentioned the aims of bringing perpetrators to justice; contributing to ‘the process of national reconciliation and to the restoration and maintenance of peace’, and deterring future perpetrations of international crimes as core aims in setting up such Tribunals.\(^8\) The International Criminal Tribunal for the Former Yugoslavia’s First Annual Report, on a rather Kelsenian note,\(^9\) noted the Tribunal’s potential role in ‘promoting reconciliation and restoring true peace.’\(^10\) Similarly, Resolution 1315 on the situation in Sierra Leone, which led to the agreement between the United Nations and the

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\(^7\) On the same problem in the context of the UK, see Andrew Ashworth, Human Rights, Serious Crime and Criminal Procedure (London: Sweet & Maxwell, 2002) 38–46. Duff et al have defined the primary goal of the criminal trial as being one of judgment and publically calling offenders into account: The Trial on Trial, Volume III: Towards a Normative Theory of the Criminal Trial (Oxford, Hart Publishing, 2007).


government of Sierra Leone establishing the Special Court for Sierra Leone, referred to the objectives of ‘bringing justice and ensuring lasting peace’.  

Fletcher and Ohlin have argued that it is more important to focus on the criminal rather than the international elements of international criminal proceedings, and they have advocated for a greater emphasis to be placed on general goals of criminal law in their judgments. However, it is not completely accurate to say that the domestic goals of criminal law have been discarded or overlooked in the interest of promoting the purely international criminal law goals, such as ending impunity and creating an historical record. Judgments have discussed deterrence and retribution albeit often in the context of a conscious shift away from other goals central to domestic criminal sentencing, such as rehabilitation of offenders.

Whether international criminal tribunals can actually play a role in deterring génocidaires and those who wish to commit war crimes or crimes against humanity is questionable, at best. The most commonly-cited example of the inability of international criminal justice to deter offenders is the fact that the Srebrenica massacre happened after the International Criminal Tribunal for the Former Yugoslavia had become fully operational, and both Karadžić and Mladić had been indicted. Most forcefully, Tallgren argued that international criminal law is almost a religious exercise in the manner in which it continues to perpetuate the myth of deterrence in spite of evidence that the existence of international criminal institutions does little or nothing to prevent such crimes from being committed, while in reality international criminal law would appear to be little more than an exercise in retributivism.

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The 1998 Report of the International Criminal Tribunal for the Former Yugoslavia to the Security Council added the prevention of historical revisionism, such as preventing later genocide denial by legally confirming that the genocide did indeed take place, to the goals of the Tribunal.\(^\text{17}\) Of course, this is only possible if the judgments on such findings — and the way that they are reached — are sufficiently thorough to be regarded as credible,\(^\text{18}\) accurate,\(^\text{19}\) and free from allegations of ‘victors’ justice’\(^\text{20}\) or procedural impropriety. Furthermore, it has been argued that findings of individual wrongdoing can mitigate the dangers of collective guilt and can re-legitimise governmental authority.\(^\text{21}\)

The goal of rebuilding the rule of law in post-conflict societies stretches beyond the realms of setting an historical record and ensuring peace through justice. It also relates closely to the need to strengthen the affected countries’ justice systems and their ability to prosecute perpetrators of international crimes in the future.\(^\text{22}\) Resolution 955 added the objective of strengthening the judicial system of Rwanda, with a view to empowering the domestic justice system to ‘deal with large numbers of suspects’, as a goal.\(^\text{23}\) Resolution 1315 on the situation in Sierra Leone noted the adverse impact that the conflict had played


\(^\text{19}\) John D. Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy’ (2009) 7 JICJ 17, 19: ‘amid the debate about the goals of international criminal justice, there is a consensus that when findings of guilt are made they must be predicated upon the international fair trial norms of the right to equality of arms and the right to adversarial procedure as these provide the foundation for a fair and accurate verdict.’


\(^\text{23}\) Resolution 955 (n 8) preambular paragraph 9: ‘Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects…’. Groome, ibid, 799-800, notes that the ‘reconciliation and integration with local justice efforts’ ought to be a goal of international criminal tribunals.
over the domestic justice system ‘and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone’.  
Furthermore, the Resolution asserted, ‘a credible system of justice… would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace’.  

In tandem with the ‘ending impunity’ goal, the founding Resolutions explicitly envisioned the enactment of fair trial standards in their proceedings. Resolution 1315 stated that the international community would make every effort to bring those responsible for serious violations of the laws of armed conflict ‘to justice in accordance with international standards of justice, fairness and due process of law’. The Special Court was described as a ‘strong and credible court’, thereby recognising the need for legitimacy as well as effectiveness in such institutions.

The respect for fair trial norms was not explicitly listed as a goal of international criminal law upon the establishment of the International Criminal Tribunal for the Former Yugoslavia, but rather, it was portrayed as an obvious fact that the new international tribunal would embrace the highest standards of fairness towards defendants. The Secretary General remarked that it was ‘axiomatic’ that the Tribunal would ‘fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings’. These ‘internationally recognised standards’ were to be found, according to the Secretary-General, in Article 14 of the International Covenant on Civil and Political Rights. The adumbration ‘in particular’ before the reference to Article 14 left the Tribunal open to considering other sources of fair trial standards, such

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25 Resolution 1315 (n 11). On this point, see Jens David Ohlin, ‘Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law’ (2009) 14 *UCLA J Int’l L & Foreign Aff* 77, arguing that international criminal procedure has a particular role to play, in that it returns process values to procedural vacuums.
26 Resolution 1315 (n 11).
29 Ibid.
as the European Convention on Human Rights, which it has done in practice.\textsuperscript{30}

The importance attached to the fairness of trials at the establishment of the International Criminal Tribunal for the Former Yugoslavia had some resonance with the statements of United States Chief Prosecutor Robert Jackson at the establishment of the very first international criminal tribunal at Nuremberg. In his opening address to the Nuremberg Trials, Jackson remarked that ‘We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.’\textsuperscript{31}

The international community’s enthusiasm for ensuring that the rights of the accused were respected in full by international tribunals did not wane with the passing of years and the emergence of some practical obstacles to making this goal a reality. In 1994, the International Criminal Tribunal for the Former Yugoslavia’s first annual report stated that the term ‘to do justice’ could be taken as meaning ‘to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty.’\textsuperscript{32} In a report following the establishment of the International Criminal Tribunal for Rwanda, the Secretary-General remarked that ‘the international character of the Rwanda Tribunal’ was in itself ‘a guarantee of the just and fair conduct of the legal process.’\textsuperscript{33} In this respect, we can see that the international community took it as a given that an international tribunal should guarantee the highest human rights standards to defendants before them. Some years later, the Ad Hoc Committee of the General Assembly, in examining the


\textsuperscript{31} Nuremberg Trial Proceedings, Vol. 2, p. 100. 21 November 1945, Opening Statement of Mr. Justice Jackson, Chief Prosecutor for the United States of America.

\textsuperscript{32} First Annual Report of the International Criminal Tribunal for the Former Yugoslavia (n 10) para 15.

International Law Commission’s draft Statute of the International Criminal Court, said that the Court ‘should be bound to apply the highest standards of justice, integrity and due process’. 34

Thus, it is argued that the idea that international criminal tribunals would both bring perpetrators to justice in accordance with international fair trial procedural standards and aid the rebuilding of domestic justice systems were goals of the contemporary international criminal tribunals upon their establishment. The need to set the fairest of procedural standards is clearly implicit in these two facets of post-conflict rebuilding and bringing perpetrators to justice through fair proceedings. The arguments as to why such procedure ought to embrace a standard-setting function shall now be addressed.

2.2. INTERNATIONAL CRIMINAL PROCEDURE AND STANDARD SETTING: THE CASE IN FAVOUR

2.2.1. Existing Impact on Domestic Criminal Law

The Statute of the International Criminal Court, in its preamble, notes that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’ Article 88 requires state parties to amend their national legislation, where necessary, in order to ensure that procedures for cooperation with the Court are in place. Many states availed of this legislative opportunity to criminalise genocide, crimes against humanity and war crimes, as defined by the Statute of the International Criminal Court, in their own national legislations. For example, in the United Kingdom, the International Criminal Court Act 2001 contained provisions on arrest, transfer to the International Criminal Court, enforcement of sentences, and other forms of cooperation in sections 2-49, while sections 50-74 adopt the definitions of genocide, crimes against humanity and war crimes from the Court’s Statute and declare these crimes to be ‘offences under domestic law’. 35 This is not to say that international criminals in the United Kingdom could have acted with impunity before 2001, as some legislation was in

place before then. For example, grave breaches of the Geneva Conventions were previously criminalised under the Geneva Conventions Act 1957, while the Criminal Justice Act 1988 implemented the provisions of the Convention against Torture. The earlier Genocide Act of 1967 was repealed by the International Criminal Court Act 2001. The International Criminal Court Act 2001 is, however, indicative of some uniformity in the approach towards international crimes, instigated by the entry into force of the Statute of the International Criminal Court, and mirrored in other jurisdictions internationally.\textsuperscript{36} It could be surmised that those jurisdictions did not wish to fall afoul of the complementary clause, and amended their legislation to ensure that all crimes within the jurisdiction of the International Criminal Court could be tried under domestic law.

The impact of international standards on substantive criminal law is not limited to the entry into force of the International Criminal Court Statute. Rule 11\textit{bis} on the transfer of cases to domestic jurisdictions, discussed in greater detail below, has also had an effect on substantive criminal law. For example, the Netherlands had to amend its laws to include the criminalisation of genocide committed since 1996, following an embarrassing incident in the \textit{Bagaragaza} case. The case had been referred to the Netherlands in 2006, but this referral was revoked when it came to light that the state did not actually have jurisdiction over the crime of genocide, as charged.\textsuperscript{37} The Dutch International Crimes Act (Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law) criminalises genocide but the District Court of The Hague held that Dutch courts did not have universal jurisdiction over genocide at the time of the Rwandan genocide in 1994. In 2011, the Dutch Parliament passed a bill that would allow Dutch courts to have universal jurisdiction over genocide committed since 1966, when the Genocide Convention Implementation Act entered into


\textsuperscript{37} \textit{Prosecutor v. Bagaragaza}, Decision on Prosecutor’s Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11\textit{bis} (F) & (G), Case No. ICTR-2005-86-11\textit{bis}, 17 August 2007.
The substance of international criminal law has resonated beyond the realms of domestic jurisdiction. International criminal rulings on the definition of the crimes of rape and torture, amongst others, have been accepted by international human rights tribunals as being instructive. These decisions show that international criminal tribunals are to be seen as leaders in setting human rights standards, and not mere followers of international human rights jurisprudence, and that there is a degree of symbiosis between the two branches of law. This symbiotic relationship is not limited to substantive criminal law provisions as they intersect with human rights violations. In Judge Sergio García-Ramírez’s Separate Opinion in the Judgment of the Inter-American Court of Human Rights in the *Case of La Cantuta*, reference was made to the principle of complementarity before the International Criminal Court – discussed further in section 2.2.2 below – as evidencing that sham trials were not accepted by the international community.

If international criminal tribunals bear a standard-setting function when it comes to the substance of international crimes, it must be asked whether the courts bear an expository function in illustrating the procedure under which such crimes ought to be tried in accordance with international best practice. This brings us back to the core question which this work seeks to address — that is, whether international criminal tribunals are under an obligation set the highest procedural standards for the fair conduct of proceedings to the accused. This section argues that practice under Rules 11bis of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda provide evidence of the tribunals’ current role in

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setting the highest standards of procedural fairness.

The system of referrals under Rules 11bis of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda allows the Tribunals (in the light of their ‘completion strategies’\(^{41}\)) to refer cases to national jurisdictions, provided the state in question has jurisdiction over the crime in question, that the case is of a level of gravity appropriate to be tried domestically, and the Referral Bench is satisfied that the accused would not be subject to the death penalty or to an unfair trial in the referral state. When referrals have been approved, international tribunals appoint monitors to ensure that these standards continue to be met during the trial, and jurisdiction may be revoked back to the tribunal if any difficulties arise. Rule 11bis has certainly had an effect on the practice of the death penalty, in particular. Rwanda abolished the practice in 2007, in order to be eligible to try detainees transferred from the International Criminal Tribunal for Rwanda domestically.\(^{42}\)

It would follow that the second guarantee — that the accused would not receive an unfair trial in the state of referral — ought to have had a similar impact on states which were keen to have cases referred to them. The principle enshrined in the rule follows from the same starting point that rules out transfer to states that continue to impose the death penalty — that is, that defendants should receive the same level of treatment whether they are tried by a domestic or an international criminal court. The Referral Bench in Limaj stated that ‘no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.’\(^{43}\) The application and assessment of fair trial rights against international benchmarks suggests a real role for the international criminal tribunals in setting the very highest standards of fairness, which would then have

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\(^{43}\) See also, Prosecutor v. Limaj et al., Decision on Isak Musliu’s Request for Provisional Release, Case No. IT-03-66-AR65.3, 31 October 2003, para 11.
to be followed by domestic courts. This is evidenced by the comments of the Chief Prosecutor of the International Criminal Tribunal for Rwanda to the Security Council: ‘[f]ollowing the Appeals Chamber decisions rejecting referral cases to Rwanda for trial under rule 11 bis . . . Rwanda is in the process of enacting . . . additional legislation to meet the remaining concerns of the Appeals Chamber’\(^{44}\) In this respect, Rule 11bis has been described as a ‘conduit for the [international tribunals] to influence domestic criminal procedural law.’\(^{45}\)

Some might argue that to demand international standards of fairness from post-conflict states would be overly demanding, or perhaps even neo-colonial. A similar argument on the principle of complementarity was made by the former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Louise Arbour, during the drafting of the Rome Statute of the International Criminal Court.\(^{46}\) However, as stated by Franck in response to criticisms that his vision of ‘fairness’ was too Western, there is no need to dash to protect every domestic practice ‘as if it were the last… white leopard.’\(^{47}\) If judicial oversight in this manner can strengthen the rights of individuals in the affected states, then they should be welcomed. Moreover, states like Rwanda have in recent practice been able to embrace these fair trial standards in domestic procedural reforms and referral has taken place.\(^{48}\) The fact that each case is assessed on its merits, taking

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into account the legislative reforms that the governments put in place in order to meet international standards, suggests that the Tribunals’ role is one of encouragement and support, rather than a top-down imposition of impossible criteria.

What factors, then, do the International Criminal Tribunals for the Former Yugoslavia and Rwanda see as imperative guarantees when deciding whether trials in a domestic state are fair enough to allow transfer to that state? The decisions on Rule 11bis referrals are not uniform in dealing with this question. In Ademi and Norac, the Referral Bench stated that ‘the requirements of a fair trial’ had been compared against the provisions in Croatian law, but did not explicitly state what those requirements were. In the early decisions on transfer to Rwanda, where the safe transfer of defence witnesses and thereby the equality of arms was at issue, the International Criminal Tribunal for Rwanda referred to its own jurisprudence and that of the European Court of Human Rights, which suggested that it required more than the minimum guarantees laid down in its own statutory provision on fair trial rights to be met, but did not expand on the full extent of a state’s fair trial obligations. Interestingly, Human Rights Watch, in its amicus brief in Kanyarukiga, stated that ‘on their face, Rwanda’s laws comply with the fair trial provisions of Article 20 of the Statute’, suggesting that guarantees equivalent to those provided by Article 20 were the standard requirements of a fair trial. The latter interpretation appears to be reflected in the International Criminal Tribunal for Rwanda’s decision on the transfer of Bagaragaza to The Netherlands, where the Dutch government had noted the influence of the International Covenant on Civil and Political Rights and the European Convention on Human Rights on its procedures, and the Tribunal concluded that the accused could be guaranteed a fair trial in the country, stating: ‘The relevant provisions in the ECHR and the ICCPR are substantially similar to

\[ \text{footnotes}\]


50 Prosecutor v. Ademi and Norac, Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11bis (n 49) para 55. At para 56, the Bench stated that it ‘accept[ed] the guarantees for a fair trial in Croatian law’.


52 Ibid, n 60.
the rights enshrined in Article 20 of the ICTR Statute.’

Similarly, the Referral Bench’s decision in *Sikubwabo* stated that ‘Article 20 of the Statute provides guidance as to the rights that must be observed in order to ensure that the accused is given a fair trial’.

One notable exception to these rather concise descriptions on the necessary components of the right to a fair trial is the Rule 11bis referral decision in *Stanković*, where the Referral Bench laid out a complete list of requirements for a fair criminal trial. This was based on the provisions of Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. The Constitution, Criminal Procedure Code and Law on the State Court of Bosnia and Herzegovina were assessed in the light of this full list rights, leading one commentator to argue that the Rule 11bis jurisprudence indicates that the tribunals are bound to ensure higher standards in the referral state than a domestic state would require for the purposes of extradition.

In *Stanković*, the parties discussed whether the referral would impact on the accused’s right to trial without undue delay at some length in their submissions. The Referral Bench was satisfied that, since the case could continue domestically from where the international tribunal left off, as the state Prosecutor planned to use the same indictment and the materials (such as the pre-trial brief, witness and exhibit lists and documentary evidence) provided by the Prosecutor of the international tribunal, this was not a cause for concern.

On the issue of availability of witnesses, the Referral Bench recalled that the international tribunal’s regime of providing safe conduct to witnesses from abroad was often less effective than the domestic state’s direct powers of enforcement over

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56 Ibid, paras 56-65.


58 *Stanković* Referral Decision (n 55), paras 69-77.
individuals residing within its borders, so this did not pose a difficulty.\textsuperscript{59} The Referral Bench was satisfied that the state could guarantee a fair trial, given that it provided for all of the fair trial guarantees in its domestic law, had ratified the European Convention on Human Rights, and in light of the fact that the referral mechanism provided ‘for a system to allow monitoring of the trial of a case which has been referred in order to ensure that the expectations of a fair trial are met’.\textsuperscript{60}

By laying down the ‘expectations of a fair trial’ as pre-conditions for the referral of cases (referrals that can be revoked if the Tribunal is not satisfied that the trial proves to be sufficiently fair), it is submitted that the Tribunals willingly embrace a demonstrative function for the fair conduct of trials. The implication from Rule 11\textit{bis} practice is that international criminal procedure is so fair that its tribunals are in a position to adjudge the fairness of domestic courts by comparison to its standards, and to demand improvements where necessary. This standard-setting function is not unique to the \textit{ad hoc} international criminal tribunals, where the international tribunal has primacy over domestic courts. It is also reflected in the International Criminal Court, through its practice of complementarity, despite the fact that that Court’s jurisdiction is subsidiary to that of domestic courts, as shall now be discussed.

\textbf{2.2.2. Complementarity and \textit{Ne Bis in Idem} before the International Criminal Court}

The principle of complementarity as a bar to the exercise of jurisdiction over a case before the International Criminal Court means that the Court has to ensure the case has not been or is not in the process of being prosecuted domestically.\textsuperscript{61} While occasionally it is stated that complementarity simply requires an assessment of whether the state is unwilling or unable to prosecute the case, the present author agrees with Robinson that the first step is to assess whether there has been inaction on the part of the state, and that the second prong (unwillingness or inability) will only need to be assessed where there has been action on the part of the state.\textsuperscript{62}

\begin{footnotesize}
\textsuperscript{59} \textit{Ibid}, para 85.
\textsuperscript{60} \textit{Ibid}, para 68.
\textsuperscript{61} Article 17, ICC Statute.
\textsuperscript{62} See Darryl Robinson, ‘The “Inaction” Controversy: Neglected Words and New Opportunities’
\end{footnotesize}
If it has been subject to such domestic proceedings, and the authorities decided not to proceed with the prosecution of the accused, the International Criminal Court must make a value judgment as to whether the conduct of those proceedings indicated that a state was unwilling or unable to bring the accused person to justice.63 Similarly, where proceedings are ongoing, the Court will ask whether the state is ‘unwilling or unable genuinely to carry out the investigation or prosecution’. In the event the domestic state is willing and able to prosecute the accused individual for the international crimes in the International Criminal Court’s indictment against him, the Court is under a statutory obligation to declare the case against that individual inadmissible.64 The Court will also declare a case inadmissible under the principle of ne bis in idem if the individual has already been tried by a domestic court, unless those proceedings were held with the intention to shield the accused from the court’s jurisdiction or otherwise were ‘not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’65

This section shall examine these two assessments which the International Criminal Court has to make in order to establish jurisdiction, and will question whether they can influence the conduct of domestic proceedings in the same manner as Rule 11bis proceedings before the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda. It shall also analyse whether the complementarity and ne bis in idem considerations provide a further reason for the International Criminal Court to set the highest standards of fairness.

Turning first to the complementarity assessment, it is appropriate to examine the meanings of ‘unwilling’ and ‘unable’. One of the hallmarks of

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63 Article 17(1)(b) ICC Statute.
64 Article 17(1) ICC Statute; this obligation is reiterated in preambular paragraph 10 of the ICC Statute, which states that the Court’s jurisdiction shall be complementary to that of states.
65 Article 20(3)(b) ICC Statute.
inability is the domestic courts’ failure to try offenders in accordance with full due process standards where there has been a complete or partial breakdown in state structures, which renders the national justice system unable to arrest the accused, secure evidence or witnesses, or unable for some other reason to conduct a trial. The possibility that the accused might not be afforded a fair trial could clearly fall within the ‘otherwise unable’ proviso of Article 17(3). According to Benzing’s reading of the travaux préparatoires on this provision, ‘ineffectiveness’ was designed to include situations where ‘procedures did not guarantee full respect for the rights of the accused or could not be considered sufficiently impartial’.66

Similarly, given that the provision on securing witnesses is not limited to prosecution witnesses, it is possible that an inability to secure the testimony of defence witnesses may fall afoul of Article 17(3) in the same way that Rwanda’s difficulties in securing defence witnesses was a barrier in the early jurisprudence on transfer of cases to Rwanda from the International Criminal Tribunal for Rwanda.67

Some have argued that the wording of Article 17(3) may allow the International Criminal Court to demand impossible standards from developing states, or those emerging from conflict situations.68 But, as illustrated by the discussion on Rule 11bis above, these types of provisions can be as much an incentive to states that want to prosecute crimes falling within the jurisdiction of the court as an implement to defeat their ambitions. This conceptualisation of complementarity as a carrot, rather than a stick, was dubbed ‘positive complementarity’ by Burke-White, who foresaw that the principle would encourage domestic states to prosecute international crimes.69 He also envisioned

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67 See above (n 48).

68 William A. Schabas, An Introduction to the International Criminal Court (Cambridge: CUP, 2011) 196: ‘Certainly, there is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries’; Mauro Politi, ‘The Establishment of an International Criminal Court at the Crossroads: Issues and Prospects After the First Session of the Preparatory Committee’ (1999) 13 Nouvelles Études Pénales 115, 143; Arbour (n 46).

69 William W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome
the possibility that the Office of the Prosecutor, perhaps in partnership with non-governmental organisations, might monitor domestic prosecutions to ensure that they ‘meet basic standards of due process and are genuine efforts to bring the accused to justice.’ This is very similar to the monitoring activities which take place under Rule 11bis. As stated above, in order to ensure the continuing legitimacy of these monitoring efforts, the monitoring body (in this case, the International Criminal Court) needs to make sure that its own procedures do not fall below international due process standards. Ideally, the Court should embody the most exemplary standards in order to encourage domestic states to do the same.

The second prong of the complementarity test, unwillingness, might be evidenced by a judicial system which fails to bring offenders to justice within a reasonable time for political reasons, or by a lack of judicial impartiality or independence. It has been argued that ‘unwillingness’ can only be proven if the domestic state’s prosecution was inspired by an attempt to shield the accused from criminal accountability, which would appear to be the case from an ‘ordinary meaning’ reading of Article 17(2)(a), in particular, which demands that the Court must consider whether ‘[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5’.

Articles 17(2) (b) and (c) of the International Criminal Court Statute read as follows:

- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or

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70 Burke-White, ibid, 74.
71 Article 17(2) ICC Statute.
72 Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 CLF 255, 257 argued that there is no legal obligation on the ICC to assume jurisdiction where an unfair trial is going to be held, although a moral obligation to do so may exist. Jann Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford: OUP, 2008) stated that only Article 17(2)(b) — that is, undue delay inconsistent with an intent to bring the person to justice — can apply also to situations where the breach of due process is to the detriment of the accused.
impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

It shall be seen that these sub-paragraphs are worded slightly differently from Article 17(2) (a)’s formulation of ‘shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court’. The question is whether the proceedings were held, or are being held, in a manner inconsistent with a desire to bring the accused person ‘to justice’. It would appear, then, that the drafters intended the ‘delay’ and ‘impartiality’ prongs of the unwillingness test to mean something more than an unwillingness to make the accused accountable. The preceding section revealed the International Criminal Tribunal for the Former Yugoslavia’s interpretation of the term ‘justice’ to mean respect for the rights of the accused as well as the rights of victims.

In the light of the fact that the two prongs of the test in Article 17(b) and (c) fall under a chapeau which asks the Court to determine questions of whether there has been an unjustified delay or whether the proceedings were not conducted independently or impartially ‘having regard to the principles of due process recognised by international law’, it could be argued that an unfair trial at the expense of the accused might indeed render the trial admissible before the International Criminal Court. According to Robinson:

During the drafting of Article 17, most delegates were concerned with sham or ineffective proceedings, and thought that the problem of overly-harsh national proceedings is one that could be taken up with a human rights body (which protects rights) not the ICC (which is about preventing impunity). Other delegates, including Mauro Politi of Italy (later a judge at the ICC) were of a different view, and secured an ambiguous but potentially significant reference to ‘due process’ in Article 17.

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75 Darryl Robinson, ‘Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller’s Sentence-Based Theory of Complementarity’ in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.) The Ashgate Research Companion to International Criminal Law: Critical Perspectives (Aldershot: Ashgate, 2013) 369, 378. See also Carnero Rojo (n 73) 840, stating that Article 17(2) ‘can also be construed as empowering the Court to take over domestic proceedings intentionally lacking due process of law’; Carsten Stahn, ‘Libya, the International Criminal Court and Complementarity: A Test for “Shared Responsibility”’ (2012) 10
Furthermore, Rule 51 of the Rules of Procedure and Evidence explicitly states that, in their challenge to admissibility of cases before the Court, states can present information, inter alia, ‘showing that its courts meet internationally recognised norms and standards for the independent and impartial prosecution of similar conduct.’ These references to international due process norms presuppose that the International Criminal Court should embody the same ‘principles of due process recognised by international law’ assessed when deciding whether a case is admissible before it. Once again, a role for the international court to demonstrate to domestic states the procedural standards expected in prosecuting the most serious offenders is observed, and this justifies the argument that there can be no room for manoeuvre in embodying the highest standards of due process in the International Criminal Court’s proceedings.

The ‘due process’ hypothesis appears to gain credence from the admissibility decision in Katanga, where Trial Chamber II stated in the context of a self-referral from the Democratic Republic of the Congo:

The Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case… The reasons for such a decision may be because the State considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial.

The Chamber stated that this interpretation was consistent with the drafters’ intentions to ‘bring an end to impunity while continuing to respect the primacy of JICJ


77 Situation in the DRC: Prosecutor v. Katanga and Chui, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Case No. ICC-01/04-01/07-1213, 16 June 2009, para 80.
national jurisdictions'. However, it could be argued that this interpretation was consistent with the context of the case, where the state had voluntarily accepted the International Criminal Court’s jurisdiction and thus did not challenge the admissibility of the case on the basis of complementarity. Whether a ‘due process’ interpretation of the principle could be effectuated when the state challenges the admissibility of the case before the International Criminal Court on the basis that it is willing and able to prosecute the individuals itself remains to be seen, but the outcome of the Libya admissibility challenge is likely to be instructive. After the arrest of Saif Gaddafi in 2011 and his detention to face trial in Libya despite an International Criminal Court arrest warrant having been issued against him, groups like Human Rights Watch pointed to alleged irregularities in the length of his pre-trial detention, access to a lawyer and other violations of fair trial rights in support of their position that the International Criminal Court was the proper forum in which to try Muammar Gaddafi’s heir apparent. On 6 December 2011, the International Criminal Court’s Pre-Trial Chamber I asked the state to confirm that Saif Gaddafi had been given access to a lawyer and adequate medical treatment. The request for these observations perhaps show that the Court’s remit stretches beyond a concern that domestic proceedings will shield the accused.

The NGO position was later modified to further assert that the initial charges against Saif Gaddafi were for improper licensing of camels and lesser

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78 Ibid, para 79.
79 Amnesty International, ‘Libya must respect ICC call to surrender Saif al-Islam’, Press Release, 5 April 2012 (‘Wednesday’s decision by the International Criminal Court (ICC) ordering Libya to surrender Saif al-Islam al-Gaddafi immediately is a step forward for justice and accountability, Amnesty International said today. “This clear ruling by the ICC judges should effectively bring an end to the long-running saga over the fate of Saif al-Islam,” said Marek Marczyński, Head of Amnesty International’s International Justice Team. “Libya must act on the ICC’s decision and surrender Saif al-Islam al-Gaddafi without further delay. An unfair trial before a Libyan court where the accused could face the death penalty is no way to guarantee justice and accountability.”’) available online at: http://amnesty.org/en/news/libya-must-respect-icc-call-surrender-saif-al-islam-2012-04-05 (last accessed 2 December 2012); Physicians for Human Rights, ‘Libya Should Surrender Saif al-Islam Qaddafi to the ICC’, Press Release, April 2012 (‘Providing justice, however, requires deep institutional reforms that will take significant time and resources. At this time, Libya does not yet have the independent judicial system necessary for a fair trial. Essential steps needed to reform Libya’s judiciary include the appointment or election of well-qualified and properly trained judges and the drafting of rules of evidence and procedures that protect the rights of the accused…’) available online at http://physiciansforhumanrights.org/library/statements/libya-should-surrender-saif-al-islam-qaddafi-to-the-icc.html (last accessed 2 December 2012).
offences, insinuating that the Libyan authorities intended to shield the accused from more serious charges of international crimes.\textsuperscript{81} This appeared unlikely, given that the draft Transitional Justice Act, which provided that all crimes committed by members of the former regime from 1969 onwards would be addressed through criminal justice mechanisms and other mechanisms, such as a truth and reconciliation commission and reparations, and given the political atmosphere after the uprising in Libya, which was extremely opposed to the old Gaddafi regime.\textsuperscript{82} In any event, the later position of Human Rights Watch and other groups appeared to give credence to the argument that ‘unwillingness’ for the purposes of complementarity could only apply where the accused would be shielded from more serious charges before the International Criminal Court by domestic proceedings. However, in its admissibility challenge, the state, represented by some leading international lawyers,\textsuperscript{83} introduced some six pages of material on the guarantees of fairness in Libyan trial proceedings.\textsuperscript{84} However, the motion also argued that ‘[i]t is not the function of the ICC to hold Libya’s national legal system against an exacting and elaborate standard beyond that basically required for a fair trial.’\textsuperscript{85} In December 2012, the Pre-Trial Chamber asked the Libyan government to provide clarifications as to the procedure that would be applied in Saif Gaddafi’s case, in the light of the due process concerns that had been raised at the oral hearing on Libya’s admissibility challenge.\textsuperscript{86} In the same vein, the Kenyan government’s appeal against the admissibility of two cases

\textsuperscript{81} See Kenneth Roth’s Twitter account, as pictured in the report by Damien McElroy, ‘Saif Gaddafi “only charged with failure to licence camels”’ \textit{The Telegraph} (London, 5 April 2012) available online at http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9189056/Saif-Gaddafi-only-charged-with-failure-to-licence-camels.html (last accessed 2 December 2012) alleging that Libya had decided not to charge for serious crimes due to a lack of evidence. This allegation was reiterated by Xavier-Jean Keita, head of the OPCD: Chris Stephen, ‘Libya to defy UN on handing over Saif Gaddafi, documents reveal’ \textit{The Guardian} (Tripoli, 7 April 2012) available online at http://www.guardian.co.uk/world/2012/apr/07/libya-saif-gaddafi-war-crimes-hague?newsfeed=true (last accessed 2 December 2012).


\textsuperscript{83} Philippe Sands, Payam Akhavan, and Michelle Butler, were, at the time of writing, acting as counsel for Libya in the admissibility challenge.

\textsuperscript{84} \textit{Situation in Libya: Prosecutor v. Al-Islam Gaddafi and Al-Senussi}, Application on Behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, Case No. ICC-01/11-01/11, 1 May 2012.


\textsuperscript{86} \textit{Situation in Libya: Prosecutor v. Al-Islam Gaddafi}, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (n 61) paras 30-47.
before the International Criminal Court placed great emphasis on the updated due process protections in the country’s constitution. The admissibility challenge ultimately failed on the basis that none of the accused individuals were subject to a national investigation for the same conduct at that time.  

The question of whether a case can be rendered admissible where proceedings have been unfair to the accused, as opposed to carried out in such a way as to shield him or her from full accountability, also arises in considerations of the *ne bis in idem* rule. Under Article 20(3), a person cannot be tried by the International Criminal Court if they have already been tried by a domestic court, unless those prior proceedings:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Some have argued that this clause can only apply where the accused benefited from the domestic court’s shortcomings. If the term ‘to bring the person concerned to justice’ essentially means the same thing as shielding him/her from criminal responsibility, why would there be a need for two separate provisions on it? It would be most unusual if the drafters chose not only to include two consecutive legal provisions that are identical in meaning, but also that they would choose different wording for both provisions. Carnero-Rojo distinguished between the concepts of bringing a person to justice and shielding an individual from criminal responsibility as they are present in both Articles 17 and 20. He stated that the latter could be interpreted as meaning “justice” as a result rather than as a process’, while the former could incorporate general due process rights. It is clear in any event that the provision requires the International

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88 Article 20(3) ICC Statute.
89 Benzinger (n 66) 598; Kleffner (n 72) 130.
90 Carnero Rojo (n 73) 836-837.
91 Ibid.
Criminal Court to act as arbiter of ‘the norms of due process recognised by international law’, and it would therefore be expected that it should itself embody and further illustrate those norms to the highest possible degree.

