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# The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights

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## I. INTRODUCTORY REMARKS

¶1 An accused party's access to fundamental fair trial rights is a key indicator of equitability in any system of criminal justice, as proceedings lose their credibility and integrity without the consistent application of due process standards.[1] However, to rely on the notion of a "fair trial" without specifying exactly what that notion encompasses would leave inalienable human rights to the (at times arbitrary) discretion of decision makers.

¶2 This article analyzes how the two United Nations *ad hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have defined the notion of a fair trial by adopting the provisions of the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR).[2] These International Tribunals were established to protect human rights of victims by bringing former "untouchables"—individuals who were alleged to have committed grave crimes but had been shielded from prosecution—to justice. However, the tribunals must also provide for fair trials because they have a duty to guarantee the fundamental rights of the accused.

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

[2] The full names of these tribunals are "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" and "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994." *See* Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute], with its respective amendments until today's date.

¶3 Fair trial rights of the accused are most prominently articulated in Articles 9(3) and 14 of the ICCPR. The detailed guarantees of these provisions and their corresponding protections in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) and the African (Banjul) Charter on Human and People's Rights of 27 June 1981 (ACHPR) are among the greatest achievements in promoting the principle of due process over the past sixty years.[3] In his report to the Security Council on the establishment of the ICTY, the Secretary-General of the UN emphasized the following: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular,* contained in Article 14 of the International Covenant on Civil and Political Rights."[4]

¶4 Hence, the fair trial guarantees of Article 14 of the ICCPR are repeated almost verbatim in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.[5] Consequently, fundamental due process rights have experienced a revival through the jurisprudence of both International Tribunals, as the inevitable gaps in the Rules had to be filled with those rights in mind. Furthermore, the Tribunals have recognized violations of due process rights and have sought to provide remedies in each case. These developments will no doubt influence the interpretation of human rights law at a domestic level.

¶5 The subsequent sections present an overview of the way in which the fair trial guarantees provided for in Articles 9(3) and 14 of the ICCPR were implemented by the International Tribunals through their Statutes, Rules, and jurisprudence, both procedural and substantive. As each aspect of Article 14 is equally important, this paper shall examine them in the order provided for in the ICCPR.

## II. ARTICLE 9(3) OF THE ICCPR – "ANYONE ARRESTED… SHALL BE BROUGHT PROMPTLY BEFORE A JUDGE."[6]

¶6 The right stipulated by Article 9(3) of the ICCPR is one of the essential guarantees preventing arbitrary and unlawful detention as well as securing a detainee's rights through a review by an independent judge or judicial officer. The right to be brought

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[3] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5 [hereinafter ECHR]; African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217 , 21 I.L.M. 58, entered into force Oct. 21, 1986 [hereinafter ACHPR]. The American Convention on Human Rights is less directly relevant for the purposes of this paper, as the jurisprudence of the International Tribunals relates to situations in Europe and Africa. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

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

[5] Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 46 (Oct. 2, 1995).

[6] International Covenant on Civil and Political Rights, art. 9(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. *See also* ECHR, *supra* note 3, art. 5(3); Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 62, Dec. 13, 2001, T/32/REV.22 [hereinafter ICTY Rules]; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 62(A), June 29, 1995 [hereinafter ICTR Rules]. The ACHR does not make a detailed reference to the above mentioned right; however, art. 6 of the ACHR does prohibit arbitrary detention and art. 7(1)(d) of the ACHR refers to the right to be tried within a reasonable time. ACHR, *supra* note 3, arts. 6, 7(1)(d), 7(5).

promptly before a judge is guaranteed in Article 20 of the ICTR Statute, Article 21 of the ICTY Statute, and Rule 62 of the Rules for both courts.[7]

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

¶8 The case of *Kajelijeli* is illustrative of the Appeals Chambers' approach.[12] Juvénal Kajelijeli, who had been found guilty by an ICTR Trial Chamber of genocide and extermination as a crime against humanity, filed an appeal challenging, *inter alia*, the ICTR's jurisdiction on the basis of the alleged illegality of his arrest and detention. Kajelijeli had been arrested without warrant on June 5, 1998 in Benin and was not transferred to the ICTR until September 9, 1998, ninety-five days later. Kajelijeli's initial appearance before a judge of the ICTR did not take place until April 7, 1999, after he had been held in custody for an additional 211 days.[13]

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[7] ICTY Statute, *supra* note 2, art. 21; ICTR Statute, *supra* note 2, art. 20; ICTY Rules*, supra* note 6, Rule 62 (stating "[u]pon transfer of an accused to the seat of the Tribunal…. [t]he accused shall be brought before [a] Trial Chamber or a Judge thereof without delay, and shall be formally charged.")