2.2.3. References to standard-setting in international criminal jurisprudence and by organs of the courts

Section 2.2.1 examined the potential for international criminal procedural standards to be embraced by countries which are keen to have cases transferred to their jurisdiction pursuant to Rule 11bis, and the implicit notion therein that international criminal tribunals do set the highest standard of fairness, or at least are under an obligation to lead by example. The present section looks at perhaps a more explicit justification for the hypothesis that international criminal tribunals should set the highest standards of fairness — quite simply, because they claim to do so already.

As discussed in section 2.1 above, the founding documents of the four courts not only stated that their goal was to bring perpetrators to justice, but to do so in a fair and impartial manner. The Special Court for Sierra Leone referred to the preambular paragraphs of Resolution 1315 in reiterating that the goal of the United Nations and Sierra Leone in establishing the court was to try and punish those most responsible in accordance with ‘international standards of justice, fairness and due process of law’.92 The letter sent by President Kabbah asking the United Nations to establish the Special Court noted that ‘the framework is meant to produce a court that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leonean soil.’ When the Special Court for Sierra Leone was faced with an issue regarding the concurrent jurisdiction of its mandate and that of the Truth and Reconciliation Commission for Sierra Leone, it stated in the strongest of terms that, ‘Should comment or conclusion be passed, it will of course have absolutely no effect on the minds of the judges of this Court who sit to provide a fair trial according to international

While an early decision in Tadić dismissed the defence argument that the jurisprudence of international human rights tribunals laid down a minimum standard that must be observed by all criminal trials, be they international or domestic, it is fair to say that all courts now consider themselves duly bound by human rights provisions on the right to a fair trial. References to the standards laid down by the European Court of Human Rights and the Human Rights Committee, in particular, are common when the tribunals interpret their parallel fair trial provisions. In Hadžihasanović, the Trial Chamber enunciated some additional reasons (apart from the closeness of the Statute’s fair trial provisions with those from the International Covenant on Civil and Political Rights and European Convention on Human Rights) why the Tribunal ought to be bound by their standards. First, many of the countries affected by the Tribunal’s jurisprudence were parties to these treaties, and the principle that ‘no distinction can be drawn between persons facing criminal procedures in their home country or on an international level’ applied. Some of the states of the Former Yugoslavia are not member states of the Council of Europe, and so the European Convention would not apply on their territory, but the Trial Chamber said that the Tribunal could not distinguish between defendants solely on the basis of their nationality and whether their home country is a party to the European Convention on Human Rights or not. The Chamber did not expand on this point, but the basis for this assertion was presumably Article 21(1) which states that ‘all persons shall be equal before

93 Prosecutor v. Norman, Decision on appeal by the truth and reconciliation commission for Sierra Leone and chief Samuel Hinga Norman JP Against the decision of His Lordship, Mr Justice Bankole Thompson delivered on 30 October 2003 to deny the TRC’s request to hold a public hearing with chief Samuel Hinga Norman JP, Case No. SCSL-2003-08-PT, 28 November 2003, para 44 (emphasis added).
97 Ibid, paras 2-6.
98 Ibid, para 5.
the Tribunal’. Second, because the Tribunal was established by the United Nations which is committed to the principles of the International Covenant on Civil and Political Rights, the Tribunal’s rules must be read in the light of the human rights enshrined therein. 99 Lastly, it stated that although the Tribunal’s core commitment was to justice for the innocent victims of mass atrocities, the conception of justice was taken also to include respect for the fundamental rights of the accused. 100

Judge Dolenc, in a separate opinion appended to the Ntagerura trial judgment, also embraced this wider conception of justice. 101 Cognisant of the fact that many might view his opinion that several counts of the indictment should have been dismissed as running contrary to principles of international justice, he argued that the responsibility of the Tribunal to ensure a fair trial was imperative to the legacy of the International Criminal Tribunal for Rwanda, the legitimacy of its judgments, and its contribution to real and lasting peace in Rwanda. 102 He argued, along the same lines of the present work, that the International Criminal Tribunal for Rwanda and its contemporaries ‘cannot lose sight of the effect of the Tribunal’s jurisprudence on international and national guarantees to a fair trial. If the international tribunals fail to provide a model of fairness, we send the wrong message to other courts.’ 103

Judge Dolenc’s far-sighted approach to the lasting legacy of the Tribunal and his recognition that international criminal justice’s goal of spreading and ensuring respect for the rule of law necessitates full respect for the rights of the accused is to be welcomed. In a similar vein, Judge Itoe issued a strongly-worded dissenting opinion before the Special Court for Sierra Leone on the majority’s holding that evidence on a contested group of charges could be heard pending the Appeal’s Chamber decision on them. 104 Judge Itoe said that the Chamber ‘is

99 Ibid, paras 2-6. In a similar vein, see Prosecutor v. Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95-14-T, 18 July 1997, para 61: ‘As an international institution, the International Tribunal was intended to give effect to the highest standards of justice’
100 Prosecutor v. Hadžihasanović et al., Decision granting provisional release to Enver Hadžihasanović (n 96) para 5.
102 Ibid, paras 4-6.
103 Ibid, para 5.
endowed with the sacred responsibility of ensuring and safeguarding the supremacy and inviolability of the principle of fairness in the conduct of a trial’ and the major casualty of not paying full heed to this principle would be the integrity proceedings and the reputation of the Special Court.\textsuperscript{105} In Nikolić, the International Criminal Tribunal for the Former Yugoslavia’s Trial Chamber II linked respect for the accused’s right to a fair trial to the Tribunal’s role in promoting human rights and respect for the rule of law.\textsuperscript{106}

References to the fact that international criminal tribunals see themselves enshrining the highest standards of procedural fairness can be found not only in the tribunals’ jurisprudence, but also on their websites and in external speeches made by court authorities. The International Criminal Tribunal for the Former Yugoslavia’s website, with reference to the adjustments that had to be made to the proposed finished date for all trials in line with the completion strategy, explains the extra time needed as being necessary ‘to ensure the highest standards of procedural fairness’.\textsuperscript{107} Similarly, as Judge Meron assumed the office of President of the Yugoslav Tribunal for the second time, he made a statement to the effect that the Tribunal embodied the ‘international community’s noblest aspirations for justice’, adding that he would work to ‘ensure that these proceedings are concluded in a timely fashion while upholding the highest standards of fairness’.\textsuperscript{108} Judge Meron also noted that:

\begin{quote}
[T]he Tribunal has made unprecedented contributions to the development of international criminal law and procedure. It has also served as an important model for other international courts and provided valuable assistance to national judiciaries trying war crimes cases.\textsuperscript{109}
\end{quote}

Through the statements of its President, we can see that the Tribunal’s judges see themselves as both embracing the highest standards of fair procedures and setting an example for domestic jurisdictions in trying the most serious crimes. In a similar vein, Judge Gabrielle Kirk McDonald addressed an informal plenary of the Preparatory Committee on the Establishment of an International Criminal Court in

\begin{footnotes}
\footnotetext[105]{\textit{Ibid}, para 18.} \\
\footnotetext[106]{\textit{Prosecutor v. Nikolić}, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, Case No. IT-94-2-T, 9 October 2002, paras 110-111.} \\
\footnotetext[107]{'Completion Strategy', available online at http://www.icty.org/sid/10016 (last accessed 10 June 2012).} \\
\footnotetext[108]{'Statement of the President of the Tribunal — Judge Theodor Meron’, 17 November 2011, available online at: http://www.icty.org/sid/10856 (last accessed 10 June 2012).} \\
\footnotetext[109]{\textit{Ibid}.}
\end{footnotes}
1997 and impressed on the Committee the need for the International Criminal Court’s Statute to ‘comport with the highest standards of fairness’, thereby implying that the International Criminal Tribunal for the Former Yugoslavia’s practice also embodied those same standards.¹¹⁰

Judge Meron reiterated his sentiments in July 2012, at the opening of the Arusha branch of the ‘residual mechanism’ for the international criminal tribunals.¹¹¹ He stated that the adoption of a Statute and Rules of Procedure and Evidence for the residual mechanism that broadly reflected the content of the International Criminal Tribunal for Rwanda’s Statute and Rules of Procedure and Evidence was important, not just for the sake of ‘normative continuity’, but also for ensuring:

service to the principles of due process and fundamental fairness — principles that have been at the core of the judicial work of both the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia for nearly two decades, and will be central to the judicial work of the Mechanism for International Criminal Tribunals for years to come.’¹¹²

President Meron noted once again the domestic referral of cases, and the role that the Residual Mechanism would play in ensuring that defendants were accorded the full panoply of fair trial rights, as well as granting access to evidence and assisting in tracing indicted individuals who had yet to be arrested.¹¹³ In a nod to jurisprudence under Rule 11bis which allowed the transfer of defendants to Rwanda for the first time, Judge Meron acknowledged ‘the great strides’ made by the Rwandan government ‘in amending their legislation to ensure the competence of the Rwandan courts to hear these cases in accordance with the highest standards of due process in their conduct.’¹¹⁴ In his closing remarks, Judge Meron noted not just the Tribunal’s dedication to ensuring that the archival materials of the International Criminal Tribunal for Rwanda would be made available to the people of Rwanda for years to come, but also further emphasised the Tribunal’s

¹¹² Ibid.
¹¹³ Ibid.
¹¹⁴ Ibid.
commitment to seeing that accused persons are ‘treated in accordance with the highest standards of procedural and substantive fairness.’ In a similar vein, the late Judge Cassese wrote an expert report on the functioning of the Special Court for Sierra Leone in 2006, in light of its completion strategy and in order to strengthen its practice in the final years of its operation. On the terms of reference, he said that the UN Secretary-General had appointed him “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.”

Similar references to the judges’ role in ensuring that international fair trial standards are fully respected can be found in the external statements of tribunal officials. In 2010, then-President of the Yugoslav Tribunal, Judge Robinson, informed the Security Council that “the Tribunal has continued to work as efficiently and expeditiously as possible in accordance with the highest standards of international due process.” The Tribunal’s Registrar, Mr. Hocking, is on record as having stated that, ‘The same institution that was created to prosecute alleged perpetrators and hold them accountable for their misdeeds, was also tasked to ensure that the right to fair trial was fully respected...’ The Prosecutor of the International Criminal Court has publicly stated that the accused before the Court will be guaranteed to receive a fair trial in accordance with the highest procedural standards on numerous occasions, as have prosecution counsel in other international criminal tribunals. Similarly, the tribunals’

115 Ibid.
120 Opening statement of the Prosecution, Prosecutor v. Lukić, Transcript, 9 July 2008, 269 (‘I give the Chamber, as well as Milan and Sredoje Lukic, my assurance, and the assurance of Mr.
websites contain many references to the highest standards of fairness in their proceedings.\textsuperscript{121}

\textbf{2.2.4. Risk of wrongful conviction}

It probably goes without saying that it would be extremely embarrassing for the international community if a court established by the community of nations and generously funded by a large number of states were found to be complicit in the wrongful conviction of an individual. As with domestic systems, one of the strongest arguments in favour of a robust protection of fair trial rights is that the greater the derogation from these rights, the greater the risk of convicting an innocent person. According to Jackson, ‘there is consensus’ that equality of arms and an adversarial procedure (by which Jackson meant a procedure which gives both parties a voice, as opposed to a system from a country with a common law tradition) are needed to reach a fair and accurate verdict.\textsuperscript{122} The need to avoid incorrect convictions increases in the international criminal law context, where the passing of judgments is inextricably linked with post-conflict justice and rule of law reform.\textsuperscript{123} If, as the founding documents of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone suggested, these tribunals were intended to strengthen the domestic criminal justice systems of affected states,\textsuperscript{124} a flawed procedural model which risks convicting the innocent cannot effectively meet that goal. Of course, no procedural model is infallible, and no matter how fair, there is always a risk that a wrongful conviction will be

\begin{footnotesize}
\begin{itemize}
\item Brammertz, that the Prosecution will conduct its case according to the highest standards of fairness and justice enabling this Chamber to reach a fair and just adjudication of the charges against these accused.’
\item ICTY Digest, 15 January 2007, available online at: http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/icty_digest_5_en.pdf (last accessed 2 December 2012): ‘The Tribunal remains entirely committed to upholding the highest standards of due process and completing its of contributing to peace and security in the Former Yugoslavia.’; Press Release, ‘Tribunal Welcomes the Arrest of Radovan Karadzic’, available online at: http://www.icty.org/sid/9952 (last accessed 2 December 2012): ‘Aware of the serious charges brought against him by the prosecution, the Tribunal is mindful that Karadzic enjoys the presumption of innocence and is committed to do all within its competences to ensure a fair and public trial in accordance with the highest standards of international law.’; ICC, ‘About the Court: ICC at a Glance’, available online at: http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/ (last accessed 2 December 2012): ‘In all of its activities, the ICC observes the highest standards of fairness and due process. The jurisdiction and functioning of the ICC are governed by the Rome Statute.’
\item Jackson (n 19) 19.
\item See above, section 2.1.
\item Ibid.
\end{itemize}
\end{footnotesize}
entered. Yet, models of the criminal process founded on due process are cautious of error and seek to avoid inaccuracy to a much greater extent than the more optimistic crime control systems.\textsuperscript{125} There is a further theoretical argument that respect for the individual’s rights need to be central to the criminal process,\textsuperscript{126} and this holds particularly true in relation to trials that bear a specific aim of spreading respect for the rule of law.

It may be argued that the evidence against renowned political and military leaders who find themselves on trial before international criminal tribunals is so overwhelming that the provision of all of the judicial guarantees is somewhat farcical and may just serve to protect the external image of the tribunals rather than being strictly necessary to ensure that innocent people are not convicted. But the fact remains that individuals have, in practice, been acquitted by the tribunals because they have not been proven guilty beyond reasonable doubt.\textsuperscript{127} In one case before the International Criminal Tribunal for Rwanda, the defendant was acquitted on the basis of a successful alibi defence.\textsuperscript{128} This proves that we cannot take it as a given that there is a strong case to be made against all those who are indicted by the tribunals. At the International Criminal Court, at the time of writing, six of the fourteen individuals for whom warrants of arrest were issued were either acquitted or had the charges against them withdrawn at an earlier stage in proceedings.\textsuperscript{129} Moreover, the guilt of the accused must be proved ‘beyond

\textsuperscript{125} Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford: Stanford University Press, 1968) 164-165.
\textsuperscript{126} Andrew Ashworth and Mike Redmayne, \textit{The Criminal Process} (4\textsuperscript{th} edn, Oxford: OUP, 2010) 20-61, 322.
\textsuperscript{129} \textit{Situation in Kenya: Prosecutor v. Muthaura}, Decision on the Withdrawal of Charges against Mr. Muthaura, Case No. ICC-01/09-02/11, 18 March 2013; \textit{Situation in the DRC, Prosecutor v. Chui}, Jugement rendu en application de l’article 74 du Statut, Case No. ICC-01/04-02/12, 18 December 2012; \textit{Situation in Darfur, Sudan: Prosecutor v. Abu Garda}, Decision on the Confirmation of Charges, Case No. ICC-02-05-02/09, 8 February 2010; \textit{Situation in Kenya: Prosecutor v. Ruto, Kosgey and Sang}, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-01/11, 23 January 2012 (declining to confirm the charges against Kosgey); \textit{Situation in Kenya: Prosecutor v. Muthaura, Kenyatta and Hussein Ali}, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-01/11, 23 January 2012 (declining to confirm the charges against Kosgey); \textit{Situation in the DRC: Prosecutor v. Mbarushimana}, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/10, 16 December 2011.
reasonable doubt’. Defendants must be given ample opportunity to raise any doubt that may exist, and they can only be afforded this opportunity through having adequate time and facilities for the preparation of their defence,\(^{130}\) the right to challenge any of the evidence against them,\(^{131}\) and all of the other guarantees enshrined in Article 14 of the International Covenant on Civil and Political Rights and its equivalent in international criminal statutes. As Judge Dolenc stated in his separate opinion to the *Ntagerura* judgment, even if the evidence is overwhelming on some distinct counts in the indictment, this should not go to prove by extension the guilt of other counts which the accused has not been given adequate opportunity to challenge.\(^{132}\)

In domestic law, miscarriages of justice are said to shake the citizens’ confidence in the legal system as a whole. For example, the wrongful convictions of the ‘Birmingham Six’ and ‘Guildford Four’ in the UK stand as paradigmatic examples and led to the creation of the Runciman Commission to examine the foundations of the criminal justice system in England and Wales.\(^{133}\) Arguably, the danger of people losing confidence in the international criminal justice system following a wrongful conviction carries even greater risks. As stated above, international tribunals seek to add to a credible historical record and prevent future revisionism by establishing at least part of the picture and deciding upon the individual responsibility of political and military leaders.\(^{134}\) If doubt were to be cast upon the soundness of such convictions as a result of an erroneous conviction, the international criminal justice project could be unhinged.

The *Barayagwiza* incident before the International Criminal Tribunal for Rwanda — where the accused was released ‘with prejudice’ after it was held that his rights had been violated by excessive pre-trial detention prior to his transfer to the tribunal — demonstrates that miscarriages of justice can have an adverse impact on state cooperation with international criminal institutions. Even though relations had been fraught between the Republic of Rwanda and the International

\(^{130}\) See below Chapter 6.
\(^{131}\) See below Chapter 6.
\(^{133}\) See further, Kent Roach and Gary Trotter, ‘Miscarriages of Justice in the War against Terror’ (2004-2005) 109 *Penn St LR* 967, 968.
\(^{134}\) Lower-ranking individuals were tried at the commencement of the ICTY and ICTR, but the point of international tribunals trying predominantly high-ranking individuals, usually infamous in their home countries, is true for at least the trials since the turn of the 21st century.
Criminal Tribunal for Rwanda before the incident, and regardless of the fact that Rwanda’s indignation was caused by the fact that a guilty man had been freed, the same destabilising effect that Rwanda’s refusal to cooperate with the tribunal had could potentially result from a state’s lack of faith in the institutions resulting from what is seen as a flawed set of rules.

By the same token, one of the reasons advanced by some commentators, in support of the United States of America’s failure to ratify the Rome Statute was the fact that trials before the International Criminal Court are not held before a jury. Although most authors have argued that a jury trial is not an inescapable requirement of the right to a fair trial in international criminal trials, this does demonstrate that procedural improprieties can be used as an excuse for states that are unwilling to cooperate due to political reasons. This negative view of the international criminal tribunals would be greatly enhanced if a wrongful conviction was entered by any of the tribunals, thus it is imperative that the fairest of procedures remain their watchword. In the Katanga admissibility decision before the International Criminal Court, the accused argued that he could not get a fair trial before the International Criminal Court as part of his admissibility challenge. In holding that fair trial considerations could not form part of an admissibility challenge, the Chamber held that the State Parties signed up to the International Criminal Court’s legal regime ‘mindful of the consequences that [its seat in The Hague] would entail for the accused brought before the Court, and considered that they were not infringing their fundamental rights.’ This shows how closely interlinked state cooperation and the perception of fairness of International Criminal Court trials are.

Some might say that the ‘wrongful conviction’ argument ought to stretch

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135 The decision to release the accused was later overturned in Prosecutor v. Barayagwiza, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, 31 March 2000, and Barayagwiza was later convicted in Prosecutor v. Barayagwiza, Judgment and Sentence, Case No. ICTR-99-52-T, 3 December 2003.

136 Amy Powell, ‘Three angry men: Juries in International Criminal Adjudication’, (2004) 79 NYU L.R. 2341. Larry May, Global Justice and Due Process (New York: CUP, 2011) 35-37, stated that international criminal tribunals have a role in promoting fair trial rights, such as trial by jury, which is clearly a theoretical rather than a practical argument.


138 Situation in the DRC: Prosecutor v. Katanga and Chui, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Case No. ICC-01/04-01/07, 16 June 2009, paras 83-84.
beyond the procedural safeguards in place and should look also at substantive elements, such as modes of liability and the malleability of definitions of crimes. This is a valid point, but one that falls outside the scope of the present work. Suffice to say for now that it is imperative that international criminal tribunals exercise the highest due process standards in order to avoid wrongful convictions, which would undoubtedly result in a lack of state confidence in the tribunals and an unwillingness to cooperate with them.

2.2.5. Dangers of setting lower standards

If, as argued above, international criminal tribunals can encourage states to embrace higher standards of due process through the mechanisms of Rule 11bis referrals and complementarity, the converse is almost certainly the case. Those involved in policy-making at a domestic level might be forgiven for thinking that a period of ten years was a reasonable length for a trial on charges of genocide or other international crimes, based on the experience to date in some international criminal tribunals discussed in this work. This position was reflected in Libya’s admissibility challenge to the Saif Gaddafi case, where it stated that:

Even this Court with its considerable resources has required several years to bring accused persons to justice in less complex cases. Libya is meeting the requirements of due process in accordance with international standards, and cannot be held to a requirement of achieving swift justice in circumstances that neither other States nor the ICC itself are required to meet.

Indeed, some of the difficulties that have arisen in domestic prosecutions of international crimes mirror some of the key issues in international criminal procedure discussed in the present work. For example, Human Rights Watch published a report in 2012 on Uganda’s International Crimes Division, where it reported the fact that an accused had not received the disclosure of prosecution witness statements until two years after his initial arrest. A waiting period of two years between arrest and the first substantive disclosure would actually be

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140 Situation in Libya: Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Application on Behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (n 84) para 94.
better than international criminal procedure standards. The danger here is that international criminal procedure’s shortcomings give a justification for a state’s derogations from international due process norms. It would be relatively reasonable for a state to argue that their procedures comport with the standards set out by international criminal tribunals, and that the tribunals’ practice should be seen as illustrative of international standards of due process. In practice, groups like Human Rights Watch have benchmarked their assessment of domestic trials for international crimes on the standards laid down by the International Criminal Court, based on the reasoning that defendants ought to receive equal treatment, whether they are tried in The Hague or in their home country.

The dangers present in setting less than the highest standards of fairness were illustrated by a number of instances — in particular, in the United States at the turn of this century — where international criminal justice’s shortcomings were used as a justification for states’ own derogations from international standards of due process. For example, Article 6(D) of the US Military Commission Order No. 1 allowed the admission of any evidence which the Presiding Officer deemed to bear probative value. There is a clear parallel between this provision and Rules 89(C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and Special Court for Sierra Leone, which provide that ‘[a] Chamber may admit any relevant evidence which it deems to have probative value.’ However, Rules 89(C) come with a limitation clause — that the evidence may be excluded if its probative value is outweighed by the need to ensure a fair trial. These provisions and related international practice,

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142 See below, Chapter 5.
146 Rules 89(D).
particularly as they pertained to the admissibility of hearsay evidence, evidence obtained through torture or other coercive means, and the testimony of anonymous witnesses, were hotly debated before the US House of Representatives in 2006. The witnesses present were: Prof. Michael Scharf of Case Western University; Judge Patricia Wald, formerly a judge before the International Criminal Tribunal for the Former Yugoslavia; Mr. Gerald Gahima of the United States Institute for Peace, and Ms. Jennifer Elsea, an Attorney with the Congressional Research Service. Judge Wald informed the House Committee on Armed Services that, in practice, judges ‘move very carefully in terms of the weight that is given’ to hearsay evidence, and she reiterated that the Tribunal is guided by European Court of Human Rights jurisprudence which states that convictions cannot be substantially based on hearsay testimony. Justification for this assertion can indeed be found in a number of judgments of the European Court of Human Rights, and in a number of decisions of the International Criminal Tribunal for the Former Yugoslavia.

While a similar provision to Rule 89(D) is included in Section 949a(F) of the Military Commissions Act of 2006, whereby hearsay evidence can be excluded if its probative value is outweighed ‘(i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (ii) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence’, this does not provide all of the same guarantees provided by the International Criminal Tribunal for the Former Yugoslavia, because large swathes of evidence can be shielded from the accused for malleable ‘national security’ reasons, thereby limiting his/her ability to raise a challenge on the grounds of Section 949a(F)(i) or (ii). Nonetheless, one member of the Senate Committee on Armed Services has stated that:

148 Ibid, 3-7.
150 Section 949(D) Military Commissions Act 2006.
if you compare our military commissions system, particularly the reformed version, to an international court trial at The Hague, we’re much more, for lack of a better word, liberal in terms of providing due process and protections to the accused than you would get if you were going to go to The Hague.\footnote{US Senate, Committee on Armed Services, Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, 7 July 2009, 15 (Senator Graham).}

This assertion was apparently made on the basis that the only factor to be considered by the International Criminal Tribunal for the Former Yugoslavia in assessing the admissibility of hearsay testimony was reliability.\footnote{Ibid, statement of Admiral MacDonald. See also, Report of the Committee on Armed Services, House of Representatives on H.R. 6054, 109\textsuperscript{th} Congress, Second Session, 15 September 2006, available online at \url{http://www.loc.gov/rr/frd/Military_Law/pdf/H-Rep-109-664-1.pdf} (last accessed 2 November 2012) 10 (‘The committee notes that this standard for admission of evidence is similar to that used by international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).’)} Similarly, the Tribunal’s extremely limited jurisprudence on the appropriateness of anonymous witnesses was relied upon by the President of the United States of America as justification for the military tribunals’ shielding of witnesses from the accused and defence counsel, who said:

\begin{quote}
For instance, the International Criminal Tribunal for the Former Yugoslavia has ruled that the accused’s rights to a fair trial and to cross-examination are not violated when, out of concern for the safety of a witness, the court permits a witness to testify before the court while shielding the identity of the witness from the accused and defense counsel.\footnote{Message from the President of the United States transmitting a draft of proposed legislation entitled the ‘Military Commissions Act of 2006’, 109th Congress, 2nd Session, House Document 109–133, 7 September 2006, available online at \url{http://www.loc.gov/rr/frd/Military_Law/pdf/Hdoc_109-133.pdf} (last accessed 2 November 2012).}
\end{quote}

This position was heavily criticised by Scharf, who pointed out the once-off nature of the \textit{Tadić} decision on anonymous witnesses,\footnote{‘Standards of Military Commissions and Tribunals’, Hearing before the Committee on Armed Services (n 147) testimony of Prof. Michael Scharf.} as discussed further in section 3.5 of the present work. This reliance on the procedure of the International Criminal Tribunal for the Former Yugoslavia (albeit wrongfully stated) as a justification for the dilution of the rights of the accused in the domestic context further illustrates the need for international tribunals to vigorously defend the rights of the accused in all circumstances. Thus, the need for such tribunals to provide fairness in their procedures stretches beyond the traditional impetus of...
protecting innocent people from wrongful conviction and into the realms of illustrating ‘demonstrable principles of fairness’.  

2.2.6. The ‘pull’ of fair procedures: legitimacy and compliance

The Tadić jurisdiction decision interpreted compliance with full due process norms as being one interpretation of the requirement that tribunals be ‘established by law’. The Chamber stated that:

The important consideration in determining whether a tribunal has been ‘established by law’ is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should [sic] that it observes the requirements of procedural fairness.

The human rights norms espoused by tribunals in their procedures have a resounding effect in terms of the external legitimacy of international criminal law. Studies such as that carried out by Nancy Combs that raise doubt as to the safety of international criminal convictions, carry a ripple effect which leads commentators to question the continued legitimacy of international criminal tribunals. Furthermore, anything less than perfect standards can be pounced upon by the tribunals’ detractors.

The fairness of proceedings may also have an effect on the internal legitimacy of the courts, and the deference with which defendants treat their authority. Tyler has written several studies on the cooperation that arises when people believe the police or judiciary bears legitimate authority over them. Their legitimate authority, in turn, is derived from fair treatment of those within their

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authority, freedom from discrimination, bias and outside interference, and uniformity of application of the law.\textsuperscript{161} Robertson has remarked that ‘the most astonishing feature of the Nuremberg trial was how the adversary dynamics of the Anglo-American trial sucked in the defendants, who played an earnest and polite, at times desperate, part in making it work.’\textsuperscript{162} In a similar vein, Luhmann’s concept of ‘legitimation through procedure’ states that parties will accept outcomes of a procedure if that procedure is flawless and the decision-makers adopt a neutral position.\textsuperscript{163} In the words of Allan:

The purpose of a criminal conviction is not merely to give the citizen a prudential incentive to obey the law, but to persuade him of the justice of the law’s demands and therefore the wrongfulness of the conduct which it condemns.\textsuperscript{164}

2.3. INTERNATIONAL CRIMINAL PROCEDURE AND STANDARD SETTING: THE CASE AGAINST

2.3.1. Context of Proceedings

It is unquestionably true that international criminal tribunals operate in a unique context. The path of an international criminal trial is often fraught with difficulty, not least because of the inconsistent nature of state cooperation. This has been evidenced by jurisprudence on the issuance of subpoenas,\textsuperscript{165} the availability of evidence,\textsuperscript{166} and the production of witnesses and defendants,\textsuperscript{167} amongst others.


But is this unique context sufficient to negate the role of international criminal tribunals in exemplifying the highest standards of procedural fairness?

Damaška, referring to the ‘challenging international environment’ in which international criminal tribunals operate, expressed doubts as to the full extent of their fair trial obligations. He maintained that responsiveness to the unique context and challenges of international criminal law ‘may require the abandonment, or relaxation, of some cherished domestic procedural arrangements’, and further argued that international criminal tribunals ‘cannot successfully pursue their manifold objectives by strictly abiding by most demanding domestic rules of procedure.’

It is submitted that some ‘domestic procedural arrangements’ may be set aside in the international criminal trial, and it could still reach the highest standards of fairness. An example of this might be exclusionary rules of evidence, which Damaška conclusively proved in his earlier work, Evidence Law Adrift, to be based more in tradition than in concern for the rights of the accused.

However, where such arrangements include universal safeguards that are functions of the presumption of innocence, such as the right to a speedy trial (which is one of the elements that Damaška sees as being ‘fair enough’), it is argued that this presents cause for concern. Such exceptionalism when it comes to fair trial rights in criminal proceedings just because they are complex may lead the way for further erosions of rights, domestically and internationally. As

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167 Situation in Darfur, Sudan: Prosecutor v. Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, 12 December 2011; Situation in Darfur, Sudan: Prosecutor v. Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, 13 December 2011; Prosecutor v. Naletilić and Martinović, Decision on the Prosecutor's Request for Public Version of Trial Chamber's ‘Decision on the Motion to admit Statement of Deceased Witnesses [...]’ of 22 January 2002, Case No. IT-98-34-T, 27 February 2002.


172 Damaška (n 168) 616.

173 See Chapter 5 below.

discussed below, domestic trials can be just as complex than international cases, and this complexity should not serve as a permit for less than fair trial procedures.\textsuperscript{175} As Damaška said in an earlier work:

It would … be a disheartening irony if a justice system, designed to contribute to the protection of human rights, could properly function only by disregarding humanistic values rooted, \textit{inter alia}, in the presumption of innocence.\textsuperscript{176}

This brings us to the second prong of Damaška’s argument — that by moving away from overly burdensome regime of protections for the accused, international criminal tribunals free their energies to allow them to better focus on their multiple goals. But, as discussed in section 2.1 above, certain goals (such as deterrence and rebuilding respect for the rule of law) are difficult to achieve in any event, and difficult to measure, notwithstanding the fact that they are inextricably linked to the need for international tribunal to set the highest standards of fairness, as argued above.\textsuperscript{177}

\textbf{2.3.2. International criminal procedure as a \textit{sui generis} system}

Critics may argue that international criminal law is a \textit{sui generis} system and an example of a system of law bringing together pieces of procedure from a wide range of domestic legal regimes which works in a legal vacuum. As international tribunals are not party to any human rights instruments, it may be argued that a certain amount of leeway is granted to judges as to how to interpret the human rights standards repeated in their statutes, and they are not bound to follow the human rights jurisprudence based on those standards. Therefore, it could be argued that international criminal tribunals are free to pave their own way in terms of the procedures they adopt, modify and put into practice on a daily basis.

However, in the light of the discussion above, which highlighted international criminal law’s acknowledged goal of strengthening the rule of law, their actual and potential influence on domestic criminal proceedings through the practices of Rule 11\textit{bis} referrals and complementarity, and the dangers inherent in their adoption of anything less than the highest standards of fairness, it is

\textsuperscript{175} See below, Chapter 5, text to n 27.
\textsuperscript{177} See, e.g., sections 2.1, 2.2.4, 2.2.5, and 2.2.6.
submitted that making reference to the *sui generis* nature of international criminal procedure does little to excuse its shortcomings.

2.3.3. Seriousness of the crimes charged

A third strand of the debate against the highest standards of fairness for the accused before international tribunals focuses on the gravity of the crimes with which they are accused. It could be argued that the role of international criminal tribunals is to end impunity for the most serious crimes known to man, and that therefore they can afford to be less concerned with standard-setting than human rights courts, for example. For example, Boas argued that the ‘nature of war crimes and their prosecution makes measures otherwise frowned upon in domestic criminal justice systems less egregious: retrospective extension of criminal provisions, extended jurisdiction, more relaxed evidentiary provisions may be considered appropriate and necessary’.  

In response to this line of argument, it must be recalled that the primary goal of *all* criminal trials is to punish the guilty, regardless of the context of the trial and the crimes charged. To treat individual defendants with less than scrupulous fairness on the basis of the seriousness of the crimes they are charged with would be averse to the presumption of innocence and would effectively be a form of punishment before judgment is passed.  

Centuries of experience in criminal law on the domestic plane tells us that confidence in the outcome can only be derived from proper respect for procedures. Therefore, the value placed on the role of the fair trial in criminal law broadly cannot be sacrificed by the fact that international criminal trials are conducted in the context of an international environment that places weight on retribution for the most serious crimes.  

It might be argued that fair trial rights erect barriers to the effective prosecution of serious criminals, and that insisting on the highest standards of fairness runs contrary to the legitimate right of victims to ‘see justice done’. The interplay between the rights of the accused and other actors with an interest in the

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180 See also, George P. Fletcher and Jens David Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’ (2005) 3 JICJ 539, 540.
181 Damaška (n 168) 614.
outcome of the trial is discussed in greater detail in Chapter 4 below, but suffice to say for the moment that this work advocates that an accused before an international criminal tribunal ought to receive a *fair* trial, not an easy one. It is well established that the procedures for fair trials serve as safeguards for abuse of power and wrongful convictions, regardless of the public interest in securing a conviction,\(^{182}\) and also that the embodiment of such rights reflect the value that society places on liberty and the presumption of innocence.\(^{183}\) By the same token, trials of alleged war criminals and *génocidaires* conducted with the fullest of respect for the fundamental human rights values which the international community holds dear reflects an international society which values the rights of each individual over the vengeful and retributivist reactions of the whole. The comments of Justice Murphy in *Yamashita* are as relevant today as they were in 1946:

> If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance... We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial... Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.\(^{184}\)

2.4. Conclusion

This chapter aimed to contribute to the vast array of literature on fair trial rights in international criminal law by placing the international criminal tribunals’ need to respect the right to a fair trial to the highest degree in the context of international criminal law’s standard-setting role. The author attempted to prove that international criminal tribunals do bear an obligation to set the highest standards of fairness through a number of distinct but related arguments. First, it was shown that the tribunals’ standard-setting function is tied — implicitly or explicitly — to the goals of their establishment.

Section 2.2 developed some of the arguments in favour of the standard-

\(^{183}\) *Ashworth* (n 8) 38-51.  
\(^{184}\) Justice Murphy *in re Yamashita* (1946) 327 US 1, 28-30.
setting function based on current practice and undeveloped potential. International
criminal law’s existing influence on both substantive and procedural law
domestically was analysed, and it was argued that both Rules 11bis on referrals
from the ad hoc tribunals and the principle of complementarity before the
International Criminal Court have already borne an influence on procedural
standards in the legal systems of affected states. A number of instances where
organs of the courts themselves expressly referred to the fact that they do enshrine
the highest standards of fairness were then analysed.

Along with the positive influence that international criminal tribunals can
and do bear on fair trial standards domestically, the converse is also true. The
impact that setting anything lower than the highest standards of fairness can have
was examined in sections 2.2.4 and 2.2.5. These included the fact that low
standards could pave the way for states to derogate from their fair trial
obligations, and that less than full respect for the rights of the accused can run the
risk of wrongful conviction. Lastly, the need for tribunals to set the highest
standards of fairness was linked to their continuing legitimacy in the eyes of those
affected by their proceedings.

Section 2.3 addressed a number of arguments that may be raised against
the tribunals’ standard-setting function. Although the international criminal
tribunals operate in a complex environment that reflects a sui generis procedural
regime, and in spite of the fact that they put individuals on trial for the most
serious crimes, it was argued that they still need to respect the highest standards of
fairness. It is now apposite to turn to a number of areas where steps have been
made towards achieving the highest standards of fairness.
While this thesis mainly focuses on a number of areas where international criminal procedure has fallen short of enunciating the highest standards of fairness, it should be made explicit that, in the author’s view, international criminal procedure is a broadly fair exercise. The recommendations made in chapters 4-6 below suggest how it could be improved in order to reach the highest standards of fairness, but for the sake of balance, this chapter discusses a number of positive precedents in international criminal procedure which should not be overlooked.

The first topic for discussion shall be the general benefit of holding criminal trials at an international level, while the following sections will discuss distinct areas of international criminal procedure where the tribunals have striven to act in accordance with the highest standards of fairness. These include the jurisprudence on provisional release, discussed in Section 3.2, which has developed to recognise that there is a right to provisional release pending trial, even though the full realisation of this right may currently be hampered by issues of state cooperation, which are outside the judges’ hands. Sections 3.3 and 3.4 then discuss different tribunals’ approaches to self-representation and dealing with disruptive accused, which have been admirable in some respects but are lacking in uniformity and coherence. Section 3.5 analyses the balance that has been achieved between the protection of witnesses and ensuring that the rights of the accused have been respected, while section 3.6 examines the jurisprudence on judicial impartiality.

However, the recognition of these advances is not without a number of caveats. It will be argued that a number of areas of best practice ought to be praised, but it should be noted that best practice is not yet universal across the four tribunals studied. Indeed, the highest standards of fairness have, on occasion, only been applied by certain chambers of a tribunal, whilst other chambers of the same tribunal have tended to fall short of best practice.

3.1. Practical Application of Fair Trial Rights at an International Level

It is a truism that the fact that trials are being held on the international level in the
first place is commendable. Furthermore, as discussed in the preceding chapter, the complementarity clause before the International Criminal Court encourages states to undertake prosecutions of serious criminals in the first instance, provided that these trials are conducted in a fair manner and without the intention of shielding the accused from punishment.¹ Before the inception of modern international criminal tribunals, former dictators usually met one of two fates — they were either murdered by dissenters, as was the fate of former Bulgarian head of state, Nicolae Ceausescu, or were exiled elsewhere in impunity, as happened with former President of The Philippines, Ferdinand Marcos, who died in exile in Hawaii, and Kaiser Wilhelm II, who died in exile in The Netherlands.

Some authors have referred to international criminal tribunals’ function in spreading the international rule of law through the trial of serious offenders on an international plane.² They argue that the establishment of these tribunals represent a further step away from state-centric approaches to human rights law and signify the international community’s commitment to ending impunity for the most egregious human rights violations.³ Furthermore, such tribunals demand that perpetrators be tried in accordance with some human rights guarantees, moving trials away from the ‘summary justice’ or ‘show trials’ approaches.⁴

That is not to say that the birth of international criminal tribunals automatically sounded the death knell for the murderous angry mob tackling their former oppressor. Muammar Gaddafi’s brutal end in Libya, which happened concurrently to a live ICC warrant for his arrest, is ample evidence of that fact.⁵ But, as Chappell and Grey eloquently noted after that event, ‘[s]uch summary judgment not only denies the accused a right to account for his or her actions but denies victims their chance to be heard.’⁶ Vigilante justice is no longer looked

¹ See above, section 2.2.2.
upon as inevitable collateral damage when tyrants meet their demise, but as an opportunity lost for justice and truth.

Aside from the very fact that trials for international crimes are being held both on the international plane and being actively encouraged on the domestic level through the practices of complementarity before the International Criminal Court and referrals by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the application of fair trial rights at an international level is to be welcomed. The fact that international criminal procedure provides an enunciation of how criminal procedure ought to work in the light of international fair trial standards and develops guidance as to how best to try those accused of the most serious crimes must be seen as a positive development.

Before the International Criminal Tribunal for the Former Yugoslavia was established, the areas of international human rights and criminal procedure converged only in the circumstances where an applicant brought a claim to an international human rights body claiming, *ex post facto*, that their fair trial rights had been breached by a domestic criminal justice system, and even then states were afforded a margin of appreciation over their domestic practices. The Yugoslav Tribunal and its successors changed that in that they illustrate a day-to-day procedural practice that is frequently declared to represent the highest standards of fairness. It could be argued that the first international criminal tribunals at Tokyo and Nuremberg showed this as early as fifty years previous, but, as acknowledged in the *Tadić* protective measures decision, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East provided limited guidance to the International Criminal Tribunal for the Former Yugoslavia as to how best to conduct its procedure. Nor did the Secretary-General’s general remarks on the parallels between the International Covenant on Civil and Political Rights and the Tribunal’s Statute provide any practical guidance in this respect.

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7 See above, sections 2.2.1 and 2.2.2.
8 See above, chapter 1 (n 91).
While this thesis argues that international criminal procedure falls short of the highest standards of fairness in a number of distinct respects, it must be acknowledged that the rights of the accused play a central role in proceedings, and that judgments often stress the importance of ensuring the fairness of trials. These statements ought to illustrate to other courts, domestically and internationally, that the rights of the accused must be the primary concern in the conduct of any criminal proceedings. This commitment shows that human rights are not just aspirations (in the sense of Bentham’s criticism of the abstraction of the French Declaration), but rather fundamental principles that drive the day-to-day mechanics of criminal procedure. By constructing a model for the conduct of complex criminal proceedings, based on a statute that lays down all of the most fundamental fair trial rights, international criminal tribunals have highlighted the inalienable nature of the right to a fair trial and its central importance to criminal proceedings. Furthermore, there are several instances where the tribunals have embraced the highest standards of fairness, as shall be discussed presently, and those instances are to be celebrated.

3.2. PROVISIONAL RELEASE

In their initial Rules of Procedure and Evidence, the ad hoc international criminal tribunals and the Special Court for Sierra Leone were permitted to grant

11 See above, section 2.2.2.
12 See e.g. Prosecutor v. Ntaganda et al., Trial Judgment and Sentence, Case No. ICTR-99-46-T, 24 February 2004, Separate Opinion of Judge Pavel Dolenc; Prosecutor v. Nyiramasuhuko et al., Decision in the Matter of Proceedings under Rule 15bis (D), Case No. ICTR–98–42–A15bis, 24 September 2003, Dissenting Opinion of Judge David Hunt, para 27; Prosecutor v. Hadžihasanović et al., Decision on the Prosecution’s Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, Case No. IT-01-47-PT, 26 March 2002, para 21 (referring to ‘the mandate of the International Tribunal to ensure that justice is seen to be done’); Prosecutor v. Bagosora, Decision on the Defence Motion for Pre-Determination of Evidence, Case No. ICTR-96-7-T, 8 July 1998, 4 (‘The Trial Chamber is fully conscious that the rights of the accused at all stages of the trial should be observed.’)
13 ‘Observe how nice, and incapable of being described beforehand by any particular marks, are the lines which mark the limits of right and wrong in this behalf—which separate the useful from the pernicious, the prudent course from the imprudent—how dependent upon the temper of the times, upon the events and circumstances of the day.’ Jeremy Bentham, ‘Anarchical Fallacies: Being an Examination of the Declarations of Rights issued during the French Revolution’ in John Bowring (ed.) The Complete Works of Jeremy Bentham: Vol. 2 (Edinburgh: William Tait, 1838-1843) 489, 515, available online via The Online Library of Liberty: http://oll.libertyfund.org (last accessed 26 January 2013).
15 See above, section 1.4.3.
provisional release to those awaiting trial ‘only in exceptional circumstances’.\textsuperscript{16} The Rule before the International Criminal Tribunal for the Former Yugoslavia was changed to remove the exceptional circumstances requirement in 1999 and the International Criminal Tribunal for Rwanda and Special Court for Sierra Leone’s Rules followed suit in 2003. It has been surmised that this initial strictness may have stemmed from a fear of backlash from the public owing to the perception that international tribunals permitted war criminals to be at large,\textsuperscript{17} and the fact that the tribunals lacked the ability to exercise their own arrest warrants, and relied on state cooperation for such matters.\textsuperscript{18} Indeed, Judge Hunt linked the increase in the number of defendants granted provisional release in the later years of the Tribunal’s life to the increase in the number of voluntary surrenders to the Tribunal since 2001.\textsuperscript{19} Following these rule amendments, the accused must prove just two factors: that they will appear for trial if released and that they will not pose a danger to victims or witnesses while on release.\textsuperscript{20} The Chamber will also hear representations from the state to which the accused is to be released and the host country.\textsuperscript{21}

It is important to note that the wording in the relevant rules of procedure before the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, under which release ‘may be ordered’ having heard from the accused and the relevant states, means that the Chamber retains discretion over the question of whether or not to provisionally release the accused.\textsuperscript{22} By contrast, the

\textsuperscript{18} Prosecutor v. Brđanin and Talić, Decision on Motion by Momir Talić for Provisional Release, Case No. IT-99-36-PT, 28 March 2001, para 18.
\textsuperscript{20} Rules 65(B) ICTY, ICTR and SCSL RPE.
\textsuperscript{21} Ibid.
\textsuperscript{22} Cf. Prosecutor v. Hadžihasanović, Decision granting Provisional Release to Enever Hadžihasanović, Case No. IT-01-47-PT, 19 December 2001, para 13 (‘[T]he question of whether the word “may” must be read as “shall” when all the prerequisites of Rule 65 are met or not can remain open.’)
International Criminal Court’s legal regime imposes a positive obligation on the Pre-Trial Chamber to release the accused, unless continued detention is necessary to ensure the accused’s appearance at trial; to ensure that the accused does not obstruct the investigation or later trial; or to prevent the continuing commission of the crime with which the accused is charged. Furthermore, if pre-trial detention continues as a result of the ‘inexcusable delay’ of the Prosecutor, the Pre-Trial Chamber must consider releasing the accused, conditionally or unconditionally.

The decision of the judges at the ad hoc tribunals and the Special Court for Sierra Leone to amend the Rules to remove the ‘exceptional circumstances’ requirement shows a cognisance of the established principle of criminal law that pre-trial detention ought to be the exception, rather than the rule, and is to be welcomed for that reason. Some may argue that the right to provisional release, while now recognised in the legal frameworks of the tribunals, remains illusory in all courts aside from the International Criminal Tribunal for the Former Yugoslavia, where release is aided significantly by the fact that various Balkan states are willing to host defendants for the duration of the bail period, and to guarantee their return to the seat of the Tribunal. In the other Tribunals, release has been hampered by a lack of state cooperation with the Tribunals, as exemplified most recently by the Bemba release decision, where six states were called to cooperate with the International Criminal Court in giving effect to the decision, but refused to do so. The decision to release the accused was overturned on appeal, before the issue of state cooperation could be fully

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23 Article 60(2) ICC Statute. See also, Situation in the CAR: Prosecutor v. Bemba, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, Case No. ICC-01/05-01/08, 14 August 2009, para 77 (stating that the decision on release is ‘not of a discretionary nature’ when all of the conditions are met).
24 Article 60(4) ICC Statute.
26 Recent examples include: Prosecutor v. Stanišić, Order Issuing a Public Redacted Version of the Confidential Decision on the Stanišić Defence Request for Provisional Release of 16 July 2012, Case No. IT-03-69-T, 7 November 2012 and Prosecutor v. Simatović, Decision on Simatović Request for Provisional Release, Case No. IT-03-69-T, 16 July 2012. In both cases, the defendants were released to Serbia.
27 Situation in the CAR: Prosecutor v. Bemba, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (n 23).
resolved. The cynic might argue that this incident reflects the tribunals’ reliance on external factors in effectuating the rights of the accused and therefore dilutes the principles of determinacy and consistency. On the other hand, it is argued that the steps taken by judges towards full realisation of the right to release pending trial, despite the limitations inherent in international criminal law’s unique context, recognise the need to set the highest standards of fairness and, as such, deserve to be lauded.

3.3. (SOME) NUANCED APPROACHES TO SELF-REPRESENTATION

The question of whether an accused individual before international tribunals should be afforded the right to represent themselves has been one of the thorniest issues before the Special Court for Sierra Leone, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. While it had not, at the time of writing, afforded much scope for debate before the International Criminal Court, it will doubtless become an issue at some point in its future proceedings. The conundrum raised by self-representation is that it is a right recognised by almost all of the leading international and regional human rights tribunals, as well as the statutes of the tribunals, but there is the danger that accused persons will use the right as a vehicle for political diatribes or propaganda.

28 Situation in the CAR: Prosecutor v. Bemba, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’, Case No. ICC-01/05-01/08, 2 December 2009.
29 Article 14(3)(d) ICCPR; Article 6(3)(c) ECHR; Article 8(2)(d) ACHR. Article 7(1)(c) of the Banjul Charter does not explicitly reference the right of the accused to defend himself or herself in person.
30 Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) SCSL Statute; Article 67(1)(d) ICC Statute.
Tribunal practice is far from consistent on how best to resolve the issues that self-representation raises, but some approaches have been both principled and pragmatic, and ought to be welcomed. In Milošević, for example, the Tribunal recognised that it was appropriate to follow the Human Rights Committee’s guidance on the matter, and declined to impose counsel on an unwilling accused.\(^\text{32}\) It did note, however, the provisions in its Rules under which obstreperous defendants could be removed from the courtroom, and stated that if the accused did decide to obstruct proceedings while representing himself, he could be said to have relinquished his right to self-represent, and counsel would have to be imposed for such a time as he was absent from proceedings.\(^\text{33}\) This approach had the advantage of both respecting the rights of the accused and ensuring that self-representation could not be used to hijack the trial. By contrast, some Chambers have taken a rather paternalistic approach to the issue of self-representation by imposing counsel apparently in the interests of ensuring the best legal representation for the accused.\(^\text{34}\) It is argued that counsel should only be imposed with the agreement of the accused, or where he or she has failed to cooperate with the tribunal by refusing to appear for trial, or has deliberately meddled in the efficient running of proceedings. Where an accused has decided to self-represent, they can be said to have willingly accepted that they may not be as adequately represented as if their case were presented by qualified legal counsel. A similar argument as regards the right to trial without undue delay is addressed in section 5.3 below.

A similarly balanced approach to the above-mentioned decision in Milošević was taken in Krajarišnik, where the accused opted to self-represent on appeal. The accused had requested in the middle of the trial that he proceed to represent himself, having previously been represented by allegedly incompetent

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\(^{32}\) Prosecutor v. Milošević, Reasons for Decision on the Prosecution Motion concerning Assignment of Counsel, Case No. IT-02-54-T, 4 April 2003, paras 36-37.

\(^{33}\) Ibid, paras 40-41.

\(^{34}\) See e.g. Prosecutor v. Norman, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court, Case No. SCSL–2004–14–T, 8 June 2004.
defence counsel. This request was denied.\textsuperscript{35} It was recognised that the accused was inadequately represented at trial and the accused was permitted to represent himself for the appeal stage of proceedings. However, conscious that he may not have been able to argue the intricacies of joint criminal enterprise mode of responsibility, Krajišnik requested the appearance of an American lawyer, Alan Dershowitz, on his behalf for this limited purpose. On 28 February 2008, the Chamber granted this request, holding that, ‘[t]here is no fundamental reason why a defendant may not make different choices – self-representing or engaging legal counsel – with regard to different issues.’\textsuperscript{36} This approach appears to have been a sensible resolution to seeing that self-representing accused individuals who are forbidden from giving instruction to standby counsel or \textit{amici curiae}\textsuperscript{37} are adequately represented. It is submitted that this outcome is far more preferable than those decisions which have placed self-representation and assistance by counsel in binary opposition, holding that an accused must opt for one form of representation or the other.\textsuperscript{38}

Counsel has been imposed on self-representing defendants on occasions when their behaviour has been seen to be disruptive to proceedings.\textsuperscript{39} Judge Schomburg advised that this should only be used sparingly and only in the circumstance of continued violations, noting that ‘[d]omestic law rarely regards obstructive behaviour as a reason to impose counsel, although this is certainly

\textsuperscript{35} \textit{Prosecutor v. Krajišnik}, Reasons for Oral Decision denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, Case No. IT-00-39-T, 18 August 2005.


possible. Rather, such conduct is usually addressed by sanctioning an accused without touching upon issues of representation.\textsuperscript{40} The jurisprudence of the European Court of Human Rights recognises that it may sometimes be necessary to impose counsel in order to preserve the decorum of proceedings, and that the right to represent oneself is not unlimited.\textsuperscript{41} In the case of Šešelj, however, the Appeals Chamber could be said to have gone too far on the rights of the accused by twice overruling Trial Chamber decisions on the imposition of counsel on a disruptive defendant.\textsuperscript{42}

It could be argued that this approach, by going beyond the limitations on the right set down in the jurisprudence of the European Court of Human Rights, actually embraces the highest standards of fairness. But the highest standards of fairness do not translate as ensuring that the accused is granted their every request. The abuse of one’s right to self-represent to defame fellow participants in the trial,\textsuperscript{43} prevent the tribunal from carrying out its day-to-day activities,\textsuperscript{44} or to abuse and intimidate witnesses,\textsuperscript{45} as Šešelj has, clearly implies that the accused has forfeited his rights, in the same way that a defendant who deliberately causes delay to the trial reneges on his right to trial without undue delay for those periods of delay caused by him.\textsuperscript{46} This argument was recognised by the Trial Chamber in Milošević that reasoned that since the right to be present at trial could be waived in situations of continued disruption, so too could the right to represent oneself.\textsuperscript{47}

The overly-protective approach to the right to represent oneself espoused by the


\textsuperscript{42} Prosecutors v. Šešelj, Decision on Assignment of Counsel, Case No. IT-03-67-T, 21 August 2006; Prosecutors v. Šešelj, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, Case No. IT-03-67-A, 20 October 2006; Prosecutors v. Šešelj, Reasons for Decision (No. 2) on Assignment of Counsel, Case No. IT-03-67-T, 27 November 2006; Prosecutors v. Šešelj, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, Case No. IT-03-67-A, 8 December 2006. For an excellent analysis, see Alexander Zahar, ‘Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal’ (2008) 19 CLF 241.

\textsuperscript{43} See the various defamatory and abusive submissions of the accused cited in Prosecutors v. Šešelj, Decision on Assignment of Counsel (n 42) paras 34-65.

\textsuperscript{44} Prosecutors v. Norman, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(d) of the Statute of the Special Court, (n 34) para 26.

\textsuperscript{45} Prosecutors v. Šešelj, Decision on Assignment of Counsel (n 42) paras 63-65.

\textsuperscript{46} See below, section 5.3.

\textsuperscript{47} Prosecutors v. Milošević, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, Case No. IT-02-54-AR73.7, 1 November 2004, para 13.
Appeals Chamber in Šešelj is inconsistent with the practice of most states. 48

3.4. DEALING WITH DISRUPTIVE ACCUSED

Accused persons can be excluded from proceedings and proceedings can continue in their absence in cases where they have persisted in disruptive behaviour and have been given a warning that continued disruption will result in removal from the courtroom. 49 In Gbao, the Chamber held that:

[I]t is a clear indication that it is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification. 50

Removal from the courtroom for disciplinary reasons is permissible under human rights law, according to Trechsel, provided that the exclusion for the courtroom only persists for as long as is strictly necessary to maintain courtroom decorum. 51 If the accused promises to cease the disruption, he or she should not continue to be excluded as a form of punishment. 52 In the interest of protecting the accused’s right to be present in proceedings, some tribunals have made provision for the removed defendant to follow proceedings via video-link in this situation, 53 which seems to be a sensible compromise.

Although the right to be present at trial is not specifically laid down in human rights or the majority of international criminal law conventions (with the exception of Article 67(1)(d) of the Statute of the International Criminal Court), the tribunals have protected the right of the accused to be physically present at his or her trial. 54 The right to be physically present at trial was established by the International Criminal Tribunal for Rwanda in light of the following factors: (1)

48 Ibid, para 12, referring to state practice from around the world.
49 Rules 80(B) ICTY, ICTR and SCSL RPE; Article 63(2) ICC Statute and Rule 170, ICC RPE.
52 Ibid.
53 Rule 80(B) SCSL RPE.
the Tribunals’ Statutes and Rules contain no express provision for an accused to participate in his trial by video-link; (2) that other international, regional and national systems view the right to be present at trial to require physical presence; and (3) that the French version of the Statute unambiguously conveys that Article 20(4) (d) refers to physical presence at the trial.\(^{55}\)

In a number of cases where the Trial Chamber decided to proceed in the absence of the accused, who was unable to attend though no fault of their own, Appeals Chambers have invariably concluded that such findings were a discernible error. In *Zigiranyirazo*, for example, a witness was unable to travel to the seat of the Tribunal due to fears for his safety.\(^{56}\) Arrangements were made for the parties to travel to the Netherlands for his testimony, but the Dutch government refused the accused a visa to travel. The Trial Chamber considered that it would have difficulty following the proceedings via video link, so deemed it necessary that the judicial bench should still travel to the Netherlands along with prosecution and defence counsel, while the defendant could watch the testimony via video link from Arusha.\(^{57}\) The Appeals Chamber found that this decision was not a proper exercise of the Trial Chamber’s discretion, for two main reasons.\(^{58}\) First, the Chamber had not taken all steps within its power to organise an alternative course of action, such as inquiring as to whether a different location, to which both accused and witness could travel, or securing enhanced witness protection measures in Arusha, would allay the witness’s fears.\(^{59}\) Second, the Trial Chamber had declined to hear the witness via video-link because concerns were raised about the Bench’s ability to follow testimony delivered in this manner. The Appeals Chamber pointed out that surely the same issues would attach with regard to the defendant’s ability to follow proceedings.\(^{60}\)

*Karemera et al.* and *Stanišić and Simatović* featured accused persons who


\(^{56}\) *Zigiranyirazo* Interlocutory Appeal Decision (n 55) para 4.

\(^{57}\) Ibid, paras 2-4.

\(^{58}\) Ibid, para 17. The Chamber actually presented these as three reasons: the failure to enquire into additional protective measures and the failure to examine additional security measures were put forward as two separate reasons.

\(^{59}\) Ibid, paras 18, 20.

\(^{60}\) Ibid, para 19.
were too ill to attend trial. When the accused’s poor health meant that he would not be in a position to attend proceedings for up to six weeks, the Stanišić Trial Chamber held that the right to be present at trial could be derogated from in cases of ‘substantial trial disruptions on the part of an accused.’\(^\text{61}\) It based this reasoning on the right of the accused to be tried without undue delay, and that of his co-accused.\(^\text{62}\) The Appeals Chamber overturned this ruling on the basis that the delay would not be ‘so substantial as to warrant derogation from the fundamental right of the accused to be present at trial.’\(^\text{63}\) Similarly, when the accused Nzirorera in the Karemera et al. trial was ill for three days, the Trial Chamber opted to proceed with the cross-examination of witnesses in his absence.\(^\text{64}\) The Appeals Chamber found this to be an ‘unwarranted and excessive’ restriction on his right to be present at trial.\(^\text{65}\) The protective approach towards the right of the accused to be present at trial as evidenced by these decisions is to be welcomed, and it is hoped that the Appeals Chambers’ interpretations will be followed in later jurisprudence.

3.5. Protection of Witnesses

The need to ensure that witnesses do not come to any harm as a result of their cooperation with the international criminal tribunal, and to balance any protection measures imposed to achieve this end with the rights of the accused, is unquestionably challenging. The tribunals lack the power to protect witnesses in the same way as domestic legal systems can, where the police can impose witness protection programmes. However, units have been established as part of the registries of the international criminal tribunals to protect witnesses and victims and to provide them with information and assistance through counselling and other services, and can provide witness protection through relocation in exceptional circumstances.\(^\text{66}\)

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\(^\text{62}\) Ibid, para 17. The ‘reverse application’ of the right to trial without undue delay in this manner shall be discussed further below at section 5.3.
\(^\text{63}\) Ibid, para 18.
\(^\text{64}\) Prosecutor v. Karemera et al., Decision on Joseph Nzirorera’s Motion for Stay of Proceedings while Unfit to Attend Trial or Certification to Appeal, Case No. ICTR-98-44-T, 11 July 2007.
\(^\text{65}\) Prosecutor v. Karemera et al., Decision on Nzirorera’s Interlocutory Appeal Concerning his Right to Be Present at Trial, Case No. ICTR-98-44-AR73.10, 5 October 2007, para 15.
\(^\text{66}\) See Rule 34 ICTY RPE; Rule 34 ICTR RPE; Rule 34 SCSL RPE; Article 43(6) ICC Statute.
Witness protection measures that seek to shield the witness’s identity from the public or other parties to proceedings have a potential impact on the rights to adequate time and facilities for the preparation of one’s defence, and to consult one’s accusers. In Bagosora, the Chamber considered equality of arms and the need to ensure a balance between the positions of the prosecution and defence as a factor in deciding whether to grant protective measures to defence witnesses.\(^67\) It is for this reason that the international criminal tribunals have been extremely unwilling to permit witness anonymity. The Tadić Protective Measures Decision can be seen as an outlier in this respect, as it has not been followed in later decisions.\(^68\) On the other hand, if witnesses cannot be assured of their safety, they will be unwilling to testify and those same rights may be impacted if defence witnesses refuse to come forward.\(^69\) As is the case in domestic proceedings, victims of sexual violence are especially vulnerable and their privacy and dignity needs to be respected in the course of proceedings.\(^70\) Therefore, the tribunals’ Statutes recognise that the rights of the accused may have to be balanced against the rights of witnesses. For example, Article 17 of the Special Court for Sierra Leone’s Statute states that the accused ‘shall be entitled to a fair and public hearing, subject to [witness protection] measures ordered’. Article 19 of the International Criminal Tribunal for Rwanda’s Statute and Article 20 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, while noting that trials are to be conducted with ‘full respect’ for the rights of the accused, state that ‘due regard’ must be given to the protection of victims and witnesses. The balance between the rights of witnesses and the rights of the accused is discussed in greater detail in Section 4.3 below.

It is difficult to derive a general assessment of whether the tribunals’ practice on witness protection has been satisfactory, because there is a remarkable lack of uniformity between the different courts on this matter. The International

\(^{67}\) Prosecutor v. Bagosora et al., Decision on Kabiligi Motion for Protection of Witnesses, Case No. ICTR-98-41-T, 1 September 2003, para 2.


\(^{70}\) Anna-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence (Antwerp: Intersentia, 2005) 231-278.
Criminal Tribunal for the Former Yugoslavia has arguably set down the most stringent pre-requisites for granting witness protection, and has required that witnesses show they have reasonable and genuine fears before protective measures will be granted.\textsuperscript{71} The International Criminal Tribunal for Rwanda has been more lenient in finding generalised factors like the security situation in Rwanda to be sufficient in this regard.\textsuperscript{72} The Special Court for Sierra Leone granted witness protection to all witnesses resident in Sierra Leone who had not expressly waived their right to protective measures.\textsuperscript{73} Nonetheless, and despite the relatively widespread nature of witness protection measures which has continued into the practice of the International Criminal Court,\textsuperscript{74} the extent of such protective measures should not be overstated. The most common protective measure is the ordering of ‘delayed disclosure’ to either party (but most commonly the defence).\textsuperscript{75} In order to allow ‘adequate time’,\textsuperscript{76} for the preparation of the defence case, the identity of the witness is disclosed at least 21 days before their appearance,\textsuperscript{77} and often longer.\textsuperscript{78} The most important point to note is that witness anonymity was granted in only one early case,\textsuperscript{79} and has not been

\textsuperscript{71} E.g. \textit{Prosecutor v. Popović et al.}, Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084, Case No. IT-05-88-A, 10 May 2012, 3.


\textsuperscript{73} \textit{Prosecutor v. Norman et al.}, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, Case No. SCSL-04-15-PT-180, 8 June 2004, para 41.

\textsuperscript{74} All witnesses bar three in the \textit{Lubanga} case before the ICC were granted protective measures according to William A. Schabas, \textit{The International Criminal Court: A Commentary on the Rome Statute} (Oxford: OUP, 2010) 825.

\textsuperscript{75} Acquaviva and Heikkilä (n 69) 836. See e.g. \textit{Prosecutor v. Prlić et al.}, Decision Establishing Guidelines for Requests for Protective Measures for Defence Witnesses, Case No. IT-04-74-T, 22 February 2008, 2-3 (distinguishing between these two types of protective measures).

\textsuperscript{76} Rule 69(C) ICTY, ICTR, and SCSL RPE.


\textsuperscript{78} For example, disclosure was delayed until 45 days before the witness was scheduled to testify in \textit{Situation in the DRC: Prosecutor v. Katanga and Chui}, Public redacted version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009, Case No. ICC-01/04-01/07-1156-Conf-Exp, 28 May 2009.

followed in later jurisprudence. The need to protect the accused from anonymous accusers has been extended to the participation of victims before the International Criminal Court. In *Lubanga*, it was stated that ‘the fundamental principle prohibiting anonymous accusations would be violated if …[the victims] were permitted to add any point of fact or evidence at all to the Prosecution's case-file’ and that therefore, the victims should not be permitted to question witnesses. It is worthy of note that later decisions on witness protection measures have placed the rights of the accused to the fore, and while delayed disclosure does not provide a full solution to an exceptionally difficult conundrum, the practice should be recognised as far preferable to full anonymity.

### 3.6. INDEPENDENCE AND IMPARTIALITY

The international criminal judiciary has been proactive in setting high standards for assessing whether there has been a breach of judicial impartiality, and the interpretation embraced to date ought to serve as a guide for the conduct of criminal proceedings domestically as well as internationally. International criminal proceedings have established that it is imperative to the fairness of proceedings that judges must not only be free from bias, they must also be free from any reasonable apprehension of bias. The Appeals Chamber of the

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80 In *Blaškić*, the Trial Chamber held that witness anonymity could only be granted where ‘fundamental exceptional circumstances’ existed. See *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-T, 3 March 2000, para 50.


83 See also, the ECtHR’s decision in *Kostovski v. The Netherlands* (1990) 12 EHRR 434, 20 November 1989, which, while not expressly ruling out the use of anonymous witnesses, stated that they could not form the basis of a conviction.

International Criminal Court stated that it was ‘the absence of bias, real or apparent…[that] legitimizes a judicial body to administer justice.’

Motions alleging judicial bias have been dealt with in a complete manner, with the remaining members of the bench assessing whether the judge’s involvement in the promotion of a cause, together with one of the parties, would lead to an apprehension of bias; whether the judge has an interest (proprietary or financial) in the outcome of the case, and whether there are any other circumstances that would lead an observer to reasonably apprehend bias. Many international criminal judges tend to have had some scholarly involvement in the issues at hand, or have served on advisory boards, prior to their judicial appointments. This will not be a cause for recusal in and of itself, unless the individual accused or their organisation was explicitly mentioned in the judge’s prior work. This was the case in Sesay, where a judge’s publication that specifically mentioned the armed group of which the accused was a member was held to give rise to a reasonable apprehension of bias. By comparison, a judge’s involvement in children’s rights causes generally was not seen to give rise to actual or perceived bias in a case involving child soldiers. Similarly, in Furundžija, it was held that Judge Mumba’s past involvement with the United Nations Committee on the Status of Women similarly did not risk an appreciation of bias on her part. Indeed, involvement with such organisations or interest groups may serve as proof of the judge’s suitability for the job. The jurisprudence on this issue seems to be in accordance with the Bangalore Draft Code of Judicial Conduct 2001.