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

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

[10] Brogan and Others v. UK, 145-B Eur. Ct. H.R. (ser. A) at ¶ 62 (1988); De Jong and Others v. The Netherlands, 77 Eur. Ct. H.R. (ser. A) at ¶ 52 (1984).

[11] Concerning the separation of powers in a democratic state, Montesquieu stated: "Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative & de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire; car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourroitavoir la force d'un oppresseur." C.-L. DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, ŒUVRE DE MONSIEUR DE MONTESQUIEU, TOME PREMIER, L'ESPRIT DES LOIX, LIVRE XI Chapitre VI, 208 (London: Chez Nourse 1767).

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

[13] *Kajelijeli*, Case No. ICTR-98-44A-A, ¶¶ 210, 237

¶9 In determining whether Kajelijeli's rights had been violated, the Appeals Chamber divided his time in detention into two periods. The first period started with his arrest by Beninese authorities and ended with his transfer to the ICTR detention facility. The second period began upon Kajelijeli's arrival in the detention facility and lasted until his initial appearance before a judge of the ICTR on April 7, 1999.

¶10 With respect to Kajelijeli's detention in Benin, the Appeals Chamber noted that both the Statute and the Rules are silent on "the manner and method in which an arrest of a suspect is to be effected by a cooperating State," including the suspect's right to be brought promptly before a judge.[14] Furthermore, it found compliance with international human rights law to be within the requested State's responsibility.[15] Interestingly, prior to that ruling, the Benin Constitutional Court had found that Kajelijeli's arrest and detention by the Beninese authorities was in violation of the Constitution of Benin.[16]

¶11 Based on its reasoning that "international division of labour in prosecuting crimes must not be to the detriment of the apprehended person," the Appeals Chamber stressed that both the Prosecution and the requested State have a duty not to impair the rights of the apprehended person.[17] The court described this shared duty in detail:

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

¶12 Similarly, the Prosecution has a two-pronged duty: reminding the authorities of the detaining state of their obligation to bring the accused promptly before a judge and to request the ICTR to provide the cooperating state with a provisional arrest warrant and a transfer order.[19] Consequently, the Appeals Chamber held the Prosecution responsible for failing to comply with its duties within a reasonable time under Rules 40 and 40 *bis* of the ICTR Rules and found that Kajelijeli's rights had been violated, since he had been detained in Benin for ninety-five days without appearing before a judge.[20] Regarding the

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[14] *Id.* ¶ 219.
[15] *Id.* ¶ 220.
[16] *Id.* ¶ 232 (referring to Decision DCC 00-064, The Constitutional Court, Republique du Benin, 24 October 2000. Article 18(4) of the Benin Constitution stipulates that "No one may be detained for a duration greater than forty-eight hours except by a decision of the magistrate before whom he must be presented. This delay may be prolonged only in circumstances exceptionally provided for by law and may not exceed a period greater than eight days.").
[17] *Id.* ¶¶ 220-21.
[18] *Id.* ¶ 221.
[19] *Id.* ¶ 222.
[20] *Id.* ¶ 233.

second period of detention, the Appeals Chamber held that "the 211–day delay between the Appellant's transfer to the International Tribunal and the initial appearance before a Judge of this International Tribunal constitutes extreme undue delay."[21] Thus, the Appeals Chamber reduced Kajelijeli's sentence from two life terms in prison and one term of 15 years to a term of 45 years as an appropriate remedy pursuant to Article 2(3)(a) of the ICCPR, balancing the violation of fundamental procedural rights against the extraordinary seriousness of his criminal conduct.[22]

¶13 The *Kajelijeli* case shows in a nutshell that emphasis is put on the rights of individuals subjected to the administration of international justice. Traditionally, an individual has been perceived as an object of international law. However, the ICCPR and the ECtHR have contributed to transforming the status of an accused party from an object to a subject in international trials.[23] This development was acknowledged and confirmed by the International Court of Justice (ICJ) in the *LaGrand* case.[24] The Court in that case concluded that Article 36(1) of the Vienna Convention on Consular Relations of 24 April 1963[25] "creates individual rights, which by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[26] Based on the conclusion that an individual enjoys rights under international law, the Court held that a violation of Article 36 of the Vienna Convention on Consular Relations necessitated an effective remedy.[27]