One notable exception to the usual complete consideration given to

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86 Furundžija Appeals Judgment (n 84) para 182; Norman Decision on the Recusal of Judge Winter (n 84) para 30.
88 Compare Norman Decision on the Recusal of Judge Winter (n 84).
89 Furundžija Appeals Judgment (n84).
90 Norman Decision on the Recusal of Judge Winter (n 84) 30.
91 Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002, available online at: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. Principle 4.11.3 says that judges may serve on advisory bodies ‘if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.’
motions alleging judicial bias might be the incident in the Karemera et al trial, where the remaining members of the bench dismissed a motion concerning the impartiality of Judge Vaz, even though they were aware that she was living with a member of the prosecution team. The Appeals Chamber held that a reasonable apprehension of bias could be found against the Chamber as a whole, and as a result ordered that the reviewed indictment as approved by the impugned bench was invalid. This incident shows the importance of giving complete consideration to impartiality motions.

There has been some doubt as to whether the ‘reasonable apprehension of bias’ standard is a correct reflection of customary international law. It is submitted that this element of the test represents the highest standards of fairness, and is consistent with both domestic criminal law and human rights law standards. In this regard, the requirement that judges be free from any reasonable apprehension of bias is to be welcomed. It has been followed in the early practice of the International Criminal Court, where two judges were permitted to remove themselves from later proceedings of a case where they had issued the warrant of arrest and confirmed the charges against the accused, on the grounds that it may give rise to a reasonable apprehension of bias. Jurisprudence of the European Court of Human Rights not fully consistent on this question,
it is submitted that judges who are involved in the issuance of an arrest warrant or an indictment should be permitted to recuse themselves on the basis that it may give rise to an appearance of bias, even though the judges themselves may not actually be tainted by bias.\textsuperscript{99}

3.7. Conclusion

This chapter discussed a number of areas where the tribunals’ approach to difficult issues of balance between the rights of the accused and the effective conduct of proceedings has been both principled and pragmatic. These include some Chambers’ interpretations of the right to self-representation, the response towards disruptive defendants, and the steps taken to ensure that the protection of witnesses does not unreasonably interfere with the rights of the accused. Furthermore, the laying down of standards that require judges to not only be free from bias, but also free from any reasonable apprehension of bias, was welcomed.

Testing this discussion against the theoretical model developed in Chapter 1 – that is, the full realisation of international human rights standards on the right to a fair trial, combined with the principles of coherence, adherence and determinacy – a number of caveats must be made. In actively recognising the accused’s right to be present, the international criminal tribunals’ practice comports with human rights standards and therefore is to be welcomed. However, incoherence was observed, not just between tribunals, but even between Chambers within the same tribunals, where the Appeals Chambers consistently overruled Trial Chambers’ restrictive reasoning on the right of the accused to be present at trial. This was the correct interpretation, in the author’s view, but it raises issues of determinacy of outcome and consistency.

The positive practice embraced by some Chambers on the right to self-representation is to be welcomed insofar as it comports with human rights standards. However, incoherence was observed, not just between tribunals, but even between Chambers within the same tribunals, where the Appeals Chambers consistently overruled Trial Chambers’ restrictive reasoning on the right of the accused to be present at trial. This was the correct interpretation, in the author’s view, but it raises issues of determinacy of outcome and consistency.

\textsuperscript{99} See also, Yvonne McDermott, ‘The Judicial Duty to Ensure Fairness of Proceedings’ in Sluiter \textit{et al} (eds.) (n 69). Compare Rule 15(D) SCSL RPE; Rule 15(C) ICTY RPE; Rule 15(C) ICTR RPE; \textit{Prosecutor v. Blagojević et al.}, Decision on Joint Defence Motion for Reconsideration of Trial Chamber’s Decision to Review All Discovery Materials Provided to the Accused by the Prosecution, Case No. IT-02-60-PT, 21 January 2003, 6, and \textit{Prosecutor v. Galić}, Decision on the Defence Motion for Withdrawal of Judge Orie, Case No. IT-98-29-T, 3 February 2003, para 8 (‘The Judges of this Tribunal are professional Judges with solid experience in handling information in the criminal legal context and notably distinguishing between facts established at trial and facts derived from elsewhere’).
standards. Some Chambers, as discussed, have gone perhaps a little too far on the right of the accused to self-represent where an exceptionally disruptive accused is on trial. Once again, this inconsistency can be found even within the same tribunal. In order to espouse the highest standards of fairness, some guidelines on the precise parameters of this right should be laid down.

The development of rules on provisional release highlights the incremental shift towards recognising the highest standards of fairness in some respects, evidenced by the fact that the International Criminal Court lays down the most expansive set of rules on this issue. However, the consistent application of these rules continues to depend on state cooperation. It would be preferable if the tribunals could take a stricter approach to uncooperative states, especially before the International Criminal Court, where there is a statutory duty of state cooperation with the Court.

The incremental development of the highest standards is also evidenced by the fact that the use of anonymous witnesses has fallen to the wayside in practice since the first decision on this matter in Tadić. As a whole, the tribunals have balanced witness protection with the right to a fair trial in a satisfactory manner, although there has been a lack of uniformity on the pre-requisites for granting witness protection measures. In order to ensure greater adherence between the primary rules of obligation on the right to a fair trial and the need to protect witnesses and the secondary rules on trial procedure, it would be preferable if there were more uniformity in this area, although it may develop over time.

Perhaps most importantly, as noted in section 3.1, many judgments have declared the importance of the rights of the accused, and the centrality of the right to a fair trial to every aspect of the tribunals’ functioning. This was praised as illustrating the fundamental importance of the right of the accused to a fair trial. On the other hand, as shall be discussed in the next chapter, some decisions have extended fair trial rights to other parties, such as the prosecution. The effect of this extension of rights to other parties is that it has allowed tribunals to put the rights of the accused in the balance in a manner that is incoherent with these lofty pronouncements on the importance of the rights of the accused.
Chapter 4: The Prosecutor’s Right to a Fair Trial and Other Extensions of Fair Trial Rights to Actors Outside of the Accused

This chapter examines the extension of fair trial rights to actors beyond the accused in the context of international criminal procedure’s standard-setting function. It will be shown that the prosecutor has, on occasion, been held to possess specific procedural entitlements that were designed and set out in human rights instruments and international criminal statutes with only the accused in mind. The extension of procedural guarantees such as the right to legal representation and the right to trial without undue delay to other parties with an interest in the outcome of proceedings, such as victims and the international community, shall also be discussed.

In addition, this chapter considers the need to balance the rights of the accused with the rights of witnesses, in particular where the witness’s life or safety is at risk. This balancing exercise, it shall be seen, is justified because it involves a balancing of two individual’s human rights — the accused’s right to a fair trial on one hand and the witness’s right to life or liberty on the other. By contrast, the balancing exercise which courts have occasionally entered into, in pursuit of equilibrium between the ‘prosecutor’s rights’ and the ‘accused’s rights’ is fundamentally flawed, because the alleged procedural rights of the prosecutor have no basis in customary international law. The prosecution does possess certain interests laid down in the statutes, designed to ensure that its case is put before the court in a coherent and complete manner, but it shall be argued that these interests should not be balanced with the rights of the accused, which ought to stand at the apex of any considerations by the court. As shall be seen in some of the examples discussed in this chapter, the impact of these extensions on the rights of the accused have been far from theoretical.

4.1. Theoretical Considerations: The Place of Other Procedural Actors in Achieving the Highest Standards of Fairness

Before entering into a full analysis of the extension of fair trial rights to the
prosecution and other actors at trial, it is apposite to consider how this chapter fits in with the work’s core hypothesis — that international criminal tribunals are obliged to set the highest standards of fairness. Some might argue that by developing a body of procedural entitlements for victims, witnesses, the prosecution and other interested parties, international criminal tribunals have gone beyond minimalist conceptions of the right to a fair trial as interpreted by domestic and human rights jurisdictions, and have thereby embraced higher standards of fairness than those embodied by human rights and domestic standards.¹ This viewpoint could be particularly championed by victims’ groups, who for many years have bemoaned the victim’s status as ‘bystander’ or ‘uninvited guest’ to criminal trials, both in certain legal systems² and on the international plane.³ Indeed, some of the very notions that drove the establishment of international criminal tribunals in the first place, such as the idea of achieving ‘justice for all’ through these courts, might well be advanced as a very good reason why international criminal tribunals need to place other actors on a relatively equal footing vis-à-vis the rights of the accused.

However, as discussed in Chapter 1 above, there is a distinction to be drawn between fairness as a meta-juridical concept, which can embrace elements of restorative justice, distributive justice and the right to an effective remedy, and the right to a fair trial as a standalone concept, which is defined most extensively in Article 14 of the International Covenant on Civil and Political Rights.⁴ Article 14 has formed the basis of the right to a fair trial in the tribunals’ statutes, and as such, these tribunals should seek to maximise the realisation of the lex lata before expanding rights to other actors as a matter of lege ferenda. Even if international tribunals were to expand these rights on the basis of a conceptual understanding of ‘fairness’ or ‘justice’, it is argued that the interpretation of rights and duties within

³ See e.g. the comments by the Colombian delegation to the ICC Preparatory Conference that ‘the victim…was an uninvited guest, a spectator, which exacerbated the conflict.’ Proposal by Colombia: Comments on the report on the international seminar on victims’ access to the International Criminal Court, PNCICC/1999/WGRPE/DP.37, 10 August 1999.
⁴ International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966.
the confines of the judicial system must necessarily be based on sound legal authority and a full discussion of the principles that drive this expansion. In practice, however, as shall be discussed below, the conceptual underpinnings of the meaning of fairness and justice have not been discussed when extending rights in this manner, and the rights of the prosecution and other actors have often been asserted without a great deal of legal reasoning.

Therefore, perhaps there is a case to be made that the conceptualisations of fairness and justice which extend beyond of the confines of the courtroom should be of limited concern to the judicial system. To expect the international criminal judiciary to achieve, for example, justice for all victims affected by the atrocities of the past may be over-ambitious. In any event, it is unlikely that such ends could be achieved by allowing victims the right to legal representation or permitting them to present evidence.

There is a need to distinguish ‘service rights’ from ‘procedural rights’ in the context of the international criminal trial, and it is submitted that victims would be far better served by the provision of service rights than by the extension of procedural rights at trial. Service rights include information about proceedings, reparations, and counselling, while procedural rights include participation in proceedings, the presentation of evidence and influence over prosecutorial decision-making. The current regime of procedural rights at the International Criminal Court may produce a greater inequality in effect, because it grants broad swathes of procedural rights to a limited number of victims of mass atrocities, whereas their fellow victims are excluded. It can also lead to disappointment where victims’ expectations surpass what the Court can actually offer. There is a clear need to carefully analyse the procedural safeguards in place for the rights of the accused when measures such as victim participation are introduced in the

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9 Ibid, 203.
interests of restorative justice.

When it comes to prosecutorial fair trial rights, the link to the very many goals of international criminal law discussed in Chapter 2 above is tenuous. Perhaps it could be argued that by allowing the prosecution to avail of fair trial rights, the goal of ‘ending impunity’ is pursued because it makes it easier for such rights to be asserted in pursuit of a conviction. The circumstances surrounding the Haradinaj retrial, discussed in detail below, serves as a prime example, where some might suggest that the prosecution’s ‘right’ to a fair trial in this regard effectively gave it a second chance to argue its case. But such incidents add fuel to the fire of these courts’ retractors who wish to argue that the cards are indefatigably stacked against the defendants in these trials. Ultimately, then, the overall impact of such extensions may take away from the goal of pursuing justice in a transparent and unbiased manner, rather than aiding the realisation of that goal.

In light of the present work’s research question of whether international tribunals ought to set the highest standards of fairness within the limited and definite paradigm of the right to a fair trial as defined by international human rights statutes, the inescapable conclusion that such rights should only apply to the accused is reached. Articles 63 and 67 in the draft statute of the International Criminal Court referred exclusively to the rights of suspects and accused persons. In spite of the fact that Article 6 is one of the most litigated provisions before the European Court of Human Rights, the Court has never dealt with cases where a breach of Article 6 has been alleged because the prosecution has been deprived of these rights. The rights of victims tend to fall under the aegis of the right to an effective remedy.

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12 See also, section 2.2.6 above.
In spite of this, all of the international tribunals studied have recognised that fairness is a duty owed principally but not solely to the accused. A number of decisions have stated that other actors, such as the prosecutor, victims, or the international community may be regarded as holders of such rights. The next section of this chapter shall examine the rights extended to the prosecution in the tribunals’ jurisprudence. Section 4.3 shall discuss the extension of the rights of the accused to victims, witnesses and the international community, the need to achieve a balance between the rights of the accused and the fundamental rights of witnesses, and the theory that witness protection issues are the only considerations that should be balanced against the rights of the accused.

4.2. The Prosecutor’s Right to a Fair Trial

In Prlić, the prosecution argued that by reducing the time allocated to it to present its case in the interests of the accused’s right to an expeditious trial, the Trial Chamber had violated ‘the fundamental right of the victims, the Prosecution and the international community to a fair trial’. The Appeals Chamber, in holding that the requirement of a fair trial was ‘not uniquely predicated on the fairness accorded to any one party’, held that the Trial Chamber had failed to adequately take into account the effect that the reduction of time might have had on the prosecution’s right to fairly present its case. This was in spite of the fact that the impugned decision was driven by the fact that just 30% of the sitting time of the Trial Chamber had been used by the prosecution in the six preceding months. In the light of this leisurely pace adopted by the prosecution and in the interests of speeding it up, the Chamber had reduced the time allocated to the prosecution for presenting its case by one third, and had offered suggestions as to the prosecution could use its time more wisely. As a result of the Appeals Chamber’s reversal of

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15 Prosecutor v. Prlić, Decision on Adoption of New Measures to Bring the Trial to an End within Reasonable Time, Case No. IT-04-74-T, 13 November 2006, para 14.
17 Ibid, para 14.
18 Ibid, para 16.
19 Prlić Decision on Adoption of New Measures to Bring the Trial to an End within Reasonable Time (n 15) para 6.
this decision, the presentation of prosecution case proceeded for some eight months longer than planned: The Trial Chamber had ordered the prosecution to complete the presentation of its case by July 2007, but the prosecution case did not in fact close until February 2008. At the time of writing, the judgment had still not been issued in the case, almost nine years since the transfer of the accused individuals to the Tribunal.\(^{21}\) Of course, this was not entirely attributable to the extra time granted to the prosecution. At the time of writing, two years had passed since the closing of the case,\(^{22}\) and a judgment did not appear to be forthcoming, given that the accused Prlić was granted provisional release until May 2013, with the proviso that the Trial Chamber could revoke the release at any time ‘should it, for example, render the final judgment’ before that time, which is not entirely convincing.\(^{23}\) Nonetheless, the point is that it should be for the Trial Chamber to decide on the time limits that need to be set for the presentation of cases, in full accordance with the rights of the accused.\(^{24}\)

The International Criminal Tribunal for the Former Yugoslavia’s Appeals Chamber in Martić had to decide whether it would be in the interests of justice to allow the evidence of a prosecution witness who had died before the defence could conclude its cross-examination of him to remain on the trial record.\(^{25}\) The Trial Chamber had held that the rights of the accused did not outweigh the probative value of the evidence.\(^{26}\) By so doing, the Trial Chamber applied the correct standard of assessment laid out in the Tribunal’s Rules of Procedure and Evidence, which state that a piece of evidence can be admitted if its probative value is not ‘substantially outweighed’ by the need to ensure a fair trial.\(^{27}\) While the outcome was itself correct and recognised the court’s truth-seeking function, the Trial Chamber and Appeals Chamber decisions on the issue are remarkable

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\(^{22}\) Proceedings were brought to a close on 2 March 2011. See [Prosecutor v. Prlić](http://www.icty.org/sid/8439), Transcript, Case No. IT-04-74-T, 2 March 2011, 52976.


\(^{24}\) See Rules 73bis(C) and 73ter(F) ICTY RPE.


\(^{27}\) Rule 89(D) ICTY RPE.
because they based their decision on the Prosecutor’s right to a fair trial. The accused sought to appeal on the grounds that the ‘only type of unfairness envisaged by the Statute… [was] unfairness to the accused’. 28 The Appeals Chamber, in dismissing this claim, noted that the Prosecutor acts on behalf of victims and the international community, and that it would be difficult to find that a trial had been fair where the prosecution had been disadvantaged owing to the Chamber’s granting of rights to the accused ‘beyond a strict compliance with those fundamental protections’. 29

This position is clearly at odds with the central hypothesis of the present work, which argues that the tribunals ought to set the highest standards of fairness. The Appeals Chamber in Martić seemed to suggest that the rights of the accused needed to be realised in their most minimalist form, and that any higher realisation, where it was ‘at the expense of the Prosecution’, 30 would be fallacious. It is submitted that the Appeals Chamber’s interpretation is erroneous, in that it fails to take into account the fact that Prosecutors before international criminal tribunals are in an institutionally privileged positions because they serve as the ‘public face’ of the court into account. 31 This enhances the cooperation between state and non-governmental organisation and prosecution investigators and counsel, while defence teams’ ability to carry out investigations, 32 secure witnesses 33 and benefit from the cooperation of non-governmental organisations 34 is necessarily hampered by a wider unwillingness to assist the defence. 35 Defence counsel lawyers have, on occasion, even been arrested in the country of

28 Martić Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić (n 25) para 10.
29 Ibid, para 13. See also Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1-AR73, 16 February 1999, para 25.
30 Ibid.
31 Charles C. Jalloh and Amy DiBella, ‘Equality of Arms in International Criminal Law: Continuing Challenges’ in Schabas, McDermott and Hayes (eds.) (n 5) 251, 263-264, pointing to the fact that Prosecutors often represents their international court or tribunal before the Security Council.
33 Mark S. Ellis, ‘Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel’ (1996-1997) 7 Duke J Comp & Int’l L 519, 534 (stating that, in Tadić, witnesses in the Prijedor region who were members of the police or armed forces were prohibited from speaking to defence teams).
34 Jalloh and DiBella (n 31) 263.
35 Ibid.
investigation as a result of their activities.\textsuperscript{36} Of course, the prosecution needs to receive an equal opportunity to present its case,\textsuperscript{37} but the position that any trial that is ‘too fair’ on the rights of the accused will result in an unfair trial when the prosecution is in any way disadvantaged seems to be a bridge too far. This perception of the fair trial as a balancing exercise between the rights of the accused and the interests of the prosecution can only result in inequity in practice, considering the prosecution’s already-privileged position. The International Criminal Tribunal for Rwanda’s approach in \textit{Zigiranyirazo} seems to strike a more appropriate balance.\textsuperscript{38} It recalled the Chamber’s role in ensuring full respect for the rights of the accused and held that the question to be asked was whether the prosecution had been ‘unduly hampered in the presentation of its case.’\textsuperscript{39} 

A number of decisions have based the extension of fair trial rights to the prosecution on the fair trial principle of equality of arms.\textsuperscript{40} Judge Vohrah, in an early pronouncement in the \textit{Tadić} case, held that the equality guarantee was a right that attached to the accused alone, as it was designed to ensure that the defence was not disadvantaged \textit{vis-à-vis} the prosecution.\textsuperscript{41} He said:

This proposition that the equality of arms principle was intended to elevate the Defence to the level of the Prosecution, as much as possible, in its ability to prepare and present its case is evident in the case law arising out of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (‘the ECHR’) and the International Covenant on Civil and Political Rights 1966 (‘the ICCPR’) both of which incorporate the principle of equality of arms in the concept of a fair trial.\textsuperscript{42}

\begin{thebibliography}{99}
\item \textsuperscript{37} See also, \textit{Prosecutor v. Mlhitinović et al.}, Decision on Prosecution’s Request for Certification of Rule 73 \textit{bis} Issue for Appeal, Case No. IT-05-87-T, 30 August 2006, para 10.
\item \textsuperscript{39} \textit{Ibid}, para 18.
\item \textsuperscript{40} E.g. \textit{Alekovski}, Decision on Prosecutor’s Appeal on Admissibility of Evidence (n 29) para 25; \textit{Situation in Uganda}, Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0004/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, Case No. ICC-02/04-01/05, 19 December 2007, para 27; \textit{Situation in Uganda: Prosecutor v. Kony et al.}, Decision on the Prosecutor’s Application for Leave to Appeal Dated the 15\textsuperscript{th} day of May 2006, Case No. ICC-02/04-01/05, 10 July 2006, para 24.
\item \textsuperscript{41} \textit{Prosecutor v. Tadić}, Decision on Prosecution Motion for Production of Defence Witness Statement, Separate Opinion of Judge Vohrah, Case No. IT-96-1-T, 27 November 1996.
\item \textsuperscript{42} \textit{Ibid}.
\end{thebibliography}
This interpretation recognises the above-mentioned fact that the prosecution will have more power and resources at its disposal than the defence, in both international and domestic criminal trials.\(^{43}\) However, later interpretations have ruled that ‘procedural equality means what it says, equality between Prosecution and Defence, and to suggest otherwise is tantamount to a procedural inequality in favour of the Defence and against the Prosecution.’\(^{44}\)

It is argued that this is an incorrect interpretation of the equality clause for the following reasons. First, the provision from which the equality of arms guarantee in international criminal law is derived states that ‘all persons shall be equal before the International Tribunal’,\(^{45}\) not that all parties should be equal before the tribunal. Second, if we look at the context of the reference to equality, we observe that this reference is made under the chapeau of ‘rights of the accused’, indicating that this equality was intended as being between accused persons, as opposed to ensuring that the prosecutor should be treated ‘as equally’ as the defendants.\(^{46}\) Lastly, the statutory provisions on rights of the accused were designed to ensure that the rights of accused as laid down in international human rights treaties were fully transposed into the law of the international criminal tribunals. Because those human rights provisions interpret the equality of arms guarantee as a right of the accused only,\(^{47}\) broader interpretations run contrary to the object and purpose of the statutory provision.

The extension of rights to the prosecution in the interests of fairness or the Prosecutor’s alleged right to a fair trial can have a real effect on the rights of the accused, and this is probably best illustrated by the Haradinaj retrial fiasco has been discussed at length elsewhere,\(^{48}\) but the facts are worthy of restatement here. The three accused (Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj) were transferred to the International Criminal Tribunal for the Former Yugoslavia on 9 March 2005. Haradinaj and Balaj were acquitted on all counts in the indictment,

\(^{43}\) See also, Jespers v. Belgium (1981) 5 EHRR 305.

\(^{44}\) Aleksovski Decision on Prosecutor’s Appeal on Admissibility of Evidence (n 29) para 23.

\(^{45}\) Article 18(1), SCSL Statute; Article 20(1), ICTR Statute; Article 21(1), ICTY Statute.


\(^{47}\) See the authority cited in Judge Vohrah’s dissenting opinion above (n 41).

\(^{48}\) Yvonne McDermott, ‘Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law’ in Schabas, McDermott and Hayes (eds.) (n 5) 165; McDermott (n 11).
and Brahimaj was acquitted on all counts but two, in April 2008.\textsuperscript{49} For reasons to be discussed in greater detail in a moment, the Appeals Chamber ordered a retrial with respect to the counts concerning a Kosovo Liberation Army detention centre in Jablanica in July 2010.\textsuperscript{50} The three accused were acquitted of all counts in the retrial judgment, issued on 29 November 2012.\textsuperscript{51} In effect, therefore, the three accused spent an extra four and a half years on trial, as a consequence of the alleged breach of the Prosecution’s right to a fair trial during the original trial.\textsuperscript{52}

The use of the term ‘the Prosecution’s right to a fair trial’ is actually somewhat controversial in this context. It was the term used in the 2010 Appeals Chamber judgment, but a corrigendum was issued a number of days later which changed the reference to ‘the Trial Chamber’s duty to safeguard the fairness of proceedings’.\textsuperscript{53} This corrigendum may well have been issued in the knowledge that the original explicit reference to the prosecution’s right to a fair trial, and the clear consequences for the accused in this instance, would be highly controversial. The nomenclature changed again slightly by the time of the retrial judgment. The newly-constituted Trial Chamber noted that the successful prosecutorial appeal alleged ‘\textit{inter alia}, that the Trial Chamber breached \textit{its right to a fair trial} by not allowing it additional time to secure the evidence of two critical witnesses’.\textsuperscript{54} Therefore, this case can be taken as a clear example of the prosecutor’s right to a fair trial in action.

Throughout the duration of the \textit{Haradinaj et al.} trial, the Chamber had to contend with allegations of intimidation of prosecution witnesses and difficulties in securing the testimony of such witnesses. Protective measures were issued for a number of witnesses in order to encourage them to testify.\textsuperscript{55} Ultimately, the Chamber heard from over 90 witnesses, some of whom only appeared following the Trial Chamber’s issuance of subpoenas for their appearance.\textsuperscript{56} Of the 18

\textsuperscript{49} \textit{Prosecutor v. Haradinaj et al.}, Judgment, Case No. IT-04-84-T, 3 April 2008.
\textsuperscript{50} \textit{Prosecutor v. Haradinaj et al.}, Judgment, Case No. IT-04-84-A, 21 July 2010.
\textsuperscript{51} \textit{Prosecutor v. Haradinaj et al.}, Retrial Judgment, Case No. IT-04-84bis-T, 29 November 2012.
\textsuperscript{52} The Appeals Chamber held that the Trial Chamber had ‘prioritised logistical considerations over the Prosecution's right to a fair trial’: \textit{Haradinaj} Appeal Judgment (n 50) para 46.
\textsuperscript{54} \textit{Haradinaj} Retrial Judgment (n 51) para 3.
\textsuperscript{55} \textit{Ibid}, para 22.
\textsuperscript{56} Subpoenas were issued 18 witnesses for the prosecution — see \textit{Haradinaj} Trial Judgment (n 49) Annex A, ‘Procedural History’, para 20.
witnesses for whom subpoenas were issued, 17 testified during the trial.\footnote{Three of these witnesses required some coaxing — one testified via video link and two only agreed to testify once contempt proceedings had been initiated against them (Haradinaj Trial Judgment (n 49) Annex A, ‘Procedural History’, paras 22-24).} It was arranged for the remaining subpoenaed witness, Naser Lika, to testify via video-link on 13 November 2007.\footnote{Haradinaj Trial Judgment (n 49) Annex A, ‘Procedural History’, para 24.} Two days after he failed to appear to testify on the scheduled date, he was arrested by the Canadian authorities.\footnote{Ibid.} A new date was organised but the authorities were unable to bring the witness to the location in time.\footnote{Ibid.} A third date was then arranged to hear this witness’s testimony, but the witness fell ill and was admitted to hospital before he could testify.\footnote{Ibid.} The prosecution informed the Chamber that it would be more than a week before it could even provide an estimate as to when the witness might be in a position to testify,\footnote{Ibid.} which the Trial Chamber obviously considered too long to wait because it declared the prosecution case closed some four days later. The prosecution took umbrage at this development, and Naser Lika was one of two key witnesses at issue in the prosecutor’s appeal and request for a retrial.

The other witness, Shefqet Kabashi, appeared at the seat of the tribunal but refused to answer any questions put to him.\footnote{Ibid.} Arrangements were made for him to testify via video link from the United States, but he was uncooperative via this medium as well.\footnote{Ibid.} In response, the Chamber ordered the Prosecutor to make the indictment against that witness public, which was probably the only remaining power it had to encourage the witness to testify. Nonetheless, the Prosecutor alleged that the Chamber had not done enough to secure the testimony of Kabashi as well as Lika. The Appeals Chamber agreed and ordered a retrial.\footnote{Haradinaj Appeal Judgment (n 50) para 49.}

At the retrial, the evidence of some 56 witnesses, including the two witnesses discussed in detail above, was tendered for the prosecution.\footnote{Haradinaj Retrial Judgment (n 51) para 4.} When witness Kabashi (who had been sentenced to two months in prison for contempt\footnote{Prosecutor v. Kabashi, Sentencing Judgment, Case No, Case No. IT-04-84-R77.1, 16 September 2011.}) appeared on the stand, he refused to cooperate or to answer questions, and he
further alleged that his testimony given in the Limaj trial had been falsified.\textsuperscript{68} The transcript of this testimony was entered onto the record under Rule 89(D), but the Chamber noted that it would need to be corroborated to form the basis of a conviction.\textsuperscript{69} One might wonder why the prosecution did not move to introduce the Limaj transcript in this manner during the original trial. Regardless, as it happened, the relevant portions of Kabashi’s testimony were not corroborated, even though the prosecution had been granted permission to introduce new witnesses.\textsuperscript{70} Despite the prosecution having been given something of a second chance in the form of the Haradinaj et al. retrial, the evidence still was not sufficient to prove the guilt of the three accused beyond reasonable doubt on the charges, and they were acquitted on all counts.\textsuperscript{71}

It would seem, therefore, that the prosecution had not been unduly hampered in the presentation of its original case at trial, since the testimony of the two ‘crucial’ witnesses proved insufficient at retrial to establish the alleged culpability of the accused. Of course, it is easy to make that assessment with the benefit of hindsight. Nevertheless, it is submitted that the most appropriate standard of assessment for issues pertaining to the prosecution’s interests at trial is whether the prosecution was unduly hampered in the presentation of its case,\textsuperscript{72} and not whether the prosecution’s rights had been ‘outweighed’ by the rights of the accused. Had the proposed standard been adopted by the Appeals Chamber in 2010, it is unlikely that the accused in Haradinaj et al. would have been deprived of their liberty for an additional two years. The crude balancing act that pits the prosecutor’s ‘rights’ against the accused’s right to a fair trial is neglectful of every court’s fundamental role in protecting the rights of defendants deprived of their liberty and facing trial before it. It is appropriate to now examine those other actors at trial to whom procedural rights have been extended.

\textsuperscript{68} Prosecutor v. Haradinaj et al., Transcript, T.332-435, Case No. IT-04-84bis-T, 22-24 August 2011.
\textsuperscript{69} Prosecutor v. Haradinaj et al., Decision on Joint Defence Oral Motion pursuant to Rule 89(D), Case No. IT-04-84bis-T, 28 September 2011.
\textsuperscript{70} Prosecutor v. Haradinaj et al., Appeal Brief on Behalf of Ramush Haradinaj on Scope of Partial Retrial, Case No. IT-04-84bis-AR73.1, 10 February 2011, para 20; Prosecutor v. Haradinaj et al., Decision on Haradinaj’s Appeal on Scope of Partial Retrial, Case No. IT-04-84bis-AR 73.1, 31 May 2011, para 26.
\textsuperscript{71} Haradinaj Retrial Judgment (n 51) paras 682-685.
\textsuperscript{72} Following Zigiranyirango, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link (n 38).
4.3. The Rights of Victims, Witnesses and the International Community

As mentioned at the outset, broader conceptions of fairness have not just extended fair trial rights to the prosecution. Of course, it would be ridiculous to suggest that the accused’s rights should trump the rights of other affected actors at all times. Where there is a balance to be struck between, for example, a witness’s right to life and the accused’s right to a public trial, it is clear where the burden should fall.73 This conclusion is supported by the European Court of Human Rights decision in Doorson.74 At issue in the present section, however, are instances where procedural rights are extended to other actors.

The Special Court for Sierra Leone, for example, has held that the right to a speedy trial attaches not just to the accused, but to victims and the international community as well, stating:

It appears in the ICCPR as a right guaranteed to a defendant, but for international human rights law it offers a vital and concomitant guarantee to victims of war crimes and crimes against humanity… Victims and relatives of victims are entitled to have those accused of hideous offences which have caused them so much grief to be tried expeditiously.75

This finding was made despite the fact that the Special Court’s Statute explicitly says that the accused is entitled to the right to trial without undue delay, and does not mention any other parties in this regard.76 The accused’s motion in this case argued that Rule 72 of the Special Court for Sierra Leone Rules of Procedure and Evidence, which sent certain matters straight to the Appeals Chamber for consideration, violated the right to appeal to a higher authority.77 The majority denied this appeal based on a finding that the rule served to enhance ‘the basic right to expeditious justice’.78 A more logical basis for denying the appeal was found in the Separate Opinion of Judge King, who recalled that the right to final appeal applied only to final appeal of a conviction as opposed to appeals on

73 See also, section 3.5 above.
74 Doorson v. The Netherlands (1997) 23 EHRR 330, 26 March 1996, para 70 (‘Such interests of witnesses and victims [as the right to life] are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled.’)
76 Article 17(4)(c) SCSL Statute.
77 Norman et al., Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal (n 75) para 9.
78 Ibid, para 30.
procedural matters.\textsuperscript{79}

Similarly, the interest of the international community in seeing the completion of international trials was put forward by the prosecution in a submission arguing against temporary release in \textit{Šainović et al.}\textsuperscript{80} The rights of victims and the international community have also been considered in referral decisions pursuant to Rule 11\textit{bis}. Although the Referral Bench in \textit{Ademi and Norac} recognised that Rule 11\textit{bis} only explicitly required that the accused could be guaranteed a fair trial, it considered that this requirement was ‘complemented by a concern for fairness towards other interested parties, such as victims and the international community’, and that fairness to those actors was a policy consideration that needed to be taken into account in making referral decisions.\textsuperscript{81} In principle, there should be nothing wrong with extending the fair trial rights of the accused to other persons with an interest in the outcome or with a role in proceedings. Problems arise, however, when those rights start to impinge on the rights of the accused, which is a risk if the early practice of the International Criminal Court regarding victim participation is to be followed in later jurisprudence.

Victims before the International Criminal Court have the right to ‘present their views and concerns… in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’\textsuperscript{82} The International Criminal Court’s formative years have been widely criticised for their broad interpretations of the rights of victims in this regard.\textsuperscript{83} Some of the rights that

\textsuperscript{79} \textit{Ibid}, Separate Opinion of Judge King, para 10.
\textsuperscript{80} \textit{Prosecutor v. Šainović et al.}, Decision on Ojdanic Motion for Temporary Provisional Release, Case No. IT-05-87-T, 7 December 2007, para 5.
\textsuperscript{82} Article 68(3) ICC Statute.
have been recognised include the right to examine evidence, the right to be notified about developments in the proceedings, the right to reparations, and the right to make submissions.\textsuperscript{84} Victims have also been granted the right to introduce evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility and relevance of evidence tendered by other parties.\textsuperscript{85} It has been suggested that these provisions effectively mean that the accused faces more than one accuser, in violation of the equality of arms principle.\textsuperscript{86} Furthermore, unlike the prosecutor of the International Criminal Court, participating victims do not bear an obligation to disclose exculpatory material to the defence, notwithstanding the fact that they now have a related right to lead evidence pertaining to the guilt or innocence of the accused.\textsuperscript{87} What this means, in theory, is that a participating victim can call a witness to testify as to the guilt of the accused, and if they have some information to suggest that this witness is actually grossly unreliable, there is no duty on the witness to disclose that fact.

In the case of a clash between the participatory rights of victims and the procedural rights of the accused, it is clear from the formulation of Article 68(3) that the rights of the accused should prevail. It is for this reason that these extensions of victims’ rights into areas such as the leading of evidence should be treated with caution. A further issue that arose from the early practice of victims’ participation was its impact on the right to trial without undue delay.\textsuperscript{88} However, later decisions have enunciated a more cautious approach towards the modalities of victim participation.\textsuperscript{89}

Witness protection measures and their interplay with the rights of the accused were discussed in detail in section 3.5 above and the arguments therein do not warrant further restatement. Suffice to say that these measures can impact on

\textsuperscript{84} \textit{Situation in the DRC: Prosecutor v. Katanga and Chui}, Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Case No. ICC-01/04-01/07, 13 May 2008.

\textsuperscript{85} \textit{Situation in the DRC: Prosecutor v. Lubanga}, Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Case No. ICC-01/04-01/07, 13 May 2008.

\textsuperscript{86} \textit{War Crimes Research Office} (n 83) 8.

\textsuperscript{87} \textit{Situation in the DRC: Prosecutor v. Lubanga}, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Case No. ICC-01/04-01-06, 26 February 2008; see also the dissenting opinion of Judge Pikis and Partly Dissenting Opinion of Judge Kirsch.

\textsuperscript{88} \textit{Situation in Kenya: Prosecutor v. Muthaura and Kenyatta}, Decision on Victims’ Participation and Representation, Case No. ICC-01/09-02/11, 3 October 2012, para 35.

\textsuperscript{89} \textit{Ibid}.
the rights of the accused, but that this is one of the excusable situations foreseen by the Statutes where the rights of the accused can be fettered by the rights of others.90 A distinction can be drawn between victims’ participatory rights as ‘status rights’ and the human rights that are at issue when we discuss the witness’s right to life or to respect for their private lives, and the right of the accused to a fair trial. Universally-accepted human rights should prevail over status rights, and when it comes to a clash between two human rights, the courts will have to strike a very delicate balance.

4.4. Conclusion

This chapter primarily focussed on the burgeoning jurisprudence on the prosecution’s right to a fair trial and the impact that it can have on the rights of the accused, as perhaps most sharply illustrated by the Haradinaj retrial decision of 2010. It was submitted that this right runs contrary to all human rights interpretations of the right to a fair trial. Furthermore, it raises questions of the determinacy of the accused’s right to a fair trial because it allows that right to be balanced against the alleged procedural rights of the prosecution.

Despite concerns raised about the applicability of rights to the prosecution as a whole, the fact remains that all tribunals have some jurisprudence on the extension of fair trial rights to the prosecution. In the light of this emerging principle of international criminal procedure, questions need to be asked about its precise parameters. It was suggested that the correct test to be used by tribunals in assessing the balance between the Prosecutor’s interests and the rights of the accused is, ‘Does this course of action unduly hamper the prosecution in the presentation of its case?’ If not, then the accused’s rights should prevail. This test would pave the way for the international criminal tribunals to lay down the highest standards of fairness. A move away from the ‘strict compliance with fundamental protections’ standard that was embraced by Martić and Aleksovski was recommended in this regard.

90 See e.g. Article 67(1) ICC Statute (‘having regard to the provisions of this Statute’) and Article 68(2); Article 17(2) SCSL Statute (‘subject to measures ordered… for the protection of victims and witnesses.’); ICTR Statute, Article 20(2) (‘subject to Article 21 of the Statute’); ICTY Statute, Article 21(2). See further Prosecutor v. Bagosora et al., Decision and scheduling order on the prosecution motion for harmonization and modification of protective measures for witnesses, Case No. ICTR-98-41-I, 5 December 2001, para 14.
Concern was also raised at the extension of procedural rights of the accused to other actors, such as victims and the international community. The rights of the already-nebulous concept of ‘the international community’ as regards the outcome and conduct of proceedings are far from clear, and seem to have been asserted in an *ad hoc* fashion. While this is far less widespread than the extension of rights to the prosecution, it was worthy of mention. Particular attention was paid to certain facets of victims’ participation before the International Criminal Court. The extension of victims’ rights to include, for example, the introduction of evidence without concomitant procedural safeguards gave rise to a question of the adherence between primary and secondary rules of obligation and therefore gave rise to particular criticism.

Lastly, it was argued that witnesses are the only party at trial whose rights need to be balanced against the rights of the accused, because their rights are properly recognised as competing human rights to the human right to a fair trial. Some of rights of other actors recognised by the tribunals can be more accurately defined as ‘interests’ or ‘status rights’ and the right to a fair trial should always trump those interests.
CHAPTER 5: THE LENGTH OF TRIALS AND THE STRUGGLE TO FIND AN IDEAL PLACE FOR EXPEDIENCE

It is fair to say that the length of trials — and the consequent cost — has been one of the major sources of criticism for international criminal tribunals in recent years. This chapter argues that the tribunals’ jurisprudence has fallen short of setting the highest standards of fairness in three respects. First, some of the causes of the excessive length of trials — including prosecutorial failures to disclose evidence and the time taken to issue judgments — do not suggest that best practice has been followed. Second, a breach of the right to trial without undue delay has proven almost impossible to assert and such motions have tended to be dealt with in a summary manner. Finally, on a number of occasions, the accused’s right to trial without undue delay has been used as the primary justification in denying a defence request, often at the expense of another right of the accused, such as the right to counsel of his or her choosing.

This chapter concludes with some suggestions that would elevate current practice to the highest standards of fairness, namely: a stricter judicial approach towards disclosure; a maximum time limit from the end of trial proceedings to the issuance of judgments, and an allocation of judicial resources to support this goal; a more detailed analysis of motions alleging a breach of the right to trial without undue delay, and a more liberal approach to the rights of the accused, which recognises that if a course of action requested by the accused might impact on the expedience of his or her trial, he or she can be taken to have voluntarily assumed that risk.

5.1. THE RIGHT TO TRIAL WITHOUT UNDUE DELAY IN PRACTICE

The right to be tried without undue delay is a minimum guarantee provided for in each of the tribunals’ statutes. The tribunals have employed the standards laid

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1 Article 20(4)(c) ICTR Statute; Article 17(4)(c) SCSL Statute; Article 21(4)(c) ICTY Statute; Article 67(1)(c) ICC Statute.
down in human rights law\(^2\) as regards the factors that should be assessed in analyzing whether a delay can be said to be ‘undue’. These are: the complexity of the case;\(^3\) the conduct of the authorities;\(^4\) the conduct of the accused,\(^5\) and the prejudice suffered by the accused.\(^6\) The burden of proof lies with the accused to show that delay was undue.\(^7\)

It should be noted that human rights tribunals have proven unwilling to lay down precise time limits for the length of trials. In *Stögmüller*,\(^8\) it was stated that ‘it is not feasible to translate this concept into a fixed number of days, weeks,
months or years, or into various periods depending on the seriousness of the offence’. This unwillingness was criticised by Sir Gerald Fitzmaurice in his separate opinion in *Golder*, where he stated that, ‘[i]n consequence, governments could never know in advance within what precise period causes must be brought to trial in order to satisfy the requirements of the Article’ and described that result as ‘a wholly unacceptable situation’.⁹

Nonetheless, by way of indication, it may be helpful to give some examples of unreasonable delay findings by the European Court of Human Rights. In *Ziacik*,⁰ a delay of just over five years and one month prior to acquittal was unreasonable, while in *Benmeziane*,¹¹ a period of seven years and two months between indictment and conviction was held to have been unreasonable. In *Ziacik*, the reorganization of the judiciary halted the proceeding of the case for more than 22 months, whilst in *Benmeziane*, despite the Government’s submissions that the delay was attributable to the complexity of the case, the Court found that the delay was mostly due to the conduct of state authorities, particularly the *juge d'instruction’s* delay of over four years in referring the applicant’s file to the assize court. These examples show that the question of whether delay was unreasonable will be taken on a case-by-case basis, having regard to the relevant factors.¹²

5.1.1. Complexity of the case

‘Complexity’ can be assessed by the examination of a number of factors, including the number of charges, the volume of evidence and number of witnesses, and the complexity of the applicable factual backdrop and legal provisions.¹³ Bearing this in mind, it is undeniable that trials before international

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¹² Richard May and Marieke Wierda, *International Criminal Evidence* (Ardsley, NY: Transnational Publishers, 2002) 279 argued that a ‘period of 11 years is clearly too long for any trial. The maximum time that can be fairly taken will depend on the … circumstances of the case, but undue delay must be avoided at each stage of the proceedings.’
¹³ *Prosecutor v. Norman et al.*, Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, Case No. SCSL-04-14-PT, 24 May 2005, Dissenting Opinion of Justice Pierre Boutet, para 30; *Prosecutor v. Bizimungu et al.*, Decision on Prosper Mugiraneza’s application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay (n 3) para 26.
criminal tribunals are exceptionally complex. At the investigative stage, they involve the unpicking of intricate command structures, political factors and historical backdrops to identify individual roles in atrocities committed on an enormous scale, often in an environment where states and witnesses are unwilling to cooperate with the institution.\(^{14}\) At trial, the tribunals have to deal with counsel who may not yet be entirely familiar with the structures and rules of the international tribunal, having often practiced in a drastically different domestic criminal procedure,\(^{15}\) evidence records that run to tens of thousands of pages,\(^{16}\) and extended forms of liability which are unique to international criminal law.\(^{17}\) It might be argued that, therefore, it is unreasonable to impose standards devised with the ‘ordinary’ criminal trial in mind to international criminal proceedings.\(^{18}\)

In \textit{Kovačević}, for example, Judge Shahabuddeen warned that ‘peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions’ called for ‘judicial flexibility’.\(^{19}\) Indeed, in a European Commission of Human Rights case concerning war crimes prosecutions in Germany, it was held that the unique features of such prosecutions permitted some derogation from

\(^{14}\) \textit{Situation in the DRC: Prosecutor v. Lubanga}, Decision on the Application for the interim release of Thomas Lubanga Dyilo, Case No. ICC-04/01-01/06, 18 October 2006, 7 (considering the volume of evidence and the fact that a large amount of evidence had to be garnered from abroad as evidence of the complexity of the case) See further, some of the problems discussed in Section 2.3 above.


\(^{16}\) To give an example, the \textit{Dorđević} Trial Chamber received some 2518 pieces of documentary evidence ‘from the bar table’ and the trial record encompasses 14534 pages of transcript. See also, \textit{Situation in the Republic of Kenya, Prosecutor v. Ruto, Kosgey and Sang}, Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence, Case No. ICC-01/09-01/11, 11 August 2011, para 3, where the pre-trial proceedings alone involved over 900 pages of disclosed information to the defence. On the practice of ‘flooding’ the defence, see Colleen Rohan, ‘Protecting the Rights of The Accused in International Criminal Proceedings: Lip Service Or Affirmative Action?’ in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.) \textit{The Ashgate Research Companion to International Criminal Law: Critical Perspectives} (Aldershot: Ashgate, 2013) 289.


the principles governing expediency in criminal trials. The Commission stated that, ‘The exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission’s opinion, inapplicable the principles developed in case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences.’ However, as pointed out by van Dijk and van Hoof, the complexity of the case is but one of the factors that is to be taken into account when assessing whether a delay has been a breach of the applicant’s human rights; therefore, the Commission was incorrect in declaring the overall principles of the right to a fair trial inapplicable in this case. Moreover, the provisions of Article 1 clearly state that the protections laid out in the Convention apply to ‘everyone’, so the distinction drawn in X v. Germany was illogical. Given that the Commission applied Article 6 as normal to a later war crimes suspect in Menten, and more recent European Court of Human Rights jurisprudence has considered the fair trial rights of those accused of war crimes, it is submitted that we can treat X v. FRG as a curiosity rather than established precedent. This means that the complexity of the case should be seen as a consideration to be taken into account when assessing whether a delay was undue rather than a factor excluding the defendant from the full scope of protection afforded by international human rights standards.

The complexity of international criminal trials alone should not itself serve as sufficient justification for judicial derogations from the right to a speedy trial. Domestic criminal proceedings often deal with complex situations, such as political corruption, Ponzi schemes, criminal gangs and stock market fraud, which also involve reams of evidence records, unclear chains of command and uncooperative witnesses. Even though the trial of Thomas Lubanga Dyilo on a sole charge relating to child soldiers could be said to be far less complex on the facts than some domestic cases, both the Pre-Trial and Appeals Chambers relied

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21 Ibid. 115-116.
23 Ibid.
on the complexity of the case as sole justification for declaring the defendant’s pre-trial detention period to have been of reasonable length.26 Lubanga’s trial lasted almost six years, from the date of his transfer to the custody of the International Criminal Court in March 2006, to the issuance of the judgment in the case on 14 March 2012. His sentence was handed down in July 2012. By contrast, one of the longest criminal trials in U.S. history which involved two self-representing Mafiosi and 18 co-defendants on trial for charges of extortion, drug and gambling charges, lasted 20 months.27

In assessing the complexity of trials, the European Court of Human Rights has laid out the following relevant factors: the nature of the facts, the number of accused persons and whether the case involves a joinder of trials, the number of witnesses heard, and the intervention of other parties.28 Joinder of trials can add to the complexity of proceedings and can be either a help or a hindrance to the expediency of a trial, depending, it would seem, on how many individual cases are joined. The Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda noted that ‘there is no guarantee that joinder will shorten the proceeding; it may actually lengthen it, since any adjournment of the trial requested and granted in respect of any one suspect in the case will result in the adjournment of the trial as a whole.’29


27 van Dijk and van Hoof (n 22) 446-450.

Chambers.30 As the other 18 individuals were either indicted and at large or at large having not yet been indicted, the judge held that it would be a breach of the rights of those before the Tribunal to a fair and expeditious trial to confirm the joint indictment.31

In joint cases where one accused is causing delays, there is an obligation to sever that individual’s case from the others, given that under Rules 82(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, the accused is entitled to the same rights during a joint trial as if he were tried separately. This was the case in Brđanin and Talić, where the case was severed due to Talić’s illness and the impact that it might have had on his co-accused’s right to an expeditious trial,32 although the Trial Chamber also noted the effect that a ‘stop-start’ trial might have on securing witness testimony.33 Similarly, the Prosecutor’s motion for a joinder of the accused Dragan Kolundžija to the indictment of Kvočka et al. was denied on the grounds that this would result in an unjustified delay for the accused in that case.34 These cases show a practical approach to the issues of joinder and severance as they pertain to the rights of the accused. Tribunals also tend to take other factors into account, such as judicial economy35 and the potential inconvenience caused to witnesses by having to testify in two or more separate trials when making these decisions.36

It is difficult to point to joinder as a sole reason for the length of trials before the international criminal tribunals, given that the trial at Nuremberg involved the joint trial of 21 individuals, and was completed within one year. The European Court of Human Rights has held that even where a trial of an accused would have been quicker if it had been severed from that of his co-accused, this in

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31 Ibid, 10-11.
33 Ibid, paras 25-27.
itself is not reason enough to find a breach of his right to trial without undue delay.\textsuperscript{37} Thus, the tribunals’ jurisprudence on joint cases, which do tend to be lengthier than single-accused trials,\textsuperscript{38} probably does not fall short of the highest international standards of fairness.

5.1.2. Conduct of the parties

\textit{A. The Prosecutorial Disclosure Obligation}

Regardless of the complexity of the case, courts should assess whether all reasonable steps have been taken to remedy any delays at each stage of proceedings, and whether the delay is really a result of the complexity of the case, or can be attributed to the authorities or to the accused. One element of the conduct of the parties that warrants further discussion is the prosecutorial compliance with disclosure obligations.

The disclosure regime, and the types of material that must be disclosed, varies slightly between the International Criminal Court and the non-permanent international criminal tribunals. Before the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone, the prosecution must disclose, within 30 days of the accused’s initial appearance, evidence in support of the indictment and any prior statements of the accused in the prosecution’s possession.\textsuperscript{39} Within a time limit prescribed by the Trial Chamber, the Prosecutor must also provide the witness statements of any witnesses which s/he intends to call at trial, along with copies of any documentary evidence to be tendered under Rules 92\textit{bis}, \textit{ter}, and \textit{quater}.\textsuperscript{40} The statements of any additional prosecution witnesses must be provided in advance of their testimony, when a decision has been made to call those witnesses.\textsuperscript{41} The second prong of the disclosure obligation requires the prosecution to disclose any material in its possession which may exculpate the accused or call the credibility of prosecution evidence into question,\textsuperscript{42} and which is not in the public domain.\textsuperscript{43}

\textsuperscript{37} Neumeister v. Austria (1979-1980) 1 EHRR 91, 27 June 1968, para 12.  
\textsuperscript{38} This was recognised in Ndayambaje Decision on the Defence Motion for Separate Trial (n 36) para 19.  
\textsuperscript{39} Rule 66(A)(i) ICTR, SCSL and ICTY RPE.  
\textsuperscript{40} Rule 66(A)(ii) ICTR, SCSL and ICTY RPE.  
\textsuperscript{41} Rule 66(A)(ii) ICTR, SCSL and ICTY RPE. The prosecution need only provide the names, and not the statements, of any rebuttal witnesses that it intends to call, \textit{per} Rules 67(B)(ii).  
\textsuperscript{42} Rule 68, ICTR, SCSL and ICTY RPE.
There is a distinction to be drawn between material of ‘public character’ and that which is in the ‘public domain’, however; in *Blaškić*, the Appeals Chamber emphasised ‘that unless exculpatory material is reasonably accessible to the accused, namely, available to the Defence with the exercise of due diligence, the Prosecution has a duty to disclose the material itself’.\(^4^4\) The responsibility over deciding whether material is exculpatory lies with the prosecution.\(^4^5\) In order to be successful, defence motions seeking the disclosure of material are required to be specific as to what material exactly is in the prosecution’s possession and how it might be exculpatory; ‘fishing expeditions’ are expressly prohibited.\(^4^6\)

Due to the added stage of the confirmation hearing, the International Criminal Court’s disclosure regime differs slightly. The disclosure of inculpatory material is designed to take place across two stages; the material upon which the Prosecutor intends to rely at the confirmation hearing should be disclosed ‘within a reasonable time before the hearing’,\(^4^7\) whilst any prior statements made by witnesses whom the prosecution intends to call must be done ‘sufficiently in advance’ of trial.\(^4^8\) Under Article 67(2) of the Statute, any exculpatory material\(^4^9\) must be disclosed ‘as soon as practicable’.

The prosecutorial disclosure obligation cannot be slotted neatly along the adversarial/inquisitorial spectrum, and has been described as ‘an inquisitorial modification of a pure adversary system’\(^5^0\). It is clear, however, that it can be best regarded as a human rights obligation as much as it is a procedural rule. Human

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\(^4^3\) *Prosecutor v. Blaškić*, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extending of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, 26 September 2000, para 38.


\(^4^5\) See e.g. *Prosecutor v. Blaškić*, Decision on the Production of Discovery Materials, Case No. IT-95-14-PT, 27 January 1997, para 47.


\(^4^7\) Article 61(3)(b) ICC Statute.

\(^4^8\) Article 64(3)(e), ICC Statute; Rule 76, ICC RPE.

\(^4^9\) The statutory provision actually refers to prosecution ‘evidence’ of an exculpatory character, but the Pre-Trial Chamber in *Lubanga* held that Article 67(2) applies to all exculpatory material: *Situation in the DRC: Prosecutor v. Lubanga*, Decision on the Final System of Disclosure and the Establishment of a Timetable, Case No. ICC-01/04-01/06, 15 May 2006, 8.

rights tribunals and international criminal tribunals alike have linked the disclosure obligation to the right to have adequate time and facilities for the preparation of one’s defence,\textsuperscript{51} and to the principle of equality of arms.\textsuperscript{52} It is further submitted, as held by the European Court of Human Rights, that a failure to disclose relevant materials can lead to a breach of the right to trial without undue delay, having regard to all of the other circumstances of the case.\textsuperscript{53}

Of course, there may be valid reasons for non-disclosure or delayed disclosure on the part of the prosecution, and these are foreseen in the courts’ statutory and rule frameworks. If disclosure of the information could endanger the security of a state, victim or witness, or jeopardise ongoing investigations, the Prosecutor can be relieved of those disclosure obligations. Rules 66(C) and 67 of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and Special Court for Sierra Leone Rules of Procedure and Evidence require the Prosecutor to apply to the Trial Chamber for a determination on this matter. At the pre-trial stage of proceedings, the Prosecutor can also apply to protect the identities of witnesses, \textit{per} Rule 69. The Statute of the International Criminal Court allows states to intervene, and Article 72(7) puts forward a number of solutions to deal with any conflict of interest between the state’s national security concerns and the rights of the accused. These include \textit{ex parte} hearings and exclusion of the evidence. In \textit{Katanga}, Trial Chamber II held that ‘early disclosure dictated solely by a concern to better protect the rights of the Defence would… contravene the spirit and the purpose of the Statute if this resulted in witnesses called to give evidence facing real risks’, and that the right of the accused to the disclosure of materials must be balanced with the rights of

\textsuperscript{51} E.g. \textit{Blaškić} Decision on the Appellant’s Motions for the Production of Material, Suspension or Extending of the Briefing Schedule, and Additional Filings (n 43) para 52; \textit{Situation in the DRC: Prosecutor v. Mbarushimana}, Decision on ‘Defence Request to Deny the Use of Certain Incriminating Evidence at the Confirmation Hearing’ and Postponement of Confirmation Hearing, Case No. ICC-01/04-01/10, 16 August 2011, para 14; \textit{Jespers v. Belgium} (1981) 5 EHRR 305.


\textsuperscript{53} \textit{Beggs v. UK}, Application No. 25133/06, Judgment, 6 November 2012, para 265.
witnesses.\footnote{\textit{Situation in the DRC: Prosecutor v. Katanga and Chui}, Public redacted version of the Decision on the protection of prosecution witnesses 267 and 353 of 20 May 2009, Case No. ICC-01/04-01/07, 28 May 2009, para 31.} This comports with Rule 81, which limits disclosure before the commencement at trial on the condition that any evidence used at trial or in the confirmation hearing must be disclosed to the accused in accordance with Article 68(5).\footnote{See further, Nicholas A. J. Croquet, ‘The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights’ Jurisprudence?’ (2011) 11 \textit{HRLR} 91, 118.} However, any requests for non-compliance with the disclosure obligations should be dealt with as expeditiously as possible so as to minimise the delay to the trial of the accused.

In practice, however, the precise parameters of the prosecution’s disclosure obligation, hearings on applications for non-disclosure and decisions on allegations of non-compliance with disclosure obligations have elongated proceedings. To give an example from the International Criminal Tribunal for the Former Yugoslavia, in the \textit{Karadžić} case, no less than 74 motions relating to disclosure issues were filed between 2009 and 2012,\footnote{A full list of relevant decisions is available at \url{http://www.icty.org/case/karadzic/4}.} and the Trial Chamber has acknowledged a number of disclosure violations committed by the prosecution in the case.\footnote{\textit{Prosecutor v. Karadžić}, Decision on Accused’s Motion for New Trial for Disclosure Obligations, Case No. IT-95-5/18-T, 3 September 2012, para 14.} In one of the longest trials before the International Criminal Tribunal for Rwanda, which ultimately resulted in the acquittal of the four accused, the Appeals Chamber recognised that the prosecution had violated its disclosure obligations at numerous junctures over the course of the trial,\footnote{\textit{Prosecutor v. Mugenzi and Mugiraneza}, Appeals Judgment, Case No. ICTR-99-50-A, 4 February 2013, para 63.} but declined to link the fact that no less than 24 separate decisions had been rendered on defendants’ requests for disclosure over the course of the trial, which obviously prohibited the speedy conclusion of proceedings.

In the case of \textit{Muthaura and Kenyatta}, part of the \textit{Kenya} situation before the International Criminal Court, the prosecution acknowledged its clear failing to comply with its disclosure obligations.\footnote{\textit{Situation in Kenya: Prosecutor v. Muthaura and Kenyatta}, Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber, Case No. ICC-01/09-02/11, 25 February 2013, para 37.} At the time of writing, the charges had been dismissed against Muthaura,\footnote{\textit{Situation in Kenya: Prosecutor v. Muthaura}, Decision on the Withdrawal of Charges against...} and there was a possibility that the
confirmation of the charges decision against president-elect Kenyatta would have to be sent back to the Pre-Trial Chamber for reconsideration, over 15 months since the original confirmation hearing. The furore that lead to two stays of proceedings in the *Lubanga* case as a result of the prosecution’s non-disclosure of exculpatory materials in the first instance and the identity of an intermediary in disregard of the Trial Chamber’s order to do so in the second is well-documented and need not be restated here. Suffice to say that those two stays of proceedings added an extra eight months to the duration of the trial; the first stay of proceedings lasted from 13 June 2008 to 18 November 2008, while the second lasted from 8 July 2010 to 8 October 2010.

Given that the conduct of the authorities is one of the factors to be assessed in judging whether a delay was undue, one might have expected that Thomas Lubanga’s defence team were in a strong position when they alleged in their submissions before the sentencing hearing that the Trial Chamber should ‘take into consideration the breach of the fundamental rights of Mr. Lubanga as it comes to its determination’. An earlier abuse of process motion, asking for a permanent stay of proceedings on the grounds that the accused’s rights had been breached by these two stays and other instances where the Prosecutor had failed to disclose evidence, had been denied in March 2011, on the grounds that the alleged violations did not render it ‘odious’ or ‘repugnant’ to continue with the trial. In the Trial Judgment, the Chamber insisted that it had taken adequate steps to

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61 *Situation in Kenya: Prosecutor v. Kenyatta*, Defence Written Submissions Following 18 March 2013 Status Conference, Case No. ICC-01/09-02/11, 28 March 2013, para 43 (requesting either a termination of the proceedings, a permanent stay of proceedings, or a referral of the confirmation decision back to the Pre-Trial Chamber).
62 *Situation in the DRC: Prosecutor v. Lubanga*, Decision on the consequences of the non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the proceedings of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Case No. ICC-01/04/01/06, 13 June 2008; *Situation in the DRC: Prosecutor v. Lubanga*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled ‘Decision on the Release of Thomas Lubanga Dyilo’, Case No. ICC-01/04-01/06, 21 October 2008; *Situation in the DRC: Prosecutor v. Lubanga*, Decision on the Prosecutor's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Case No. ICC-01/04-01/06, 8 July 2010; *Situation in the DRC: Prosecutor v. Lubanga*, Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to Release Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 8 October 2010.
63 *Situation in the DRC: Prosecutor v. Lubanga*, Transcript, Case No. ICC-01/04-01/06, 13 June 2012.
vindicate the rights of the accused throughout the trial, and ‘had addressed any
potential prejudice to the accused arising from incomplete or late disclosure’.65
The allegations raised in the sentencing hearing on the alleged breaches of the
accused’s rights to adequate facilities for the preparation of his defence and to trial
without undue delay were given similarly summary analysis. The Chamber held
that these factors did not call for his sentence to be reduced, as the length of time
spent in detention would be deducted from his sentence.66 For what it was worth,
the Chamber did go on to note Mr. Lubanga’s cooperation with the court
throughout the trial, despite the ‘particularly onerous circumstances’ he faced,67
which was unlikely to have provided much comfort to the accused.

This raises the question of whether the consequences of failing to disclose
materials, which can in turn lead to a breach of the right to trial without undue
delay, are sufficiently punitive to deter prosecutorial carelessness when it comes
to these obligations. Rules 68 of the Rules of Procedure and Evidence of the
International Criminal Tribunal for the Former Yugoslavia, International Criminal
Tribunal for Rwanda and Special Court for Sierra Leone allow a Chamber to
decide on ‘sanctions’ to be imposed on a party. While Rule 84 of the International
Criminal Court’s Rules of Procedure and Evidence does allow the Trial Chamber
to make orders for disclosure, there is no equivalent rule on sanctions after a party
has failed to carry those orders out.

Violations of disclosure obligations have continued throughout the
lifetimes of the tribunals, and many have attributed this phenomenon to the
courts’ failure to impose strict reprimands for such violations.68 For example, the
International Criminal Tribunal for Rwanda’s Appeals Chamber saw it sufficient
to ‘firmly remind… the Prosecution of the fundamental importance of its positive
and continuous obligation to disclose exculpatory material under Rule 68 of the
Rules’,69 but declined to grant financial compensation to the acquitted men. In
Haradinaj, individual censure of the lead counsel for the prosecution on the

65 Situation in the DRC: Prosecutor v. Lubanga, Judgment Pursuant to Article 74 of the Statute,
Case No. ICC-01/04-01/06, 14 March 2012, paras 120-121.
66 Situation in the DRC: Prosecutor v. Lubanga, Decision on Sentence pursuant to Article 76 of
the Statute, Case No. ICC-01/04-01/06, 10 July 2012, para 90.
67 Ibid, para 91.
68 Rohan (n 16); Michele Caianiello, ‘Law of Evidence at the International Criminal Court:
69 Mugenzi and Mugiraneza Appeal Judgment (n 58) para 63.
grounds of its failure to comply with disclosure obligations was later overturned.\textsuperscript{70} The Trial Chamber in \textit{Furundžija} lodged a formal complaint with the prosecution considering its opinion that the prosecution’s conduct on disclosure had been ‘close to negligence’, to which the Prosecutor replied that the matter would be investigated.\textsuperscript{71} In \textit{Bagosora}, the Trial Chamber held that the prosecution had failed to fulfil its disclosure obligations, and ‘exhort[ed]… the Prosecution to be more cooperative with the Defence Counsel in general, and with respect to disclosure in particular’.\textsuperscript{72} This relatively lenient approach appears to be quite endemic. According to Gibson and Lussiaa-Berdou:

while the chambers of [the ad hoc] tribunals regularly recall the importance of disclosure as a fundamental component of fair trials, even repeated violations of disclosure obligations by the prosecution fail to elicit sanctions, and the remedy for late or non-disclosure is regularly limited to postponement of the testimony or cross-examination of the relevant witness, rather than the more stringent remedies of exclusion of evidence, dismissal of charges which rely on the evidence, or a stay of proceedings.\textsuperscript{73}

It could be argued that the Trial Chamber’s finding in \textit{Lubanga} that the delays caused solely by the misconduct of the prosecution would be deducted from the defendant’s sentence sends a message that permits complacency, because prosecutorial teams will not worry too much about prolonging the accused’s time in detention; it will just be taken away from their sentence in the end. A number of alternative sanctions may serve a greater deterrent function. For example, Caianiello has suggested that repeated violations of the disclosure obligation should, in exceptional cases, lead to a permanent stay of proceedings.\textsuperscript{74}

Perhaps this would be a bit extreme, as a permanent stay of proceedings should only be an exceptional remedy,\textsuperscript{75} but certainly if a piece of evidence has not been disclosed in sufficient time to allow the accused sufficient opportunity to

\begin{itemize}
  \item \textsuperscript{70} \textit{Prosecutor v. Haradinaj et al.}, Decision on Prosecutor’s Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis, Case No. IT-04-84bis-T, 27 March 2012.
  \item \textsuperscript{71} \textit{Prosecutor v. Furundžija}, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 15.
  \item \textsuperscript{72} \textit{Prosecutor v. Bagosora}, Decision on the Motion by the Defence Counsel for Disclosure, Case No. ICTR-96-7-T, 27 November 1997.
  \item \textsuperscript{73} Kate Gibson and Cainnech Lussiaa-Berdou, ‘Disclosure of Evidence’ in Karim Khan, Caroline Buisman and Christopher Gosnell (eds.) \textit{Principles of Evidence in International Criminal Justice} (Oxford: OUP, 2010) 306, 313.
  \item \textsuperscript{74} Caianiello (n 66).
  \item \textsuperscript{75} X v. \textit{Federal Republic of Germany} (1980) 25 Decisions and Reports 142 (‘Insofar as the applicant claims a right to discontinuation of the criminal proceedings in view of the long delays which had occurred, the Commission considers that such a right…would only apply in very exceptional circumstances.’)
\end{itemize}
prepare his case, that evidence (or the related witness where it is a witness statement that has not been disclosed) should not be allowed as evidence in the trial record. This would follow from Rules 89 of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and Special Court for Sierra Leone Rules of Procedure and Evidence (under which evidence can be excluded where its probative value is outweighed by the right to a fair trial) and Article 69(4) of the Statute of the International Criminal Court, which states that the probative value and the possible prejudice to the accused will be taken into account in decisions on the relevance or admissibility of evidence.