¶14 In the *Rwamakuba* case, after finding the defendant not guilty on all charges,[28] the ICTR Trial Chamber stated in a further decision that even though the Statute does not provide explicitly for an appropriate remedy, the Security Council "cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms."[29] Consequently, the International Tribunal "must have the inherent power to make an award of financial compensation."[30] The Trial Chamber awarded Rwamakuba compensation of $2,000 and ordered the Registrar to apologize for the violation of his right to legal assistance. The Registrar objected to the Trial Chamber's award of financial compensation, but the Appeals Chamber affirmed the International Tribunal's power to grant compensation in appropriate and limited circumstances.[31] Furthermore, over the

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[21] *Id.* ¶ 250.
[22] *Id.* ¶ 324.
[23] WOLFGANG SCHOMBURG & OTTO LAGODNY, INTERNATIONALE RECHTSHILFE IN STRAFSACHEN [International Cooperation in Criminal Matters] (4th ed. 2006); STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 247 (2005).
[24] Federal Republic of Germany v. United States, 2001 I.C.J. 104 (June 27, 2001), *available at* http://www.icj-cij.org/docket/files/104/7736.pdf [hereinafter LaGrand Case].
[25] Vienna Convention on Consular Rights, Apr. 24 , 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].
[26] *See* LaGrand Case, *supra* note 24, ¶ 77.
[27] *Id.* ¶¶ 77, 90-91. For further analysis of the ICJ judgment on art. 36 of the Vienna Convention on Consular Relations*, see, e.g.,* B. Simma & C. Hoppe, *The LaGrand Case: A Story of Many Miscommunications*, *in* INTERNATIONAL LAW STORIES 23 (2007); Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellin—A Rocky Road Toward Implementation*, 14 TUL. J. INT'L & COMP. L. 7 (2005).
[28] Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Judgment (Sept. 20, 2006).
[29] Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appropriate Remedy (Jan. 31, 2007).
[30] *Id.* ¶ 218.
[31] Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appeal Against Decision on Appropriate Remedy, ¶ 26 (Sept. 13, 2007).

objections of the Registrar, the Appeals Chamber stated that "internal institutional considerations related to the execution of an order, including budgetary matters, are separate considerations from the Tribunal's authority to award an effective remedy."[32]

## III. ARTICLE 14(1) OF THE ICCPR – "EVERYONE SHALL BE ENTITLED TO A FAIR AND PUBLIC HEARING."[33]

¶15 The right to a public hearing has two purposes: it guarantees the protection of the defendant from secret trials, and it protects the right of the public to scrutinize the integrity of proceedings.[34] However, guarantees cannot be viewed in isolation. They have to be balanced against the interests of the judiciary in protecting the rights of especially vulnerable witnesses, some of whom are alleged victims of the accused.

¶16 Consequently, the ICTY and ICTR Statutes provide for some exceptions from conducting public hearings. Whereas Article 14(1) of the ICCPR acknowledges the necessity of excluding the public from trials for reasons including *ordre public* and national security, Articles 21 and 20 of the respective Statutes make the right to a public hearing subject to the protection of victims and witnesses.[35] Therefore, the mandate of each judge or chamber is to strike a proper balance, on a case-by-case basis, among the due process rights of the accused, the public interest in transparency, and the safety and dignity of victims and witnesses.

¶17 Rule 69 and Rule 75 of the ICTY Rules elaborate on this issue and particularize the meaning of Article 21 of the ICTY Statute. Rule 75 states that a "Judge or a Chamber may … order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused." Those measures can be closed sessions, private sessions, face distortion, voice distortion or testimony by video-link. Rule 69(C) provides for the disclosure of the identity of the victim in "sufficient time prior to trial." However, since the Appeals Chamber considers the latter provision to be subject to Rule 75,[36] critics have interpreted it to allow a "permanent non-disclosure of the identity of the witness at the discretion of the judge."[37] The complete anonymity of a witness—an unacceptable measure with a view to the rights of the accused—was granted only in *Tadić*.[38] However, the Trial Chamber in *Brđanin* indirectly rejected that ruling, stating that "the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one."[39]

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[32] *Id.* ¶ 30.

[33] ECHR, *supra* note 3, art. 6(1); ACHR, *supra* note 3, art. 8(5) (No specific mention of this right is made in the ACHR. The ACHR mentions that 'Criminal Proceedings shall be public'); ICTY Statute, *supra* note 2, art. 21(2); ICTR Statute, *supra* note 2, art. 20(2).

[34] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 609 (2003).