The individual sanctioning of prosecution lawyers by notifying their native bar council of their misconduct might seem like a reasonable penalty when the lawyer in question has been repeatedly responsible for non-disclosure; however, this penalty was overturned by the Appeals Chamber in Haradinaj, on the grounds that the Office of the Prosecutor acts as a whole, and individual lawyers could not be penalised in this manner under Rule 68.76

Perhaps the most reasonable solution, especially in the light of the duty incumbent on International Criminal Court’s Prosecutor to investigate exonerating circumstances equally,77 would be to allow open access to all evidentiary materials, save those which require a determination by the Chamber on the security of states or witnesses, in the form of a dossier, as in continental legal systems. This would also relieve some of the criticisms that are often laid against prosecution teams in relation to the practice of ‘flooding’ the defence, whereby thousands of pages of documents are disclosed to the defence in advance of trial, without indicating precisely which parts are exculpatory, which means that defence teams have to analyse vast quantities of evidence within a short time frame.78 Furthermore, rather than holding separate hearings on alleged breaches of disclosure obligations which can drag on for several weeks, such motions could

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76 Haradinaj Decision on Prosecutor’s Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis (n 70) para 39 (holding that ‘Rule 68 provides for specific obligations for the Prosecutor, which extend beyond the individual prosecutors acting on a specific case’, and that Rule 46 was lex specialis on individual sanctions.) By contrast, a senior trial attorney for the prosecution was given a warning in Prosecutor v. Karemera et al., Decision on Prosecutor’s Rule 68(D) Application and Joseph Nzirorera’s 12th Notice of Rule 68 Violation, Case No. ICTR-98-44-T, 26 March 2009, para 27.
77 Article 54(1)(a) ICC Statute.
78 Rohan (n 16) 294-297.
be dealt with orally and the offending party could be swiftly sanctioned to avoid future carelessness as to their obligations.

B. The Time Taken to Issue Judgments

The judicial duty to issue a judgment within reasonable time is also clearly a ‘conduct of the parties’ that needs to be taken into account. As noted with reference to the *Prlić* in chapter 4 above, upwards of two years can elapse between the close of the case and the issuance of the judgment. *Prlić* is not exceptional in this respect. One of the longest ‘gaps’ between the close of trial and judgment was almost three years in the case of *Bizimungu, Mugenzi, Bicamumpaka and Mugarineza (Government II).*

This is a shocking length to make defendants wait for the verdict in any case, but is even more inexcusable when one takes into account that two of the accused were acquitted of all charges at trial, and the remaining two defendants were acquitted on appeal in 2013. By the time of their acquittals, Bizimungu and Bicamumpaka had been in detention for and twelve years and seven months and twelve years and five months respectively. Taking their appeals into account, Mugenzi and Mugarineza spent almost fourteen years on trial before their acquittal in 2013. This remarkable statistic is unfortunately not unique; Gratien Kabiligi, one of the co-accused in the *Bagosora* trial, spent eleven years and five months in the custody of the Tribunal before his acquittal on 18 December 2008. In that case, the trial had ended in June 2007 and 18 months passed before an oral summary was issued, acquitting Kabiligi and ordering his release. The full judgment was released in February 2009.

This practice of issuing summaries with the full judgment to follow later became increasingly common in the later years of the International Criminal

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79 Chapter 4 above, text to n 22-24.
82 *Mugenzi and Mugarineza* Appeal Judgment (n 58).
83 Bizimungu was arrested on 11 February 1999, and the three co-accused in the case were all arrested on 6 April 1999.
85 *Ibid*, para 2368.
Tribunal for Rwanda, but, as the Bagosora experience illustrated, it did not really expedite the issuance of judgments greatly. In Taylor, too, more than a year passed between the close of trial and the issuance of a judgment in summary form. The full judgment then followed one month later. In principle, the idea of issuing summary judgments first and the full judgment later is a good one, but it would seem to contravene the purpose of this practice if the accused still has to wait for more than a year before they are informed of the Court’s final verdict.

While it is accepted that international criminal trials involve greater quantities of evidence than the ‘regular’ criminal trial, the judges will have been present for the presentation of that evidence, and prosecution and defence teams will have summarised their positions in their closing briefs and arguments. Furthermore, Chambers have a team of judicial assistants at their disposal that can prepare summaries of evidence presented in court to refresh the Chamber’s memory and research briefs on legal issues that have arisen in the course of the trial. It is submitted that by the close of trial, judges should have a good idea about whether they are inclined to find the defendant(s) guilty or innocent on the charges in the indictment. It would not be unreasonable to suggest that judges could spend one or two weeks intensely deliberating on the question of the guilt or innocence of the accused and deliver that judgment shortly after the close of trial. Bear in mind that judges do not have to unanimously reach a verdict of guilt or innocence, which should make it easier to come to a majority decision on the question of culpability. Following that verdict, the judges could spend a few months drafting the final judgment, which would include a full analysis of the evidence at hand and the important findings on legal and definitional issues which are often contained in judgments.

While the nature of proceedings before the two types of institutions is of course very different, regard might be had to the form of judgment-drafting before the European Court of Justice. There, a case is assigned to a Judge Rapporteur or Reporting Judge. Under the Judge Rapporteur’s instruction, their judicial assistant

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86 The trial closed on 11 March 2011 and the summary judgment was issued on 26 April 2012.
87 Prosecutor v. Taylor, Judgment, Case No. SCSL-03-01-T, 18 May 2012.
89 Article 23(2) ICTY Statute; Article 22(2) ICTR Statute; Article 18, SCSL Statute; Article 74(3) and (5) ICC Statute.
('referendaire') prepares a draft judgment. The judges then deliberate intensely over the draft judgment in secret proceedings and emerge with amendments to the draft, which are incorporated by the referendaire who produces a final judgment. This system is far from perfect, owing principally to the enormous judicial workloads before the European Court of Justice, but it is certainly markedly more efficient than the international criminal tribunals.

It seems that one of the main problems leading to delays between the close of trial and the issuance of judgment is that judges are sometimes quickly reassigned to sit on the bench of a new case. The judges in Bagosora were involved in the adjudication of Prosecutor v. Semanza, and Prosecutor v. Ntagera et al. Two of the judges in Bizimungu, Judges Khan and Muthoga, sat in three new cases between the close of that trial and the issuance of the judgment: Nshogoza, Ntawukulilyayo and Gatete. This means that they become immersed in their new case and understandably, they do not have the same amount of time to dedicate to the issuance of the judgment in their previous case as they would have if that was their only task. But knowing that the judges in their case were busy with another case is of little reassurance to those acquitted persons who have spent a superfluous three years in detention waiting for a judgment. It is submitted that judges should not be transferred to new cases until the judgment has been issued in their last case. This would comport with various judgments of the European Court of Human Rights which have held that the Contracting States have a duty to organize their judicial systems to ensure the fullest compliance with Article 6.

Some might argue that a maximum time limit for the length of trials should be imposed, and if a judgment has not been released by that date, the accused should be released. There is an inherent risk, however that such a system would be too prone to abuse by delaying defence tactics; the conduct of the defence should continue to be taken into account when deciding whether a delay has been unreasonable. The discussion on disclosure above did not delve into the precise

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parameters of defence disclosure, but delays caused by failures in this regard would obviously be taken into account in any assessment of the delay. Similarly, when the accused asks for extra time, that extra time cannot be used in any allegation of a breach of the right to a speedy trial.  

In finding a middle ground between that extreme position and the current unfavourable system of delays in issuing judgments, it is submitted that the judges’ inability to decide on the guilt or innocence of an accused within a period of twelve months casts doubt over the culpability of the accused, and should in itself be cause for dismissal of the case with prejudice.

5.1.3. Prejudice suffered

The final element that will be examined is whether the accused has suffered prejudice as a result of the undue delay. ‘Prejudice’ in this sense can be defined as any impairment on the defendant’s ability to present an effective defence, or any ‘threat to… an accused’s significant stakes, psychological, physical and financial’.  

It could be said that any delay will always cause prejudice to the accused in a criminal trial in terms of their physical and psychological wellbeing, insofar as their continued liberty remains unclear until all proceedings have been completed, but this argument has been unsuccessful in practice. In Bizimungu, one of the accused argued that the fact of his continued incarceration and the resulting infringements on his right to private and family life should have been sufficient to establish a prima facie case for prejudice.  

This position would appear to have particular resonance with the unique context of international trials, where individuals can spend up to a decade or more in custody many thousands of miles away from their families, with their prospects of provisional release hampered by uncooperative states.  

However, this argument was rejected, with the Trial Chamber saying:

As far as prejudice to the Accused is concerned, the Chamber notes that the Defence has failed to show how the delay of four years, six months and 28 days has prejudiced [the] Accused such as to prevent a fair trial…The burden for

94 See below, section 5.3.
96 Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza’s application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay (n 3) para 7.
97 See above, section 3.2.
proving prejudice does indeed lie with the Defence.\textsuperscript{98}

The international criminal tribunals are in a difficult position from the outset, insofar as their trials relate to incidents that happened years, and often decades, before. With each passing month, witnesses’ memories are likely to fade slightly more, and individual witnesses will die or move away from their last known residence. This places an additional imperative on the tribunals to ensure that trials are conducted in as expedient a fashion as possible. Once an undue delay has been proven that is not solely attributable to the complexity of proceedings and that can be traced back to one of the parties, it is submitted that the need to show resultant prejudice should not be an insurmountable barrier to cross.

It is difficult to point to any of the issues — or parties — discussed above as the sole cause of the extremely lengthy nature of trials before international criminal tribunals. More likely, it is a combination of these and other factors, including requests from both parties for additional time to prepare their cases at the pre-trial stage, the amount of witnesses and the volume of evidence involved and the unavailability of witnesses that lead to their unprecedented length, where it is not uncommon for defendants to be in custody for the best part of a decade. However, as discussed in Chapter 2 above, by setting such a low precedent for the length of trials, the courts send a message to states that such elongated proceedings are acceptable. Two distinct issues discussed above — compliance with disclosure obligations and the length taken to issue judgments — set standards which are far below what should be expected from an international organ established to bring international criminals to justice in a fair manner. It is clear that the judges need to take a more proactive approach to these issues, by dealing with violations of disclosure obligations swiftly and with adequate sanctions, and by issuing at least a summary judgment on the guilt or innocence of the accused shortly after the close of trial. The next section discusses the manner in which judges have dealt with motions where a breach of the right to trial without undue delay has been alleged.

\textsuperscript{98} Ibid, para 7.
5.2. The Treatment of Motions on the Right to Trial Without Undue Delay

The Bizimungu et al. case was discussed above, in relation to the almost three years that elapsed between the close of trial and the delivery of judgment. Unsurprisingly, over the course of those three years, the accused men brought motions before the Chamber alleging that their right to trial without undue delay had been breached.\textsuperscript{99} Early in the trial, the accused Mugiraneza claimed that the prosecutor’s failure to disclose materials pursuant to Rules 66 and 68 had caused undue delay.\textsuperscript{100} This motion was dismissed on the grounds that the Trial Chamber felt that there was ‘no need to inquire into any role that the Prosecutor might have played about the alleged undue delay.’\textsuperscript{101} This was clearly an incorrect assessment, given that the role of the authorities needs to be taken into account when deciding whether a delay was undue, so the Appeals Chamber returned the matter to the Trial Chamber for reconsideration.\textsuperscript{102} In the second decision, while the Trial Chamber dismissed the prosecution’s argument that the delay had been caused by the defence in filing incessant motions, it held that the delay was not caused by the prosecution, without giving any detail as to how it came to that decision, other than to say that it had conducted a detailed enquiry into

\textsuperscript{99} Relevant decisions include: Prosecutor v. Bizimungu et al., Decision on Mugiraneza’s Request for Reconsideration or Alternatively Certification to Appeal the Decision on Mugiraneza’s Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay dated 23 June 2010, Case No. ICTR-99-50-T, 31 August 2010; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza’s Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, Case No. ICTR-99-50-AR73, 23 June 2010; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, Case No. ICTR-99-50-AR73, 29 May 2007; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza’s Third Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, Case No. ICTR-99-50-AR73, 10 February 2009; Prosecutor v. Bizimungu et al., Decision on Justin Mugenzi’s Motion Alleging Undue Delay and Seeking Severance, Case No. ICTR-99-50-T, 14 June 2007; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza’s Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay, Case No. ICTR-99-50-T, 3 November 2004; Prosecutor v. Mugiraneza, 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, Case No. ICTR-99-50-T, 2 October 2003, and Prosecutor v. Mugiraneza, 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, Case No. ICTR-99-50-AR73, 27 February 2004.

\textsuperscript{100} Mugiraneza 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 (n 99).

\textsuperscript{101} Ibid, para 14.

\textsuperscript{102} Mugiraneza 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 (n 99) 3.
prosecutorial conduct.\textsuperscript{103} The scope and results of that enquiry were not shared in the decision. Later motions on undue delay in the trial were all dismissed with reference to the complexity of the case, the need to take the totality of the situation into account and the assessment that the length of the delay suffered could not \textit{ipso facto} render a delay undue.\textsuperscript{104} By contrast, in his partially dissenting opinion to the decision on Mugiraneza’s fourth motion to dismiss the indictment on the grounds of undue delay, Judge Short considered that that the Chamber’s failure to deliver its judgment was itself ‘sufficient to constitute a violation of Mugiraneza’s right to a trial without undue delay.’\textsuperscript{105}

When it finally issued its decision, the Chamber dealt with the final motion on this matter, filed by the accused Mugenzi, who had asserted that there had been a breach of his right to trial without undue delay owing to the Tribunal’s failure to prioritise the case.\textsuperscript{106} This assertion was based on the fact that the judges in the case had been assigned to different cases.\textsuperscript{107} While the Trial Chamber acknowledged that ‘the increased workload of the presiding judges… contributed to this delay’,\textsuperscript{108} the motion was denied, based on the complexity of the case, encompassing factors such as the number of co-accused and the amount of witnesses heard.\textsuperscript{109} However, these factors do not adequately explain why it should take almost three years to issue a judgment.\textsuperscript{110} The defendant’s motion was dismissed as being in disregard of ‘the common challenges of trial administration of a multi-accused case with a complicated procedural history’.\textsuperscript{111} However, the task of issuing a judgment after the trial has been completed is not quite an administrative function in the managerial or organisational sense. Instead, it is the

\textsuperscript{103} Bizimungu et al., Decision on Prosper Mugiraneza’s Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial without Undue Delay (n 99) para 32.
\textsuperscript{104} See the decisions of 29 May 2007, 10 February 2009, 27 February 2009 and 23 June 2010 (n 99).
\textsuperscript{105} Bizimungu et al., Decision on Prosper Mugiraneza’s Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay (n 99) Partially Dissenting Opinion of Judge Short, para 2.
\textsuperscript{106} Bizimungu et al., Judgment and Sentence (n 80) paras 66-79.
\textsuperscript{107} See above (n 91).
\textsuperscript{108} Bizimungu et al., Judgment and Sentence (n 80) para 74.
\textsuperscript{109} \textit{Ibid.}, paras 66-79.
\textsuperscript{111} Bizimungu et al., Judgment and Sentence (n 80) para 79.
imperative and overarching purpose of the trial, and it should be treated as the Chamber’s utmost priority, particularly when defendants are deprived of their liberty in waiting for a trial judgment. The Chamber must have made its decision to acquit two of the co-accused some time in advance of the 2011 judgment; they should have moved swiftly to release those men as soon as it became apparent that these two defendants were going to be acquitted.\textsuperscript{112} Judge Short, in a partially dissenting opinion, opined that the two acquitted men should have been declared to be entitled to compensation as a result of the failure to issue a judgment in good time, whilst the two convicted men should have been given a reduction in sentence in recognition of the violation of their rights.\textsuperscript{113}

It could be surmised that this reticence to recognise a breach in the right to trial without undue delay may arise from a fear that if the Chamber holds that the rights of the accused have been violated in this manner, he or she should be released without charge. Indeed, this is the remedy often sought by defendants.\textsuperscript{114} It is suggested that this conception is ill-founded, because human rights jurisprudence clearly establishes that a reduction in sentence and/or compensation where a defendant is convicted is an adequate remedy, while those acquitted should be entitled to compensation upon acquittal.\textsuperscript{115} In the words of van Hoof and van Dijk:

> the public interest in the prosecution and conviction of the criminal may be so great that the prosecution should not be stopped for the sole reason that the reasonable time has been transgressed; another, more proportionate compensation should be awarded to the victim of that transgression.\textsuperscript{116}

The same public interest can undoubtedly be said to apply to international criminal proceedings. International criminal courts should be secure in the knowledge that the validity of their convictions will not be called into question by an unreasonable delay in proceedings;\textsuperscript{117} in that regard, it is submitted that where

\textsuperscript{112} McDermott (n 110).
\textsuperscript{113} Bizimungu et al., Judgment and Sentence (n 80) Partially Dissenting Opinion of Judge Emile Francis Short.
\textsuperscript{114} Dismissal of the indictment was the relief sought in the motions at issue in the many decisions listed above (n 99).
\textsuperscript{116} van Dijk and van Hoof (n 22) 450.
\textsuperscript{117} Eckle v. Germany (n 115) para 20.
it is the length of proceedings that were in violation of the accused’s rights under the Statute, not the proceedings as a whole, compensation should be offered.\(^\text{118}\) However, in practice, only one defendant has been given compensation for a breach of their rights at the hands of an international criminal tribunal — at the International Criminal Tribunal for Rwanda, Rwamakuba was given $2000 in 2007 because he was denied access to a lawyer for 125 days following his arrest.\(^\text{119}\) In the *Mugenzi and Mugiraneza* appeal, Judge Robinson stated that he would have given the acquitted men compensation of $5000 each for the breach of their rights.\(^\text{120}\) Judge Robinson opined that at least one year of the delay could be considered to have been ‘undue’, owing to the delay in issuing a judgment. He said that ‘Mugenzi and Mugiraneza suffered psychological non-pecuniary damage which cannot be sufficiently compensated by the mere finding of a violation; cases show that in such circumstances financial compensation is warranted.’\(^\text{121}\)

It is accepted that some might find the granting of compensation in this manner, when the court’s resources should be channelled into achieving justice for the victims of mankind’s most horrendous crimes, repugnant. But to permit the perpetuation of unjustified delays in these trials without consequence also sends the wrong message from an international criminal tribunal established to enshrine the highest standards of fairness — that is, if someone is accused of the worst international crimes, they do not deserve the same procedural safeguards. It does not require a great stretch of the imagination to foresee how this precedent could be used and abused by those states that wish to hold terror suspects indefinitely.\(^\text{122}\) Furthermore, there is no excuse for denying compensation to an individual who was held for over a decade before they were ultimately found innocent. While an exact parallel cannot be drawn between persons deprived of their liberty for several years following a wrongful conviction and persons who have spent a lengthy time in detention prior to acquittal, it is worthy of note that many

\(^{118}\) See also *Bizimungu et al.*, Judgment and Sentence (n 80) Partially Dissenting Opinion of Judge Emile Francis Short; *Prosecutor v. Mugenzi and Mugiraneza*, Appeals Judgment (n 58) Partially Dissenting Opinion of Judge Robinson.


\(^{120}\) *Prosecutor v. Mugenzi and Mugiraneza*, Appeals Judgment (n 58) Partially Dissenting Opinion of Judge Robinson, para 12.

\(^{121}\) *Ibid*, para 9.

\(^{122}\) See above section 2.2.5.
exonerated people who have been granted compensation have spent a shorter periods in detention than those facing trial before the international tribunals. The right to compensation following wrongful conviction is enshrined in Article 14(6) International Covenant on Civil and Political Rights and Article 85(2) of the Statute of the International Criminal Court. It is submitted that there should be a parallel right to compensation following an unduly long period of time in detention prior to acquittal.

The discussion in this section aimed to illustrate that the bar is set very high when an accused wishes to assert that his or her rights have been violated. By contrast, it is not uncommon for a course of action sought by the accused to be denied on the grounds that it may lead to a violation of the accused’s right to an expedient trial. We now turn to discuss what the author dubs this ‘reverse application’ of the right to trial without undue delay.

5.3. THE REVERSE APPLICATION OF THE RIGHT TO TRIAL WITHOUT UNDUE DELAY

A number of cases appear to have asserted the right to trial without undue delay as a bar to proceeding in a certain manner, often against the will of the accused. The most extreme example may be the case of Nyiramasuhuko before the International Criminal Tribunal for Rwanda, following a situation where one of the three trial judges was not re-elected to the Tribunal. Under an earlier version of Rule 15bis, continuation of proceedings in the long-term absence of a judge after the trial had started could ‘only be ordered with the consent of the accused’. However, this Rule was amended in May 2003 to qualify that consent. Under the new Rule 15bis(D), if the accused withheld his consent, the two remaining judges could decide to proceed with a substitute judge anyway ‘if, taking all the

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123 From the United States of America, the New York Times reports two cases where both exonerated men were wrongly convicted and imprisoned for six years. One received around $158,000 in compensation and the other received just under $500,000: Brandi Grissom, ‘Exonerated of Crimes, but Compensated Differently’ New York Times/Texas Tribune (Austin, TX, 23 September 2011) online at http://travel.nytimes.com/2011/09/23/us/exonerated-of-crimes-but-compensated-differently.html?pagewanted=all&_r=0 (last accessed 4 March 2013).
125 This was contained in the original Rule 15(E) ICTR RPE (UN Doc ITR/3/Rev.1, International Criminal Tribunal for Rwanda, 29 June 1995) and repeated as Rule 15bis(C) in the 11th amendment to the RPE (UN Doc ITR/3/Rev.11, International Criminal Tribunal for Rwanda, 31 May 2001).
circumstances into account, they determine[d] unanimously that doing so would serve the interests of justice.’ In *Nyiramasuhuko*, only the accused Nsabimana had agreed to proceeding with a substitute judge.\(^{127}\) The five co-accused objected to this course of action, which was understandable, given that 22 of the 23 witnesses who had been heard by the Chamber by that time were subject to protective measures and therefore their evidence had not been recorded; this meant that the substitute judge would not have been able to assess their demeanour by looking at the trial record.\(^{128}\) Nonetheless, Judges Sekule and Ramaroson noted that the substitute judge would have had to confirm that they had familiarised themselves with the trial record, and on that basis, held that it would be in the interests of justice to continue with a substitute judge rather than to start again with three new judges, which would have the effect of making proceedings ‘drag on endlessly’.\(^{129}\) As regards the rights of the accused, the two judges held that a recommencement of the trial with a new judge, in the manner requested by the accused, would ‘prejudice the rights of the accused more than it… [would] advance them.’\(^{130}\)

In a similar vein, the imposition of the right to a fair trial as a bar to some course of action requested by the accused can be observed in *Blagojević*, where the accused Blagojević had requested a replacement of his defence counsel.\(^{131}\) The Trial Chamber denied this request on the grounds that ‘the ensuing delay in proceedings… [would constitute] a violation of their [the accuseds’] right to an expeditious trial.’\(^{132}\) It could be argued that the Chamber also had to consider the rights of Blagojević’s co-accused, but the Chamber could have severed the case if needed to protect the rights of the co-accused. Of course, this is not to suggest that the request of the accused should have been granted; the point is, rather, that it is quite remarkable that a person’s rights should be used against them in this manner.

The reverse application of the right to trial without undue delay has carried

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\(^{127}\) *Nyiramasuhuko et al.*, Decision in the matter of proceedings under Rule 15bis(D) (n 124) 3.


\(^{129}\) *Nyiramasuhuko et al.*, Decision in the matter of proceedings under Rule 15bis(D) (n 124) paras 33-34.

\(^{130}\) *Ibid*, para 34.

\(^{131}\) *Prosecutor v. Blagojević et al.*, Decision on independent counsel for Vidoje Blagojević's motion to instruct the Registrar to appoint new lead and co-counsel, Case No. IT-02-60-T, 3 July 2003.

\(^{132}\) *Ibid*, para 113.
on into the practice of the International Criminal Court. In *Katanga*, the accused was not permitted to bring a challenge relating to admissibility after the confirmation of the charges because, according to Trial Chamber II:

the provisions of paragraphs 5 to 8 of [Article 19 of the ICC Statute]... are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase.133

The denial of the accused’s request was based on the assertion that it was in the best interests of accused persons deprived of their liberty to rule out the questions of complementarity and gravity as bars to admissibility before the International Criminal Court as quickly as possible.134 But, as Dov Jacobs has noted, this assertion was based on ‘a fictional assumption of will’, insofar as the Chamber took it upon itself to decide what was best for the accused rather than taking the actual request of the defence as an indicator of its chosen course of action.135

In the case of *Kenyatta and Muthaura*, part of the Kenya situation before the International Criminal Court, where the accused individuals requested a reconsideration of the confirmation of the charges hearing as a result of the prosecution’s foibles,136 the prosecutor attempted to argue that it would contravene the right to a fair and expeditious trial to grant this request.137 The prosecution withdrew the charges against Muthaura less than a month later,138 and at the time of writing, it remained to be seen whether the right to an expeditious trial would be used against his co-accused Kenyatta in the manner suggested by the prosecution in its submissions. It is argued that in a situation like this, where the accused is clearly aware that an alternative course of action will lengthen his or her trial but nonetheless requests it rather than continue in a manner that he or she sees as prejudicial, judges should take account of that ‘forfeit’. As ‘the conduct of the parties’ is a deciding factor in assessing whether the right to trial...
without undue delay has been breached, the courts will not fall afoul of this recognition. A parallel might be drawn here between the situation in *Nyiramasuhuko* and the numerous decisions where the accused has decided to represent themselves; even though counsel may offer a more effective defence, the accused can be seen as having been willing to take that risk, and so long as he or she does not disrupt proceedings or use his or her self-representation as a vehicle for spreading propaganda, he should be allowed to proceed in that manner. As George P. Fletcher has said, where an individual has capacity to consent and consents to something that would, without consent, be a clear breach of his rights — such as having medical treatment or testifying against themselves — that conduct can no longer be said to be a violation of the person’s rights, owing to the consent. To assert an individual’s rights as justification for denying a course of action which they willingly consented to is paternalistic, at best.

### 5.4. Conclusion

This chapter attempted to analyse the problems associated with the length of international criminal trials through the lens of the highest standards of fairness. One may conclude that, given the excessive periods of detention of over a decade in the International Criminal Tribunal for Rwanda, the highest standards of fairness have most certainly not been achieved in this respect. It should be pointed out that the International Criminal Tribunal for Rwanda is by far the worst offender when it comes to the length of trials, particularly as regards the amount of time that has passed between the close of trial and the issuance of the judgment in a number of high profile cases. However, we also discussed the *Prlić* case before the International Criminal Tribunal for the Former Yugoslavia, where two years have passed since the close of trial, with no judgment forthcoming. In this respect, the international tribunals have fallen short of the dictates of the principle of coherence. There is also a deficit of determinacy insofar as the application of primary rules on criminal responsibility is postponed for many years. Further, the

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139 See above, section 3.3.
140 This risk taken by the accused was recognised in *Prosecutor v. Krajišnik*, Decision on Krajišnik Request and on Prosecution Motion, Case No. IT-00-39-A, 11 September 2007, para 41.
interpretation of the right to trial without undue delay gives rise to some problems of consistency, as the right has proven exceptionally difficult to claim but can be blithely asserted against the will of the accused as a justification for declining to grant a request.

Over the course of the chapter, a number of important issues as they pertain to the right to a speedy trial were discussed. First, the complexity of proceedings and the unique context of international criminal law appear to serve as too ready a justification for delays which are not exactly attributable to that context. It was submitted that motions alleging a breach of the right to trial without undue delay should be given greater attention in this regard. To that end, the conduct of the parties – particularly the prosecution as regards disclosure and the judges’ own conduct in issuing judgments after the close of proceedings – could be examined in greater detail. Where an accused has spent more than a decade in detention pending judgment, and that elongated period cannot be attributed to his or her own conduct, courts should not erect an additional barrier where some special prejudice must be shown; it should be possible to make at least a prima facie case on the basis of the excessive length of detention. Finally, the practice on the ‘reverse application’ of the right to an expedient trial is somewhat fragmented, but should be reconsidered in the light of liberal interpretations of human rights and a recognition of defendants’ autonomy.
CHAPTER 6: THE USE OF WRITTEN STATEMENTS IN LIEU OF ORAL TESTIMONY AT TRIAL

This chapter introduces some quantitative analysis to the use of written witness statements in lieu of oral testimony at trial to assess whether the international tribunals have achieved the highest standards of fairness as they relate to the presentation and examination of evidence. It will be recalled that the ‘highest standards of fairness’, as interpreted by the present work, comprise of universal human rights standards on the right to a fair trial, combined with the principles of adherence, coherence and determinacy.

From the point of view of determinacy, it will be observed that the rules on this area of evidence law before the international criminal tribunals have been exceptionally fluid and changeable. A large number of amendments have been introduced over the years which have driven the tribunals from a system with a preference for orality to one which accepts all forms of evidence. Most scholarly works on these changes focus almost exclusively on the issue of admissibility, with analyses of weight being limited to perfunctory remarks stating that judges ought to be very cautious in relying on such written testimony to establish individual criminal responsibility.¹ Such caution is warranted, in order to comport with the accused’s right to examine the witnesses against him or her and to have a

¹ An early version of this chapter was presented at a conference entitled ‘Integrating a Socio-Legal Approach to Evidence’, held in University College Dublin on 19 November 2011. I would like to thank Prof. John D. Jackson and Dr. Yassin M’Boge for their invitation to speak at that event, and all present thereto for their feedback.

judgment that is not based decisively on untested witness testimony.\textsuperscript{2} This chapter seeks to fill a gap in the literature by establishing whether caution has been observed in practice, by tracing pieces of evidence admitted under the newer, more liberal rules on written witness testimony from admissibility to judgment, to establish what impact, if any, the liberal admissibility rules have had in practice and whether the critique that such rules would lead to a lowering of fair trial standards has been realised.

It may be argued that the link between rules on the admissibility of evidence, and the weight given thereto, is not squarely a fair trial rights issue to the same extent of some other rights discussed in the present work, or that one’s analysis of the issues raised by evidence rules is influenced by one’s domestic legal background. Yet, the weight given to such evidence, which is the primary focus of this chapter, is inextricably linked to the right not to have a conviction entered against one on the basis of untested evidence. As stated by the European Court of Human Rights in \textit{Lucà}:

\begin{quote}
Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused had no opportunity to have examined… the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.\textsuperscript{3}
\end{quote}

It will be shown that some Chambers have emphasised the importance of orality, but have gone on to reference witness statements, as opposed to live witness testimony, in some 80% of the judgement’s footnotes.\textsuperscript{4} Other Chambers have suggested that written testimony that was not subject to full cross-examination should not, as a matter of principle, be given less weight than oral testimony.\textsuperscript{5} On one occasion, written witness testimony was interpreted in a manner that appeared to impose a positive obligation on the defence to rebut such testimony,\textsuperscript{6} calling the principle that the burden of proof should lie with the


\textsuperscript{3} \textit{Lucà v. Italy}, ibid, para 40.

\textsuperscript{4} See below, section 6.3.1.

\textsuperscript{5} See below (n 82) and accompanying text.

\textsuperscript{6} See below (n 87) and accompanying text.
prosecution into question. Furthermore, as shall be seen, judgements are entered on the basis of ‘the totality of the evidence’, which allows an indeterminate amount of weight to be given to untested and often uncorroborated witness statements on the basis of the ‘big picture’ of the evidence as a whole. Finally, it shall be seen in section 6.2 that the admissibility of such statements raises the question of equality of arms in some tribunals, given that the more liberal rules on written statements are used by the prosecution approximately four times more often than they are used by the defence.

Nine judgments will be analysed in detail. These judgments were chosen solely on the basis of their date of issue. Cognisant of the fact that the admissibility rules have become more flexible over time, and wishing to analyse trial judgments where the most flexible admissibility rules were in force, it was decided to analyse trial judgments issued from 1 January 2011 to 1 June 2012 as a representative sample. It perhaps goes without saying that judgments for contempt offences fall outside the scope of this chapter, as do appeals judgments, which tend to give deference to the fact-finding activities of the Trial Chamber due to its proximity to the evidence and the fact that it can assess demeanour, credibility and consistency in a way that the Appeals Chamber cannot. Findings of fact may only be overturned where the Appeals Chamber holds that no reasonable trier of fact would have entered a conviction on the basis of the evidence to hand. This provided a total of one judgment from the Special Court for Sierra Leone, five from the International Criminal Tribunal for Rwanda, and three from the International Criminal Tribunal for the Former Yugoslavia. The case selection

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8 Sections 6.3.2 and 6.3.3 below.
9 See below (n.59) and accompanying text.
brought the added benefit of providing a large cross-section of Chambers composed of judges from different legal traditions, which allows us to test the hypothesis that judges can be biased towards their own procedural backgrounds.\textsuperscript{14}

There is an obvious omission in the form of the 2012 judgment in \textit{Lubanga} before the International Criminal Court,\textsuperscript{15} as the differences in the structure of that Court’s Rules of Procedure and Evidence and statutory framework do not lend themselves methodologically to an accurate comparison in the same way as the broadly similar rule structures of the other three tribunals do. However, the \textit{Lubanga} judgment will be referred to throughout as providing a point of general comparison.

6.1. \textit{BACKGROUND}

It would be difficult to point to an area of international criminal procedure where the rule amendments have been as responsive to developments in jurisprudence as that of the use of written witness statements \textit{in lieu} of oral testimony. The deletion of the principle of orality under Rule 90(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and the introduction of Rule 92\textit{bis}, which allows for the admission of written witness statements that do not go towards proving the acts and conduct of the accused, were clearly a reaction to two Appeals Chamber judgments in \textit{Kordić and Čerkez} on the admissibility of a statement of a deceased witness.\textsuperscript{16} Rule 92\textit{bis}, as originally enacted, was less strict than the Rule 94\textit{ter} on affidavits which it replaced, in that it did not require statements to be formally made in accordance with domestic law if the witness was dead — Chambers could still rule such


\textsuperscript{15} \textit{Situation in the DRC: Prosecutor v. Lubanga}, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06-2842, 14 March 2012 (‘\textit{Lubanga} Judgment’).

evidence to be admissible, having regard to other factors like reliability. The requirements that affidavits be introduced solely for corroboratory purposes and that the statements be admitted before the witness whose testimony would be corroborated testified were also removed. Over time, Rule 92bis has been amended further. The requirement of giving the other party 14 days’ notice has now been removed, as has the provision on the Trial Chamber’s ability to order the appearance of the witness for cross-examination (although, of course, the latter option is still open to the Chamber). The Special Court for Sierra Leone’s Rule 90(A) was amended to remove the preference for orality in 2003, and in 2004, adopted its own Rule 92bis. The International Criminal Tribunal for Rwanda retains a preference for orality in its Rule 90(A) although it too has adopted a Rule 92bis on prior statements not going towards the acts and conduct of the accused.

Similarly, shortly after the Appeals Chamber in Milošević held that if a witness were present in court and available to attest to the veracity of a prior statement, the prior statement could be introduced under the flexible lex generalis of Rule 89(F), subject to a right of the parties to cross-examine the witness, the judges of the International Criminal Tribunal for the Former Yugoslavia introduced Rule 92ter precisely to this effect. The Special Court for Sierra Leone has an equivalent Rule, adopted in November 2006.

In Milutinović in 2006, the International Criminal Tribunal for the Former Yugoslavia faced a request for the admission of the prior recorded testimony of two deceased witnesses — Ibrahim Rugova, who testified in the Milošević trial, and Antonio Russo, who had given a statement to investigators in the field — under Rule 92bis. The former was denied admissibility, as it went towards

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proving the acts and conduct of the accused, whereas the latter was admitted as it related to crime base evidence.\footnote{Ibid, paras 18-22.} Two months later, the Tribunal adopted Rule 92\textit{quater} relating specifically to the written statements of deceased witnesses, which are no longer precluded from going towards the acts and conduct of the accused.\footnote{Rules of Procedure and Evidence, UN Doc IT/32/Rev.39, International Criminal Tribunal for the Former Yugoslavia, 13 September 2006.} The Rugova transcript was ultimately admitted pursuant to the new Rule 92\textit{quater}.\footnote{Prosecutor v. Milutinović, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92\textit{quater}, Case No. IT-95-87-T, 5 March 2007, para 8.} The Special Court for Sierra Leone adopted its own Rule 92\textit{quater} in May 2007,\footnote{Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 May 2007.} while the International Criminal Tribunal for Rwanda retains Rule 92\textit{bis}(C) on the statements of deceased witnesses, meaning that, in principle, such testimony should not go towards proving the acts and conduct of the accused.

The most recent addition to the family of rules is 92\textit{quinquies} of the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia, which was introduced after allegations of witness intimidation in the \textit{Haradinaj}\footnote{Prosecutor v. Haradinaj et al., Judgment, Case No. IT-04-84-T, 3 April 2008, paras 22-28.} and \textit{Limaj}\footnote{Prosecutor v. Limaj et al., Judgment, Case No. IT-03-66-T, 30 November 2005, paras 13-15.} trials and following the report of a working group on contempt proceedings.\footnote{Report of the International Tribunal for the Former Yugoslavia, UN Docs A/65/205 and S/2010/413, 30 July 2010, para 23.} The new rule provides that where a witness fails to attend or appears in court but failed to testify in any substantive sense owing to ‘improper interference’ with the witness, a written transcript or statement can be introduced \textit{in lieu} of oral testimony.\footnote{Rule 92\textit{quinquies}, Rules of Procedure and Evidence, UN Doc IT/32/Rev.44, International Criminal Tribunal for the Former Yugoslavia, 10 December 2009.} As with Rule 92\textit{quater}, such evidence is not precluded from relating to the acts and conduct of the accused, although that may be taken into account as a factor in deciding admissibility. There is no equivalent rule in the SCSL and ICTR Rules of Procedure and Evidence.

The manner in which rule-making in this area has been driven by reactions to difficulties that have arisen in the day-to-day practice of international criminal procedure may lead us to question whether international criminal procedure’s standard-setting function has been readily embraced by the tribunals, or whether international criminal judges have instead viewed their procedure as being...
malleable to events as they arose rather than having an illustrative function. However, it should be noted that the International Criminal Court’s Rules of Procedure and Evidence are not amended by judges, but by a two-thirds majority of the Association of State Parties.\textsuperscript{33}

The International Criminal Court, under Article 69(4), may admit any evidence ‘taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony’.\textsuperscript{34} It is submitted that this \textit{lex generalis} is reserved principally for the admission of documentary evidence, such as ‘bar table’ evidence, whereas witness testimony is expressly governed by the \textit{lex specialis} of Article 69(2), which states that witnesses shall in principle be heard by the Chambers, save where otherwise provided by Article 68 (on witness protection measures), or otherwise in the Rules of Procedure and Evidence. The reference to the Rules, then, must be taken to explicitly limit the admission of such testimony under Article 69(2) to the provisions in Rules 67 (on video and audio-link testimony) and 68 (on prior recorded testimony), respectively. Rule 68 states that the Chamber can admit prior recorded testimony in written form (i.e. statements or transcripts) only where both parties have been given the chance to examine the witness during the recording. The witness does not need to be present in court in such circumstances. Alternatively, where the witness is present in court and does not object to the statement being entered into the record in its documentary form, the prior recorded testimony can be admitted once the prosecution, the defence and the Chamber have been given the opportunity to cross-examine him or her.

\textbf{6.2. Admissibility of Written Witness Statements}

The table that follows illustrates the full scope of evidence admitted, whether \textit{viva voce} or pursuant to one of the rules on written witness testimony, as part of the prosecution (P) or defence (D) case.

\textsuperscript{33} See further, Article 51, ICC Statute.

\textsuperscript{34} \textit{Situation in the DRC: Prosecutor v. Lubanga}, Decision on the consequences of the non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the proceedings of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Case No. ICC-01/04/01/06, 13 June 2008, para 24.
### Table 1: Forms of Witness Testimony, January 2011-June 2012

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Court</th>
<th>Viva Voce</th>
<th>92 bis</th>
<th>92 ter</th>
<th>92 quater</th>
<th>92 quinquies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Đorđević, IT-05-87/1-T</td>
<td>23 Feb 2011</td>
<td>ICTY</td>
<td>P D P D D</td>
<td>23 0</td>
<td>34 0</td>
<td>48 13</td>
<td>5 1 0 0</td>
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<tr>
<td>Gotovina et al., IT-06-90-T</td>
<td>15 April 2011</td>
<td>ICTY</td>
<td>81 57 10 10 71 51 14 1 0 0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Perišić, IT-04-81-T</td>
<td>6 Sept 2011</td>
<td>ICTY</td>
<td>35 21 3 3 37 0 11 3 0 0</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Taylor, SCSL-03-01-T</td>
<td>18 May 2012</td>
<td>SCSL</td>
<td>94 21 28 1 0 0 2 0 0 0</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Ndindilyimanana et al., ICTR-00-56-T</td>
<td>17 May 2011</td>
<td>ICTR</td>
<td>72 144 0 4 0 0 0 0 0 0</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nyiramasuhuko et al., ICTR-98-42-T</td>
<td>24 June 2011</td>
<td>ICTR</td>
<td>59 130 0 0 0 0 0 0 0 0</td>
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</tr>
<tr>
<td>Ndahimana, ICTR-01-68-T</td>
<td>30 Dec 2011</td>
<td>ICTR</td>
<td>15 30 0 0 0 0 0 0 0 0</td>
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</tr>
<tr>
<td>Gatete, ICTR-00-61-T</td>
<td>31 March 2011</td>
<td>ICTR</td>
<td>22 27 0 0 0 0 0 0 0 0</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Karemera &amp; Ngirumpatse, ICTR-98-44-T</td>
<td>2 Feb 2012</td>
<td>ICTR</td>
<td>29 124 16 98 0 0 0 0 0 0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table notes:**

1. In Đorđević, 29 of the 34 prosecution witnesses whose testimony was admitted under Rule 92bis were called for cross-examination.
2. Seven witnesses were called to testify *viva voce* by the Chamber in Gotovina.
3. In Perišić, one of the three prosecution 92bis witnesses was called for cross-examination.
4. The 28 92bis prosecution witness statements admitted in Taylor were admitted subject to the prosecution making the witnesses available for cross-examination by the defence. The defence waived its right to cross-
examination for one witness, but 27 92bis witnesses were cross-examined.

5. 16 of the 98 Rule 92bis witnesses admitted for the defence in Karemera & Ngarumpate were ordered to appear for cross-examination.

6. In Taylor, other documentary evidence, such as code-cables and other contemporaneous documents which would normally be the purview of Rule 89(C) were admitted under Rule 92bis. As these were not witness statements or prior recorded testimony, they have not been analysed in the course of this chapter.

7. The testimony of 130 defence witnesses in Nyiramasuhuko et al. and 144 defence witnesses in Ndindiliyimana et al. might seem like a high volume, but this can be attributed to the large numbers of co-accused: six in Nyiramasuhuko et al. and four in Ndindiliyimana et al.

8. In Nyiramasuhuko et al., the accused Kanyabashi’s request to have the statements of defence witnesses D-22-A and D-30-S entered to the record under Rule 92bis was denied.

9. According to the Gatete Judgment (n 12) para 80, the prosecution had relied upon several prior statements in its closing brief that it had not sought to introduce to the record under Rule 92bis — the Chamber held that it would not rely on those statements as proof of their contents, given that they were not admitted under Rule 92bis and in any event, did not meet the formal requirements of the Rule. As the statements were introduced under Rule 89(C) they were just used for the purposes of assessing the credibility of the witnesses who gave them, when relevant.

10. In Gatete, both the prosecution and the defence had sought to have evidence entered into the record under Rule 92bis, but their requests were denied.

A few preliminary observations may be made on the basis of the above figures. The most notable trend is the conspicuous absence of written witness statements in the record of recent cases before the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda (with the exception of the Karemera trial), in comparison to the International Criminal Tribunal for the Former Yugoslavia. Of course, the structure of the Rules of Procedure and Evidence accounts for some of this divergence — the International Criminal Tribunal for Rwanda has only adopted Rule 92bis of the more recent rule amendments, and retains a preference for orality in Rule 90(A). However, this cannot be the only factor when one considers the infrequent use of Rule 92bis, and the fact that the

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37 Prosecutor v. Gatete, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to postpone filing of Closing Briefs, Case No. ICTR-00-61-T, 24 June 2010, paras 16-20.
Special Court for Sierra Leone has adopted all but 92quinquies of the newer Rules in this area, and has shown a similar degree of conservatism. Indeed, the only request to use Rule 92ter before the Special Court for Sierra Leone was rejected.38 We might ask, then, why the Karemera trial stands as an outlier amongst contemporaneous International Criminal Tribunal for Rwanda trials in its use of Rule 92bis statements. The argument that a Chamber’s willingness to admit written testimony hinges on the legal background of the judges holds some limited weight in this instance. Trial Chamber III in the case was initially composed of Judges Byron (St. Kitts and Nevis), Short (Ghana) and Joensen (Denmark), two of whom are from broadly common legal system backgrounds, while Denmark has a largely inquisitorial model. In an early decision on Rule 92bis, Trial Chamber III, so constituted, denied the prosecution request for the admission of 71 written statements of rape witnesses in lieu of oral testimony,39 on the basis that this evidence sought to establish the widespread and systematic nature of the rapes allegedly committed by the accused’s subordinates or co-perpetrators.40 These allegations, the Chamber held, were ‘so pivotal’ to the prosecution case that it would be unfair to admit the evidence without the opportunity for cross-examination.41 This was a rather narrow interpretation of the ‘acts and conduct’ provision, which generally accepts that the acts and conduct of one’s subordinates can be admitted under Rule 92bis.42 Later, when Judge Short was replaced by Judge Kam of Burkina Faso (which can be loosely classified as a civil law system), the Chamber did appear to become more open to the admission of written statements; indeed, the December 2006 judgment on the admissibility of written statements going towards the charge of rape as a crime against humanity was ‘reconsidered’ in September 2007 as a result of a number of changes in circumstance. These changes were: that oral witnesses had testified in court on these counts; that the prosecution was now

39 Prosecutor v. Karemera et al., Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, Case No. ICTR-98-44-T, 11 December 2006.
41 Ibid, para 20.
42 See e.g. Prosecutor v. Milošević, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92bis, 21 March 2002, para 22; Prosecutor v. Galić, Decision on Interlocutory Appeal Concerning Rule 92bis, Case No. IT-98-29-AR73.2, 7 June 2002, para 15.
happy to accept cross-examination of these 92bis witnesses if the Chamber so ordered (in contrast to its 2006 ‘all or nothing’ approach) and that the renewed request of the prosecution was significantly narrowed in scope as well as copper-fastened by more evidence on the trial record than had been contained at the time of its original request. A reverse in position on the ‘acts and conduct’ standard for the rape witness statements was enacted, with the Chamber noting that it did ‘not agree with the Defence contention that there are elements of the statements… which are so pivotal to the Prosecution case… that their admission would be unfair.’ 16 witness statements, all of which were ultimately relied upon in the Trial Judgment, were admitted without being subject to cross-examination, although three had portions redacted, and one later testified orally. In all likelihood, the change in the composition of the Chamber is likely to be but one factor leading to this divergence in interpretation; the fact that corroborating oral testimony had already been produced by the time of the second decision was likely to have been as or more decisive to the Chamber’s change of position.

Moreover, the composition of the Chamber cannot account for the preponderance of written statements as a whole in this case; the defining feature is the fact that the defence requested the admission of more Rule 92bis statements than in any other case studied. There were issues throughout the trial, with the length of the defence witness list, particularly with the accused Nzirorera who had initially proposed calling 180 witnesses viva voce and submitting 47 statements under Rule 92bis. Having been ordered to reduce his list of witnesses to 55, Nzirorera sought to admit some 127 witness statements under Rule 92bis in December 2008. 20 statements were admitted into evidence, and a further 60

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43 Prosecutor v. Karemera et al., Decision on Reconsideration of Admission of Written Statements and Admission of the Testimony of Witness GAY, Case No. ICTR-98-44-T, 28 September 2007.
44 Ibid, para 23.
45 Karamera Judgment (n 12) paras 1337-1424.
46 Witness GAY: Karamera Judgment (n 12) paras 1355-1360; 1371.
47 See Prosecutor v. Karemera et al., Decision on Reconsideration of Admission of Written Statements and Admission of the Testimony of Witness GAY (n 43).
49 Ibid, para 11.
50 Prosecutor v. Karemera et al., Decision on Joseph Nzirorera’s Motions for Admission of Written Statements and Testimony, Case No. ICTR-98-44-T, 15 July 2009, para 1 (“Karemera Written Statements Decision”). Nzirorera also lodged separate motions for individual statements to be entered under Rule 92bis; see, for example, Prosecutor v. Karemera et al., Decision on Joseph Nzirorera’s Submission of Rule 92bis Certified Statements of Gratien Kabiligi, Case No. ICTR-98-44-T, 7 April 2010; Prosecutor v. Karemera et al., Decision on Joseph Nzirorera’s Motion for
were declared admissible, subject to certification. The accused produced certified statements for 44 witnesses. Several statements were denied admissibility because of their limited relevance, probative value or reliability, while some 25 were rendered inadmissible by virtue of the fact that they went towards the acts and conduct of the accused, but as a whole, the Chamber showed a relatively lenient approach to admissibility, which combined with the defence’s extensive request, led to a greater admission of 92bis statements than observed in other trials. Of the 61 witness statements (excluding transcripts) declared admissible, however, only three — those statements of witnesses Kagaba, Rukerikibaye and Kahihura — were referenced in the trial judgment, raising doubts as to the relevance of the admitted material.

We can also observe from the table that the Rules do not always operate as one might expect them to from a literal reading of the Rules of Procedure and Evidence. For instance, Rule 92bis allows for the admission of written testimony that does not go towards the acts and conduct of the accused without cross-examination, although Rule 92bis (C) of the International Criminal Tribunal for the Former Yugoslavia’s Rules of Procedure and Evidence and Rule 92bis (E) of the International Criminal Tribunal for Rwanda’s Rules permit the Trial Chamber to decide that the witness must appear for cross-examination. There is no equivalent in the Rules of Procedure and Evidence of the Special Court for Sierra Leone. None of the relevant sets of Rules indicate what factors might be taken into account in deciding whether to require cross-examination. However, the Yugoslav and Rwanda Tribunals’ Rules note factors like the public interest in


Karemera Written Statements Decision (n 50) para 115 and Prosecutor v. Karemera et al., Reconsideration of and Corrigendum to the Chamber’s Decision on Joseph Nzirorera’s Motions for Admission of Written Statements and Testimony, Case No. ICTR-98-44-T, 31 July 2009.


Karemera Written Statements Decision, supra note 50, paras 10-23.

Karemera Written Statements Decision, supra note 50, para 9.

For a critique of the free proof approach, which allows ‘almost limited galaxies’ of material to be admitted to the record which is ultimately of limited value at the final determination, see Murphy (n 1) 540-544.
hearing the evidence orally, fair trial considerations and unreliability as reasons for why the Trial Chamber might decline to admit evidence under the Rule;\(^{56}\) the same factors could presumably be taken into account in deciding whether to require cross-examination, but this is not explicit.

The argument is frequently raised that, given the fact that it does not require cross-examination, Rule 92\textit{bis} has the potential to open a Pandora’s box — as many international criminal convictions are based on extended forms of liability, there is a risk that seemingly sanguine ‘crime base’ evidence may be decisive in the ultimate verdict.\(^{57}\) However, we can see that a large proportion of Rule 92\textit{bis} testimony was subject to cross-examination by the non-moving party,\(^{58}\) which makes it more akin to Rule 92\textit{ter} testimony than to the form originally envisioned for Rule 92\textit{bis}. Rule 92\textit{bis} (C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia states that the Rule 92\textit{ter} procedure will apply if the witness is called to testify. Of the total number of 207 92\textit{bis} witnesses across the three tribunals listed in the table above, 81 were called for cross-examination.

It is clear that Rule 92\textit{ter}, in turn, has been greatly utilised by the International Criminal Tribunal for the Former Yugoslavia, where Rule 92\textit{ter} testimony outweighed the use of \textit{viva voce} testimony for the prosecution in all trials observed. Indeed, the fact that such a high preponderance of testimony under Rules 92\textit{bis} and 92\textit{ter} (some 65\%) was introduced by the prosecution in the ICTY cases studied may lead to concerns on the equality of arms principle. In a decision on referrals to Rwanda, the International Criminal Tribunal for Rwanda held that it would be a breach of equality of arms if the majority of prosecution witnesses were heard in person and the majority of defence witnesses testified via video link.\(^{59}\) This increased utilisation of written statements without examination-in-chief may hamper the tribunals’ purported goal of setting an historical record,\(^{60}\) as

\(^{56}\) ICTR and ICTY Rules 92\textit{bis}(A)(ii).

\(^{57}\) See, for example, Jackson (n 1) 29-30, and Patrick L. Robinson, ‘Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY’ (2005) 3 JICJ 1037, 1043-1046.

\(^{58}\) See Taylor Judgment (n 11); see also Karemera Written Statements Decision (n 50) para 25.


it removes much of the material that would otherwise be contained in transcripts on the Tribunals’ websites and renders it inaccessible to victims and other interested parties.

Again, some flexibility in the application of the rules has been observed — in Đorđević, for example, the motion to admit the testimony of witness Haxhiu was granted in part, but the witness was ordered to appear for examination-in-chief as regards one contentious meeting discussed in his statement.61 While in theory, Rule 92ter procedure ought to protect both the expedition of the trial and the rights of the accused, but it has not been immune from critique. Rule 92ter has been criticised for limiting the orality of proceedings in the sense that the first time the court hears a witness is in the context of cross-examination, as there is no initial examination, which may in turn render credibility assessments more difficult.62 In Milutinović, the Trial Chamber urged caution insofar as Rule 92ter statements had been tendered just days before the witness appeared in court to give evidence, and some statements had been altered quite significantly in advance of the witness’s appearance, which had the potential of hampering the other side’s right of cross examination.63 As neither party claimed to have suffered prejudice as a result, the Trial Chamber did not take any further action on the issue, but it did note that such last-minute amendments to witness statements were ‘generally unsatisfactory’.64 This issue of last-minute amendments to Rule 92ter statements appears to have persisted in the International Criminal Tribunal for the Former Yugoslavia. In Đorđević, the defence objected to last-minute changes made to witness Neraj’s testimony days before testifying, and to the introduction of additional materials (namely, a transcript of the witness’s testimony from Milutinović) being entered along with this witness’s statement under Rule 92ter, claiming that they had not received notice of this, thereby hampering the possibility of full cross-examination on the transcript.65 The objection was not upheld; indeed, the Milutinović transcript had been explicitly
mentioned in the admissibility decision.\(^66\)

The International Criminal Tribunal for Rwanda does not have a Rule 92\textit{quater}, but its Rule 92\textit{bis}(C) allows the admission of the statements of deceased witnesses provided that such testimony does not go towards the acts and conduct of the accused. Three statements in \textit{Karemera} were admitted under Rule 92\textit{bis}(C),\(^67\) although they were not ultimately referenced in the final judgment. Rule 92\textit{quater} saw the admission of two witness statements for the prosecution in the \textit{Taylor} trial before the Special Court for Sierra Leone. Admissibility under Rule 92\textit{quater} before the International Criminal Tribunal for the Former Yugoslavia was an altogether more common occurrence. It was noted with interest that one of the most criticised rules in the International Criminal Tribunal for the Former Yugoslavia’s procedural framework, Rule 92\textit{quinquies},\(^68\) was not used in any of the cases observed.

Lastly, it must be noted that a body of material entered into the record under Rule 89(C) has been excluded from the scope of this chapter. The reasoning for this was that Rule 89(C) ought to be, and generally is, the preserve of documentary evidence — that is, material that is contemporaneous to the events in question, and not statements made after the fact by witnesses, whether in court or in the field.\(^69\) Statements admitted under this Rule should only be used to go towards proving the credibility of the witness, and should not be used as proof of their contents.\(^70\) However, that principle has not always been observed in practice.\(^71\) For example, the evidence of witness Kabashi from the \textit{Limaj} trial was admitted under Rule 89(C) after the witness stated that he could not confirm his testimony from that trial (thereby precluding it from the remit of Rule 92\textit{ter}).

\(^{66}\text{Prosecutor v. Đorđević, Decision on Prosecution’s Motion for Admission of Evidence pursuant to Rule 92\textit{ter} (n 61).}\)
\(^{67}\text{\textit{Karemera} Written Statements Decision (n 50) paras 105-111.}\)
\(^{68}\text{See e.g. Rohan (n 1) 523-524.}\)
\(^{69}\text{See e.g. \textit{Prosecutor v. Nizeyimana}, Decision on Nizeyimana Defence Motion for Recall of Prosecution Witness AJP or Admission of Documentary Evidence, Case No. ICTR-00-55C-T, 7 July 2011, para 10; \textit{Prosecutor v. Brima et al.}, Decision on Joint Defence Motion to Exclude All Evidence from Witness TFI-277 Pursuant to Rule 89(C) and/or Rule 95, Case No. SCSL-04-16-T, 24 May 2005, para 22; \textit{Prosecutor v. Naletilić and Martinović}, Decision on the Admission of Witness Statements into Evidence, Case No. IT-98-34-T, 14 November 2001; \textit{Prosecutor v. Galić}, Decision on Interlocutory Appeal Concerning Rule 92\textit{bis} (C) IT–98–29–AR73.2, 7 June 2002, para 31.}\)
\(^{70}\text{\textit{Prosecutor v. Kanyabashi}, Decision on Kanyabashi’s Three Motions to Vary His List of Witnesses and to Admit Written Statements under Rule 92\textit{bis} (n 36).}\)
\(^{71}\text{E.g. \textit{Prosecutor v. Haradinaj et al.}, Decision on Joint Defence Oral Motion pursuant to Rule 89(D), Case No. IT-04-84\textit{bis}-T, 28 September 2011, para 11.}\)
Trial Chamber confirmed that the testimony went to the acts and conduct of the accused, but stated that it would need to be corroborated if it were to be relied upon in coming to the final verdict. Having regard to the low standard of corroboration, as discussed in section 6.3.3 below, whereby untested written statements can be corroborated by further written statements, this assurance may have been of little comfort to the affected defendants.

6.3. WEIGHT GIVEN TO WRITTEN WITNESS STATEMENTS

It is worthy of note that many of the judgments analysed emphasised the principle that admissibility had no bearing on weight; in other words, the fact that a piece of evidence was admitted to the record did not mean that the evidence in question would be relied upon in the final judgment.

6.3.1. The continued value of oral testimony

Almost all of the judgments from the International Criminal Tribunal for Rwanda studied reiterated a preference for oral witness testimony and recalled the Appeals Chambers principle that prior witness statements should not normally be admitted as proof of their contents. This position is of little surprise as that preference remains in the Tribunal’s Rules of Procedure and Evidence; the Trial Chamber in Nyiramasuhuko noted that this preference was ‘general, though not absolute’. The preference for oral testimony was not alien to the other Tribunals, however. In Gotovina, the case which made the most extensive use of Rule 92ter, the Chamber ‘expressed a strong preference that […] important evidence central and critical to the case be elicited orally from a witness in court.’ The Chamber clearly did not regard Rule 92ter as eliciting evidence-in-chief from a witness in this regard, for on 24 April 2008, the following instructions were given to the prosecution: ‘The Trial Chamber expects the Prosecution… to clarify as necessary

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72 Ibid, para 13.
73 Taylor Judgment (n 11) para 202; Đorđević Judgment (n 13) para 12; Gatete Judgment (n 12) para 18; Gotovina et al. Judgment (n 13) para 45.
74 Ndahimana Judgment (n 12) para 45; Nyiramasuhuko et al. Judgment (n 12) para 177.
75 Nyiramasuhuko et al. Judgment (n 12), para 181.
76 Gotovina et al. Judgment (n 13) para 16.

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portions of the statement, without eliciting the same evidence *viva voce*. Nevertheless, the 122 witnesses who were cross-examined and whose testimony was entered pursuant to Rule 92ter appear to have had a remarkable impact on the trial judgment. 121 of these witnesses are cited in the judgment across a total of 6173 footnotes. To put that figure into context, the two-volume judgment contains a total of 9606 footnotes. Volume one of the judgment, which is principally comprised of the factual findings in the case, cites 106 Rule 92ter witnesses a total of 4520 times; the total number of footnotes in that volume is 5757, indicating that the evidence of witnesses introduced under this rule were quite decisive in establishing the guilt or innocence of the accused. Thus we see that while in principle, the Trial Chamber might have expressed a preference for full *viva voce* testimony, Rule 92ter evidence had a far from insignificant effect on the ultimate judgment.

The *Perišić* Trial Chamber explicitly stated that the Rule 92ter testimony before it was considered in the same manner as *viva voce* testimony would have been. In the light of the often inadequate amount of time given to parties to prepare for cross-examination, as discussed above, and given the fact that some important details might be missed in a reading of the statements, one wonders whether a more discerning eye ought to be cast over witness statements admitted in this manner. In *Perišić*, defence counsel Mr. Guy-Smith remarked, ‘I think they [the prosecution] changed… [the status of the witness] again. Yesterday’s *viva voce* is today’s 92ter’. When it came to the weight to be attached to Rule 92bis evidence, *Perišić* adopted a lowest common denominator approach, stating that there was no reason to presume as a general rule that Rule 92bis testimony should bear less weight than *viva voce* testimony. However, the Trial Chamber emphasised, the fact that it had not been subject to cross-examination would obviously be a factor to be considered in weighing the evidence.

Generally in the judgments observed, Rule 92bis testimony was

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79 *Perišić* Judgment (n 13) para 42.
80 See above (n 62) and accompanying text.
82 *Perišić* Judgment (n 13) para 41.
83 *Ibid*. See also, section 6.2.3 below.
corroboratory to oral evidence. An exception was observed in *Karemera*, however, where the only evidence of rape in the Butare *préfecture* that had been introduced by the prosecution was a single 92*bis* witness statement.\(^{84}\) The charges of rape at the other crime bases were supported by a mix of oral testimony, written statements and adjudicated facts from the *Akayesu, Niyitegeka* and *Musema* trials which the Trial Chamber had taken judicial notice of.\(^{85}\) The Chamber held that the single statement had been ‘corroborated by the pattern of evidence from the other *préfectures*.\(^{86}\) The Chamber was further swayed by the fact that the defence had ‘not sought to rebut her evidence.’\(^{87}\) This appears to be a very dangerous precedent indeed as regards both the burden and standard of proof. It appears to be something of a stretch to suggest that just because a pattern of conduct was proven in regions X and Y, this goes towards proving the same conduct in region Z. Moreover, the fact that the Chamber was swayed by the defence’s failure to rebut a single piece of evidence may be taken as imposing a positive burden on accused persons to counter the evidence against them, which goes beyond the presumption of innocence principle.

In spite of judicial pronouncements affirming the continued value of orality, therefore, we can identify a distinct shift away from its serving as a cornerstone principle in the presentation of evidence. Not only does admitted witness testimony in written form now outnumber oral testimony before the International Criminal Tribunal for the Former Yugoslavia by a ratio of almost two to one, the statistics from *Gotovina* discussed at the start of this section show that orality may be more a desirable goal than a continuing foundational principle when it comes to evidence and proof before the international tribunals. This is not unique to the International Criminal Tribunal for the Former Yugoslavia — the International Criminal Tribunal for Rwanda in *Karemera et al.* showed a worrying flexibility when it came to untested, uncorroborated witness testimony, and highlighted one of the real dangers of a broad admissibility regime — allowing proof by pattern as opposed to defined facts. This pattern-based approach to establishing culpability is further illustrated by what can be called the ‘totality of the evidence’ approach, another theme that ran throughout the judgments

\(^{84}\) *Karemera* Judgment (n 12) paras 1408-1410.
\(^{85}\) *Ibid*, paras 1337-1424.
\(^{86}\) *Ibid*, para 1411.
\(^{87}\) *Ibid*. 

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analysed.

6.3.2. The ‘totality of the evidence’ approach

One of the arguments in favour of a broad admissibility regime is that it allows judges to make an assessment based on the ‘big picture’ which is sketched through thousands of individual pieces of evidence. The other side of the coin, however, is that it is often difficult to assess exactly how much weight is given to a piece of evidence in the absence of an explicit pronouncement on the credibility or reliability of that witness or evidence. In Đorđević, for example, following a pronouncement that, on occasion, the Chamber accepted evidence that contained inconsistencies or contradictions while rejecting evidence that was apparently consistent with other pieces of evidence, the Chamber claimed to have ‘acted in light of the other evidence on the issue’.

Similar approaches to the evidential record ‘as a whole’ were identified in Nyiramashuko, and Perišić. Further to the Appeals Chamber decision in Brđanin, the right to a reasoned verdict does not stretch to a right to know whether and on what basis a Trial Chamber found one piece of evidence to be more reliable or authentic than another piece.

Assessment on the totality of the evidence is logical, in a sense, because the judge at the end of trial is in the optimal position to assess the evidential record as a whole. This approach does, however, raise a number of questions. The first is whether the admissibility rules really suit this approach, which may be likened to the intime conviction du juge standpoint in inquisitorial legal systems. Many of the admissibility rules on written witness testimony in lieu of viva voce evidence were introduced with a view to aiding expedience, but have ironically on occasion added an extra layer of complexity in calling for submissions on whether a statement goes to the acts and conduct of the accused, whether cross-examination would be in the interests of justice, and so forth, to such an extent that at times, it would have been more expedient to call the witness to testify in person. In the light of this paradox, we might question the wisdom of a complex admissibility process that has no bearing whatsoever on weight, and that leaves it

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88 Đorđević Judgment (n 13) para 18.
89 Nyiramashuko et al. Judgment (n 12) paras 190, 343, 391, 569.
90 Perišić Judgment (n 13) para 41
open to judges to completely disregard admitted evidence. The ‘totality of the evidence’ approach might be well suited to a legal culture that embraces the free admission of almost all evidence, but it appears to be at odds with a statutory framework that demands that certain criteria be met before a piece of evidence can even come before the judges.

The observer might also question the extent to which a ‘totality of the evidence’ approach can be implemented in a context where the totality of the evidence comprises of tens of thousands of pages of transcript, thousands of pieces of evidence, and a trial period that often stretched into the hundreds of days. For example, as well as the witnesses outlined in the table in section 2 above, the Đorđević Trial Chamber also received 2518 pieces of documentary evidence ‘from the bar table’ and the trial record encompasses 14534 pages of transcript. The Lubanga judgement illustrates this point: there was so much evidence admitted before the Chamber that the parties were asked to make explicit which witnesses and pieces of testimony they wanted the Trial Chamber to focus on in making its judgment, and they were warned that if they failed to do so, they ran the risk of having relevant pieces of evidence overlooked.92

Moreover, this approach shows that admissibility decisions do influence the final judgment, because written witness testimony submitted under any given rule can add to the ‘big picture’ formed by the judges in their final assessment, regardless of whether that testimony has been cross-examined, goes to the acts and conduct of the accused, or is reliable beyond the bare ‘some indicia of reliability’ standard needed for admissibility.93 In Gotovina, a reverse burden was imposed insofar as it was held that the non-moving party needed to demonstrate that the statement was unreliable to object to its admission.94

6.3.3. Corroboration and consistency

Corroboration is central, but not imperative, to the assessment of Rule 92quater testimony. The Perišić Trial Chamber stated that corroboration was not a formal

92 Lubanga Judgment (n 15) paras 95-97.
93 See e.g. Prosecutor v. Đorđević, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92quater, Case No. IT-05-87/1-T, 5 February 2009, paras 17-19 and 22-24 (on ‘indicis of reliability’).
requirement for Rule 92\textit{quater} testimony, but that uncorroborated testimony admitted under this Rule could not solely form the basis for a conviction.\footnote{Lubanga Judgment (n 15) para 44.} A number of factors were identified by Gotovina for assessing the weight of such statements; these included the circumstances in which the statements were made or recorded, whether they were consistent with other statements, and whether they had been subject to cross-examination.\footnote{Gotovina \textit{et al.} Judgment (n 13) para 16.}

The Trial Chamber in Perišić indicated that Rule 92\textit{bis} testimony did need to be corroborated, but then corroborated the 92\textit{bis} statement of witness Deronjic with the testimony of two other untested witness statements,\footnote{Perišić Judgment (n 13) paras 665-667.} indicating that if corroboration is needed, the standard of proof is not very high. Gotovina stated that corroboration would be taken into account in its assessment of the evidence,\footnote{Gotovina \textit{et al.} Judgment (n 13) para 16} but did not appear to suggest that an absence of corroboration would necessarily render a Rule 92\textit{bis} statement of less value to a Chamber. As discussed above,\footnote{Section 6.2.1 above.} Karemera allowed a witness statement admitted under Rule 92\textit{bis} to stand as proof of a matter without corroboration from any other piece of evidence before the Chamber, aside from a consistent pattern of conduct derived from the fact that similar events had been adequately evidenced in other \	extit{prefectures}.

Consistency can be a factor in assessing Rule 92\textit{ter} testimony, where an initial statement forms the basis for cross-examination.\footnote{Prosecutor v. Đorđević, Decision on Prosecution’s Motion for Admission of Evidence pursuant to Rule 92 \textit{quater}, Case No. IT-05-87/1-T, 5 February 2009, para 9.} In Nyiramashuko \textit{et al}, the Chamber stated that consistency between earlier statements and the oral testimony given in court was not decisive or indicative of the truth — if somebody gives a dishonest account twice, it doesn’t make the account any less dishonest — but that inconsistencies might be taken as an indicator that the testimony is not fully accurate.\footnote{Nyiramashuko \textit{et al.} Judgment (n 12) paras 178-180.} The Trial Chamber in Đorđević took a rather more optimistic view of inconsistent accounts, pointing to the fact that different questions under cross-examination might lead to different answers, and therefore inconsistency was not necessarily fatal to the usefulness of the inconsistent testimony. Rather, the Chamber said, such a situation would call for a ‘careful scrutiny’ when
weighing the values of the witness’s testimony.\textsuperscript{102}

It is apparent from the above that uncorroborated or inconsistent witness testimony is not precluded from going towards a final conviction; corroboration and consistency are merely factors to be taken into account when weighing the evidence. The argument that admissibility has no bearing on weight becomes less convincing when it is noted that no further corroboration, or even internal consistency, is strictly required. It would appear, therefore, that admissibility decisions can and do have an impact on final judgments.

\textbf{6.4. Conclusion}

This chapter sought to fill a gap in the literature on written witness statements \textit{in lieu} of oral testimony at the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone by stepping beyond admissibility decisions to assess the weight given to such statements. The chapter did not claim to give an overall assessment of the trajectory of the move towards increased use of written testimony over time, but rather a snapshot of the impact of new admissibility rules at one point in time, which shows that admissibility decisions do have an impact on the final judgment. Further research would be needed to assess the overall impact of these new Rules.

The statistics produced do show that, perhaps surprisingly, the more flexible rules on written witness testimony that have been introduced in recent years have been used relatively infrequently, particularly at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. This suggests that some of the criticisms of the newer rules may have been premature and may illustrate that the judges have shown increased deference to the need to set the highest standards of fairness. However, this trend is more likely to be attributable to the tradition of orality in the affected regions and to the conduct of the parties than to any conscious judicial decision.

At the International Criminal Tribunal for the Former Yugoslavia, on the other hand, written testimony far outnumbers its oral counterpart before Trial Chambers, and while lip service is occasionally paid to the continuing importance

\textsuperscript{102} Đorđević Judgment (n 13) para 14.
of orality in trial procedures, the principle that oral testimony bears greater value than written has clearly diminished in recent years, illustrating that the admission of written statements in lieu of oral testimony may have broader implications.

Two themes were identified in the assessment of the weight of written testimony before the tribunals which may lead us to re-examine the continuing significance of admissibility rules before the international tribunals. The first is that the ‘totality of the evidence’ is said to have been assessed as a whole, meaning that evidence which is admitted into the record that might not be decisive by itself can add to the bigger picture in reaching the final verdict. The second is that written witness testimony need not be corroborated or consistent with other testimony from that witness to be relied upon. These themes cast some doubt on the continuing position that admissibility has no bearing on weight, and may suggest the need for enhanced caution when making admissibility decisions in the future.

These doubts on the impact of admissibility decisions on the ultimate outcome of proceedings raise difficulties under Franck’s principle of adherence – that is, consistency between primary and secondary rules. If the secondary rules of procedure can impact on the right of the accused to test the witnesses against him or her, the lenience that has developed as regards the admissibility of written witness testimony over the years of the tribunals’ development might warrant closer consideration in order to achieve the highest standards of fairness.
CHAPTER 7: CONCLUSION

This work set out to examine the standards of due process embraced by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court. In the context of domestic and international convergence on the key components of the right to a fair trial, it asked to what extent these international criminal tribunals could be said to bear a standard setting function, which could set an example for the conduct of criminal trials in accordance with the highest due process standards. The study sought to answer two key questions:

1. Should international criminal tribunals have a standard-setting function in enunciating the parameters of international fair trial rights?
2. Do the tribunals studied, in practice, set the highest standards for fair trial rights?

In asking these questions, the present work built upon the extensive and burgeoning literature on fair trial rights in international criminal proceedings by undertaking an exposition of the wider implications of the realisation of the right to a fair trial by international criminal tribunals. Many of the key works on fair trial rights in international criminal law have assessed the tribunals’ procedural frameworks against human rights,1 domestic procedural standards,2 or their own statutory instruments by treating international criminal tribunals as sui generis legal regimes,3 but have given the broader theoretical reasons as to why tribunals should espouse the right to a fair trial only a perfunctory analysis. Indeed, some leading authors have expressed the view that these tribunals do not need to set leading examples on every aspect of the right to a fair trial, but rather just need to

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2 Christoph J.M. Safferling, Towards an International Criminal Procedure (Oxford: OUP, 2001)
be ‘fair enough’. The work has hopefully furthered the debate by justifying the need for international criminal tribunals to set the highest standards of fairness, and by examining the extent to which the tribunals’ standard-setting function has been realised in regards to a number of distinct areas of procedure, which were examined in detail.

It is apposite to recall the meaning of the term ‘the highest standards of fairness’. This is a term which is commonly invoked by organs of the tribunals themselves, both in judicial decisions and in public pronouncements of their actors. In attempting to enunciate what this term could mean, some of key theories on fairness in the law were examined but were found to be difficult to apply to due process standards in that many theories were developed with distributive justice or administrative procedures in mind. It was submitted that the notion of ‘fairness’ in the context of the fair trial could survive as a standalone ideal, comprised of a number of minimum guarantees as enunciated in near-universal human rights and domestic constitutional provisions and reflected in the statutes of the international criminal tribunals. But, as acknowledged by Mégret, human rights standards are under determinative in that they outline minimum standards which must be embodied, as opposed to outlining how the best procedural models should be designed. Therefore, the author chose to combine these minimum human rights standards with distinct elements of Franck’s theory of legitimacy, which was the primary basis for his later work on fairness in international law. These elements are: determinacy, which demands reasoned decisions and clarity on the meaning of rules; coherence, which requires rules to be applied in a consistent manner, and adherence, which necessitates consistency between primary and secondary rules. Franck’s fourth element of legitimacy (symbolic validation) and his additional component of fairness (distributive justice) were seen as being of lesser importance to the present work, for reasons

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5 See above, section 2.2.3.
6 See above, chapter 1 (n 136).
7 See above, section 1.4.
9 See above, section 1.4.
discussed in chapter 1 above. Some key areas of international criminal procedure were examined through the lens of this theoretical framework.

A key theme throughout the work was that the tribunals have for the most part been cognisant of international standards on the right to a fair trial, but that the application of these standards has sometimes been inconsistent. One might question whether consistency is a viable goal in the examination of four tribunals, located in different parts of the world, at different stages in their development. However, it will be recalled that the inconsistency in the application of fair trial standards was even witnessed between different chambers of the same tribunal. It is hoped that as the International Criminal Court becomes the primary international criminal tribunal in the near future, its practice will apply the highest standards of fairness in a consistent manner, in order to enhance the coherence and determinacy of its rules. In this regard, the main findings of the present work on its two key research questions will be instructive.

7.1. FINDINGS

7.1.1. Should international criminal tribunals have a standard-setting function in enunciating international fair trial rights?

The author attempted to demonstrate the work’s core hypothesis — that international criminal tribunals should in fact bear a responsibility to set the highest international standards of fairness in their procedures — with reference to a number of factors. First, quite simply, the tribunals have consistently reminded observers, through their case law and external communications, that they offer defendants the highest standards of fairness.11 Second, an examination of the purported goals of international criminal law, as reflected in the tribunals’ founding documents, revealed the spread of the rule of law and the strengthening of domestic criminal justice systems to be a key aim.12 These goals are clearly linked to the need to set the highest standards of fairness; if anything less were to be developed as acceptable procedural standards, some domestic states with

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11 See above, section 2.2.3.
12 See above, section 2.1.
malevolent intentions could rely on those lower standards as justification for their unfair practices.\textsuperscript{13} This danger is not illusory; a number of examples where the International Criminal Tribunal for the Former Yugoslavia’s early practices on the use of anonymous witnesses and the acceptance of hearsay evidence before the Tribunal were used as justification for domestic due process breaches were discussed in Chapter 2.\textsuperscript{14} In addition, of course, the higher the standards of fair trial embraced by the tribunal, the lower the risk is of wrongful conviction.\textsuperscript{15} Chapter 2 also discussed the rules relating to complementarity and \textit{ne bis in idem} before the International Criminal Court, and Rule 11\textit{bis} transfers before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It was posited that the fact that these rules permit the international tribunal to assess whether the domestic system enshrines or enshrined international fair trial procedures highlights their role in enunciating the fairest trial practice.\textsuperscript{16} These elements of sections 2.1 and 2.2, when taken as a whole, were argued to provide clear evidence to the position that international criminal tribunals need to set the highest standards of fairness.

For the purpose of testing the hypothesis, a number of arguments that may be made against it were explored.\textsuperscript{17} Some of these arguments were garneried from the existing literature on the subject, and included protestations based on the tribunals’ resources, the complexity of the cases, and the seriousness of the crimes they prosecute. In response to these counter-arguments, a number of factors were pointed to, including: the huge budgets allocated to the tribunals proportional to the number of cases they prosecute, the fact that complex cases, such as white collar crime, are prosecuted in domestic contexts and states are still required to implement the full panoply of fair trial rights in these cases,\textsuperscript{18} and the point that human rights are applicable to all persons, regardless of the seriousness of the crime with which they are charged.\textsuperscript{19} To deny the accused fair trial rights based on the seriousness of the crimes with which they are charged would contravene the presumption of innocence and the principle that there should be no punishment

\textsuperscript{13} See above, section 2.2.5.
\textsuperscript{14} \textit{Ibid}.
\textsuperscript{15} See above, section 2.2.4.
\textsuperscript{16} See above, sections 2.2.1 and 2.2.2.
\textsuperscript{17} See above, section 2.3.
\textsuperscript{19} See above, section 2.3.
unless and until a finding of guilt has been reached.20

7.1.2. Do international criminal tribunals set the highest standards of fairness in practice?

In a number of distinct areas of procedure, the international criminal tribunals have made steps towards achieving the highest standards of fairness. Some of these positive precedents were discussed in Chapter 3, including the culture of human rights which the international criminal tribunals seek to spread through their very existence.21 The tribunals are to be applauded for the manner in which they have (aside from an unfortunate incident in Tadić case) successfully ensured witness protection without prejudicing the rights of the accused;22 adequately (for the most part) dealt with the issue of self-representation of the accused without prejudicing their rights or the integrity of proceedings;23 broadly respected the right to a public trial and have made a large amount of documentation publicly available through their websites;24 laid down coherent guidelines for the assessment of judicial impartiality,25 and made substantial advances on the right to provisional release pending trial.26 These precedents are to be welcomed.

However, the qualifications that accompanied many of the above-listed advances – such as the fact that a certain Chamber had embraced best practice, whereas another Chamber in the same tribunal had failed to do so – hints at one of the work’s primary conclusions. In line with the ‘coherence’ objective, it was submitted that international criminal procedure needs to develop into an advanced system of law, as opposed to a changeable set of laws.27 The practice of the ad hoc tribunals, where rules of procedure were changed regularly – often to address the problems of the day as opposed to being motivated by the need to create a

20 See above, section 2.3.3.
22 See above, section 3.5.
23 See above, section 3.3.
24 See above, section 3.7.
25 See above, section 3.6.
26 See above, section 3.2.
27 Chapter 1, text to footnote 101.
coherent legal regime – were particularly criticised in this regard.\textsuperscript{28} Chapter 6 discussed the manner in which amendments to the rules relating to written evidence were adopted in response to jurisprudential developments. Before the International Criminal Court, Rules of Procedure and Evidence can only be changed by the Assembly of State Parties,\textsuperscript{29} so the issue of regular rule changes is less of a problem. The Regulations can be changed by judges and have been changed three times since their inception, although none of the amendments could be said to have had any discernible effect on the rights of the accused. However, the jurisprudence on Regulation 55 on the recharacterisation of the facts, which has been used in practice to reclassify the mode of liability with which the accused has been charged, shows a continuing malleability in the application of the law.\textsuperscript{30}

The issue of incoherence in interpretation between tribunals, and even between Chambers of the same tribunal, persists, and was illustrated throughout the present work.\textsuperscript{31} A lack of uniformity throughout the tribunals was perhaps to be expected in the early years of international criminal justice, but it is hoped that international criminal procedure as a body of law might become more coherent in future practice.\textsuperscript{32}

Three key areas of international criminal practice were particularly singled out as falling short of exemplary standards of fairness. First, Chapter 4 discussed the extension of fair trial rights to actors outside of the accused. This was argued to be incompatible with terms of the Statutes and Rules, and was submitted to be incompatible with human rights standards, which have clearly developed fair trial rights with the accused person in mind.\textsuperscript{33} It was recognised that some might view

\textsuperscript{28} See further, Megan A. Fairlie, ‘Rule-Making from the Bench: A Place for Minimalism at the ICTY’ (2004) 39 Texas Int’l L J 257
\textsuperscript{29} Rule 3, ICC RPE.
\textsuperscript{30} Situation in the DRC: Prosecutor v. Katanga and Chui, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, Case No. ICC-01/04-01/07, 21 November 2012.
\textsuperscript{31} Clear inconsistencies in practice are discussed in sections 3.2, 3.3, 3.4, 4.3, 5.2, 5.3, 6.2, and 6.3 above.
\textsuperscript{32} A number of key academic contributions listed in Chapter 1 above, such as Karim Khan, Caroline Buisman and Christopher Gosnell (eds.) Principles of Evidence in International Criminal Justice (Oxford: OUP, 2010) and Goran Sluiter et al. (eds.) International Criminal Procedure: Principles and Rules (Oxford: OUP, 2013) have focused on the developing principles of international criminal procedure.
\textsuperscript{33} See above, chapter 4.
the case law on prosecutorial fair trial rights and on extended procedural rights for victims (outside of those provided for in the International Criminal Court’s Statute and Rules) as providing evidence that the tribunals have acted in cognisance of their standard-setting role, and have sought to create a new norm in human rights by extending fair trial rights to the prosecution and other actors.\(^{34}\) On the contrary, it was argued that the extension of fair trial rights in this manner can and does impact negatively on the rights of the accused, as evidenced by the *Haradinaj* retrial fiasco.\(^{35}\) It was recommended that the tribunals should step away from this interpretation and reinstate the accused as being the only holder of due process rights at trial. A distinction was drawn between ‘ordinary’ human rights, such as the right to life and those attaching to one’s status, such as the right to a fair trial or the protection against *non-refoulement*. In that regard, there was no difficulty in recognising that the rights of the accused do sometimes need to be balanced against witnesses’ right not to be placed in danger of death or harm.

Second, the tribunals’ interpretation of the parameters of the right to trial without undue delay — and the steps taken to operationalise that right — was adjudged to have fallen short of the highest standards of fairness in a number of respects. Chapter 5 discussed a number of the causes of the excessive length of trials and surmised that judges could have taken a more activist approach to the issue of disclosure, and implemented stricter penalties for breach of the prosecutorial disclosure obligation. Furthermore, it was submitted that the delays experienced between close of trial and final judgment were inexcusable, and that in order to meet the highest standards of fairness, judicial resources should be allocated to ensure that a judgment (at the very least, in summary form, with a full judgment to follow) be issued within a maximum time limit. This chapter also observed that breaches of the right to trial without undue delay had proven almost impossible to assert in the tribunals’ jurisprudence, with some tribunals holding, for example, that the fact that a defendant had been deprived of their liberty for

\(^{34}\) See above, chapter 4.

more than four years did not provide *prima facie* evidence that they had suffered prejudice.\textsuperscript{36}

It was surmised that the reluctance in this regard could be attributed to the perception that if a breach of the right to trial without undue delay were to be found, the trial against the accused would have to be stayed permanently and he/she would have to be released,\textsuperscript{37} but it was submitted that this is not the only available remedy at the tribunals’ disclosure. They could, for example, seek an undertaking from the prosecution that it would endeavour to comply with its obligations in a timely manner in the future, or could offer the accused compensation for the delay, provided that the delay was not so serious as to render a fair trial impossible. The final recommendation from Chapter 5 in relation to the right to trial without undue delay arose with regard to what was termed the ‘reverse application’ of the right, whereby it has been invoked on occasion to refuse an accused’s request.\textsuperscript{38} It was recalled that the accused’s conduct is one of the factors that is taken into account when alleged breaches of the right to trial without undue delay are being assessed, so any fears that the trial might later have to be halted as a result of implementing a distinct right of the accused were unfounded. Thus, this practice of the ‘reverse application’ of the right to a speedy trial should be abandoned if the highest standards of fairness are to be embraced by the international criminal tribunals.

Third, Chapter 6 undertook a quantitative analysis on the use of written witness statements by the Special Court for Sierra Leone, International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda over an 18 month period from 2011-12. The findings suggested that the more flexible rules on that have been introduced on the admissibility of written witness statements have been utilised surprisingly infrequently at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. At the

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\textsuperscript{36} *Prosecutor v. Bizimungu et al.,* Decision on Prosper Mugiraneza’s application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50-T, 3 November 2004, para 32.

\textsuperscript{37} E.g. *Bizimungu et al.,* Decision on Prosper Mugiraneza’s application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, \textit{ibid}.

International Criminal Tribunal for the Former Yugoslavia, on the other hand, three worrying trends on the use of written witness statements, which could be said to suggest that the highest standards of fairness have not been embraced, were identified. The first is the apparent parity of the sources between written and oral testimony — a piece of evidence in the former category does not necessarily need to be corroborated by another piece of evidence, or be consistent with a witness’s previous testimony. Second, judges have made frequent reference to ‘the totality of the evidence’ approach, which means that the evidential record will be assessed as a whole, thereby granting value to statements made by witnesses who have not been subjected to cross-examination by the opposing party. Third, the fact that the more recent (and liberal) admissibility rules have in practice been used by the prosecution with far greater frequency than the defence may raise questions on the equality of arms principle in practice.

A number of common themes emerged from the three chapters on distinct areas where the tribunals have fallen short of the highest standards of fairness. These were:

(a) Apparently conscious efforts to avoid appearing ‘too fair’ to accused persons

As regards the rights and interests of parties at trial, in balancing the rights of the accused against, for example, the international community’s right to a speedy trial, or the rights of victims to have their voices heard, the tribunals appear to have made a conscious effort to avoid the inevitable criticism that they act in disregard of the suffering incurred by the innocent victims of the conflicts within their jurisdictions. In a similar vein, the move toward the increased use of written witness statements, while primarily motivated by a desire for expedience, was further justified by the need to avoid ‘secondary victimisation’ that vulnerable victims and witnesses can suffer when placed on the witness stand. Further, the excessive length of proceedings in all tribunals studied, and the clear disparity in resources in many cases before the ad hoc tribunals show a minimalistic approach to the rights of the accused as opposed to one which sees the espousal of the highest standards of fairness to the accused as one of the main aims of international criminal proceedings.
(b) The tailoring of procedures in order to fit with the unique day-to-day operation of international criminal trials

It will be recalled that the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and Special Court for Sierra Leone can be tailored by a plenary of the judges. The changeable nature of rule amendments was perhaps best illustrated by our discussion of the rules on written witness testimony in Chapter 6, where new rules on written witness testimony could be directly traced to preceding jurisprudential developments, such as the death or unavailability of witnesses in a given case. The conformity of this practice with Frank’s conception of ‘adherence’, whereby primary and secondary rules of obligation must be consistent, may be called into question in this regard, when we see that rule-based practice on such statements may derogate from distinct rights of the accused laid out in statute. Similarly, by extending fair trial rights to the prosecution, in particular, the tribunals have used the unique difficulties posed by international criminal prosecutions and investigations as justification for the resultant balancing exercise of the rights of the accused with the rights of the prosecution.

(c) A lack of uniformity in international criminal procedure

The discussion of some of the positive aspects of international criminal procedure, such as the practice on self-representing accused, highlighted a lack of uniformity between different judicial panels which may hinder tribunals from reaching their full standard-setting potential. Similarly, the weight given to written witness statements differs drastically between tribunals. On the other hand, once the ad hoc tribunals and the Special Court for Sierra Leone have completed their mandates and the International Criminal Court moves into its intended role of being the only international criminal tribunal, it is quite possible that we may witness an enhanced uniformity in procedure. There is still ample scope for the International Criminal Court to embrace its standard-setting function to the fullest in its future proceedings. Therefore, it is appropriate for the next section to discuss the barriers that have hindered the operationalisation of the tribunals’ standard-
setting function, if the International Criminal Court is to overcome those barriers in the future.

7.1.3. What are the barriers hindering international criminal tribunals from enunciating the highest standards of fairness?

(a) Internal fragmentation

The issue of inconsistencies in procedural standards throughout international criminal institutions, and even between individual Chambers within the same tribunal is a result not just of rule-making from the bench in the ad hoc tribunals, as discussed above.\(^{39}\) It also arises from the fact that a procedural culture is not engrained; the status of international criminal procedure as a ‘clash of legal cultures’ is well-documented.\(^{40}\) Judges, counsel and legal support staff come from a variety of legal cultures and do not tend to stay in post for as long as those in domestic legal appointments do.\(^{41}\)

International criminal procedure, being a result of ‘the gradual decanting of national criminal concepts and rules into the international receptacle’,\(^{42}\) offers practitioners the opportunity to suggest the adoption of procedures poached from their own legal tradition.\(^{43}\) Transposed into the breeding ground of international criminal procedure, this practice may offer reasonable solutions for short-term problems, but may not be grounded in an overarching theoretical framework suitable to international criminal procedure and thereby offers little in its

\(^{39}\) For a discussion of this problem in greater detail, see Fairlie (n 28).


\(^{43}\) Judge Levi Carneiro, in his Dissenting Opinion in the ICJ’s *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* case, (Judgment, 1952 ICJ Reports 20 (22 July 1952) at 161 para 14) referred to the fact that ‘[i]t is inevitable that every one of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin.’ The same could clearly be said for practitioners in the international criminal law arena, where lawyers and judges train and qualify in a domestic jurisdiction before moving to the international criminal system.
development of a coherent system of law. These procedural solutions may not be implemented by the other tribunals, leading to further fragmentation. The coherence of procedural standards is therefore far from obvious and undermines international criminal procedure’s standard-setting function. It is submitted that international criminal judges should be more reflective in adopting procedures in the future. They should be guided by questions such as whether the procedure in question is desirable in the long-term, or whether it may need to be later amended; whether the procedure comports fully with statutory provisions and other rules and regulations, and whether this practice sets a desirable standard that they would be happy to have applied to all crimes, and not just those of the particularly serious nature that they are prosecuting.

(b) Context of international criminal proceedings

Aside from the fact that international criminal procedure’s status as a sui generis or hybrid creature allows judges to be selective in merging domestic procedural elements, other unique elements of the international criminal legal process allow judges to step away from their standard-setting role. As pointed out by Damaška, international criminal trials operate in a challenging legal and political environment. Investigations are often complex cross-border affairs, carried out long after the atrocities under investigation occurred and without judicial oversight. The trial process is beset with difficulty in obtaining witness attendance, communicating thousands of pages of documents between the parties and limiting complex legal arguments to reasonable time-frames. Occasionally, trial chambers have the added burden of ensuring that obstreperous defendants do not use the process for their own political gains. Moreover, tribunals face external pressures and often unrealistic expectations from an international community with a desire for retribution for the grave atrocities of the past and to establish a full historical record on those events to grant peace and closure to the

44 It may also be the case that dominant judges drive the development of procedural rules towards their home model or another preferred model, but further research would be needed to assess whether this has been the case in the practice of the ICTY, ICTR and SCSL.
45 A particularly telling example of non-reflective judicial rule making is the jurisprudence on Regulation 55 before the ICC in the Katanga case, discussed in brief in section 7.2 below.
47 Patricia M. Wald, Tyrants on Trial (New York: Open Society Institute, 2009) 16.
victims, from funders, and, in the case of the *ad hoc* tribunals and the Special Court for Sierra Leone, there is said to be an added degree of pressure to act with expedition in line with their completion strategies.\(^{48}\) That being said, the completion strategies do not seem to have hurried judges in issuing judgments, as outlined in Chapter 5 above. If anything, the opposite would appear to be true.

This truly exceptional context, however, does not provide a justification for the tribunals’ espousing of less than the highest standards of fairness. Chapter 2 above outlined many reasons why the tribunals should be seen to bear a standard-setting function with regard to the rights of the accused. It is submitted, then, that international criminal tribunals should move away from some of the more questionable practices highlighted in Chapters 4-6 of the present work, and fully embrace their standard-setting function. This can be achieved by, *inter alia*, recognising that fair trial rights attach to the accused alone and that these rights can only be balanced against the other rights, as opposed to interests, of other actors at trial; taking a more proactive approach to the right to a speedy trial, especially as regards the disclosure of evidence at the pre-trial stage, and acting with enhanced caution when it comes to the admissibility and weight of untested witness testimony.

(c) Priorities

It could be submitted that international criminal judges have not fully embraced their standard-setting role because they have not been aware of this role until the present work was completed. This is unlikely, given the references to the tribunals’ utmost standards discussed in section 2.2.3 above. In the alternative, it could be said that the manifold goals of international criminal justice (discussed in section 2.1 above) render it simply impossible (or even undesirable) for tribunals to attempt to carry out all of the goals that they were designed to achieve, and that it is unreasonable to impose yet another goal upon them. However, it is submitted that the standard-setting goal is far more achievable than some of the pre-established goals of international criminal justice, such as bringing peace to the

affected regions, which are often cited in judgments without dispute.\textsuperscript{49} It is hoped that one of the broader policy implications of the present study will be an enhanced cognisance of the standard-setting function and a move towards operationalising it in the tribunals’ future practice, particularly in the practice of the International Criminal Court. However, a number of limitations of the study are present which must be noted.

7.2. \textit{Limitations of the Study}

The present work was inevitably limited in certain respects. First, it was decided at an early stage to limit the study to the ‘pure’ modern international tribunals, to the exclusion of internationalised or hybrid tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Panels for Serious Crimes of the Dili District Court in East Timor, and the War Crimes Chamber within the courts of Bosnia and Herzegovina. This exclusion was made because it was felt that the impact of these internationalised tribunals was far less widespread and that had less potential to effectively lay down standards of international due process that could be followed further afield. The earlier international criminal tribunals at Nuremberg and Tokyo pre-dated the vast majority of international human rights law, and thus it would be unreasonable to expect them to have laid down the highest standards of procedural fairness, although the efforts to ensure fairness to the defendants at Nuremberg, in particular, is worthy of praise.\textsuperscript{50} Furthermore, it was decided to exclude the newest international criminal tribunal, the Special Tribunal for Lebanon, in the study’s recommendations because its practice at the time of writing was too limited to include it within the ambit of the present work’s conclusions. That is not to say that the Special Tribunal for Lebanon’s practice to date has been unproblematic; its provisions on trials \textit{in absentia} provide particular cause for concern.\textsuperscript{51}

The discussion on the distinct areas where international criminal procedure has fallen short of the highest standards of fairness was limited to areas where the

\textsuperscript{49} See above, section 2.1.
\textsuperscript{50} See further, Otto Kranzbuhler, ‘Nuremberg Eighteen Years Afterwards’ (1964-1965) 14 \textit{DePaul Law Review} 333, 336-337 (arguing that the Nuremberg trials were broadly fair, apart from the unfortunate precedent on equality of arms).
\textsuperscript{51} See Paola Gaeta, ‘To be (Present) or not to be (Present): Trials \textit{In Absentia} before the Special Tribunal for Lebanon’ (2007) 5 \textit{JICJ} 1165.
practice was sufficiently developed in at least three of the four tribunals studied. At the time of writing, one was particularly perturbed by a development at the International Criminal Court, where a majority of the Trial Chamber in Katanga and Chui separated the joint trials and decided that it would be permissible to assess whether the accused Katanga was liable under a different form of participation than that charged, after the trials had ended. This was made possible by the provisions on re-characterisation of the facts under Regulation 55, but the author feels that the decisions on this Regulation have gone too far to date. However, this issue is unique to the International Criminal Court, and a decision was made to limit the discussion of practice that falls short of the highest standards of fairness to those issues where a decisive trend has been evinced amongst the international criminal tribunals and that were relatively common to all tribunals. The very many causes for concern that arise from case law under Regulation 55 at the International Criminal Court were decided to be better suited to distinct academic articles.

The issues raised by pre-trial practices and sentencing were excluded only out of fear that a study which covered both trial and pre-trial procedures may end up having more breadth than depth; pre-trial procedure would itself be worthy of a separate book or PhD thesis.

7.3. RECOMMENDATIONS FOR FUTURE RESEARCH

This study developed a model for assessing the highest standards of fairness comprised of a combination of international human rights standards and the principles of coherence, adherence, and determinacy, and tested the performance of the international criminal tribunals against that model. It may be surmised from the present study that even though international criminal procedure could not be said to have embraced the optimal due process standards, it is just ‘fair enough’ to

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52 *Situation in the DRC: Prosecutor v. Katanga and Chui*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Case No. ICC-01/04-01/07, 21 November 2012.

avoid widespread criticism and lack of confidence in the judgments it produces.\textsuperscript{54} This model could be used in the assessment of other courts and tribunals in future studies.

The framework of assessment in the present work was centred on the trial phase of proceedings. Future works could extend the analysis to cover the pre-trial, sentencing, and appeal stages of proceedings, as well as other courts and tribunals. Later editions of the present work could, over time, test the hypothesis to a greater extent by studying the International Criminal Court’s role in developing a truly international concept of the fair trial. It could examine, for example, whether domestic practice has begun to reflect the standards set down in international criminal procedure. As a body of law, international criminal procedure is currently at too juvenile a stage in its development to undertake such an analysis.

A number of key pieces of literature have suggested that a more managerial style of judging may enhance the actualisation of fair trial rights in international criminal law.\textsuperscript{55} A further study might assess the extent to which different judging styles can aid the realisation of the highest standards of fairness. It is likely that a more active judicial style might solve certain problems that have been identified in the course of the present work, such as the issues relating to trial without undue delay, but that it is not a panacea. A more managerial style of judging could not in itself remedy the issues raised in Chapter 4 on the rights of parties other than the accused, for example.

Lastly, it would be interesting to situate the arguments raised within the wider debates on the benefits of international criminal justice as a means for dealing with past atrocities. Advocates of restorative justice may argue that in optimising due process standards, such as the right to an expedient trial, the proposed model would detract from other important goals, such as setting an historical record. These arguments were touched upon in Chapter 2 but a later study might examine the place of the competing objectives of international criminal law in greater detail.

7.4 Conclusion

This thesis has offered a definitive exposition of the wider importance of fair trial rights in international criminal law. In justifying the position that international criminal tribunals should lay down the highest standards of fairness in their procedure, the author developed a number of distinct arguments, including: that the need to set the highest standards of fairness is implicit in many of the declared goals of international criminal tribunals; that judges already declare that tribunal practice represents the fairest procedures for the rights of the accused, and that the legitimacy of the international criminal justice project is closely interwoven with the need to set the highest standards of fairness. It is hoped that the standard-setting function will be taken into account by international criminal law practitioners, judges, scholars and policy-makers in the future.

As international criminal law has developed, its procedures have been refined to address the rights of the accused in a more satisfactory manner. Some important examples of this include more expansive rules on the right to provisional release, and the jurisprudence on witness protection measures. By pointing to a number of distinct areas where the highest standards of fairness have not been realised, including the extension of rights to parties other than the accused, the application of the right to a speedy trial and the inconsistent approaches to written witness testimony, the author hopes to have illustrated some areas that provide room for improvement, as contemporary international criminal justice moves into its third decade.
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