[35] *See* ICTY Statute, *supra* note 2, art. 22; ICTR Statute, *supra* note 2, art. 21.

[36] Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case, 620 (Feb. 21, 2007).

[37] Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV., 1381, 1412 (2001).

[38] Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 55-58 (Aug. 10, 1995), *See also infra* chapter IX for an in-depth discussion of this issue.

[39] Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Motion by Prosecution on Protective Measures, ¶ 20 (Jul. 3, 2000); *see also* Prosecutor v. Bicamumpaka, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ¶ 13 (Jul. 12, 2000) (stating that "it would

¶18 In light of this jurisprudence, it can be said that the International Tribunals have succeeded in principle in fulfilling their obligation to ensure the right to a public hearing while simultaneously protecting the dignity and safety of witnesses and victims.[40] Nevertheless, the impression remains that protective measures have been requested too often and granted too easily.

## IV. Article 14(2) of the ICCPR – "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[41]

¶19 The right to be presumed innocent until proven guilty is one of the cornerstones of fair trial proceedings and is "related to the protection of human dignity."[42] Hence, this fundamental human right is set out in the major international and regional human rights instruments and is also incorporated in the Statutes of the UN *ad hoc* International Tribunals, namely in Article 21(3) of the ICTY Statute and Article 20(3) of the ICTR Statute. In its General Comment No. 13, the HRComm stated:

> By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of trial.[43]

¶20 On its face, the standard of proof applied depends on the nature of the legal system. Whereas the proof of guilt has to be established objectively beyond a reasonable doubt in an adversarial system, inquisitorial (i.e., primarily judge-led) systems claim to apply a more subjective approach.[44] The judge must be convinced that guilt has been established beyond his or her personal doubt.[45] However, the ultimate threshold of the applicable test is *cum grano salis*, similar in both systems.

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be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial.").

[40] The Tribunals have accomplished this goal in part by holding contempt proceedings against people who have deliberately violated protective orders. *See, e.g.,* Prosecutor v. Margetić, Case No. IT-95-14-R77.6 (Feb. 7, 2007); Prosecutor v. Jović, Case No. IT-95-14 & 14/2-R77 (Aug. 30, 2006); Prosecutor v. Haxhiu, Case No. IT-04-84-R77.5 (Jul. 24, 2008). In Prosecutor v. Šešelj, a separate Trial Chamber, not having heard the merits of the case as such, found the Accused guilty of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules, and sentenced him to a single term of fifteen months imprisonment. This article is not the appropriate place to challenge the wisdom of such a punishment. *See* Prosecutor v. Šešelj, Case No. IT-03-67-R77.2 (Jul. 24, 2009).

[41] ECHR, *supra* note 3, art. 6(2); ACHPR, *supra* note 3, art. 7(1)(b); ACHR, *supra* note 3, art. 8(2); ICTY Statute, *supra* note 2, art. 21(3); ICTR Statute, *supra* note 2, art. 20(3).

[42] Bassiouni, *supra* note 34, at 603.

[43] Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *supra* note 8, Gen. Comm. 13, ¶ 7.

[44] The test on appeal before ICTY and ICTR is whether "a reasonable trier of fact could have come to this conclusion beyond reasonable doubt." I would prefer to ask whether a trier of fact could reasonably have come to this conclusion.

[45] Bassiouni, *supra* note 34, at 603.

¶21 In this context, it has to be noted that even though Rule 67(B)(1)(a) of the ICTY Rules seems to present a specific standard for the defense of alibi, the ICTY Appeals Chamber in *Lukić and Lukić* applied the same standard: "[I]n alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true. In other words, the Prosecution must establish beyond reasonable doubt that, 'despite the alibi, the facts alleged are nevertheless true.'"[46]

¶22 In international criminal proceedings, two issues arise regarding the presumption of innocence: whether to deprive the accused of his liberty or grant him provisional release and at what stage the accused is no longer presumed innocent. Regarding the first issue, the presumption of innocence implies that an accused party should not be kept in pre-trial detention save for certain exceptions, such as if he poses a flight risk, if he poses a risk of intimidating victims and witnesses, or if there are no more lenient measures available. Such situations are rare in domestic proceedings. However, the proceedings before the International Tribunals are different. The alleged crimes are extremely serious, and both Tribunals have to rely solely on the cooperation of the states involved for enforcement. Furthermore, the host country of an international criminal tribunal may not be willing to grant a defendant the right to move freely in its territory if he is released before or during his trial.[47]

¶23 Some specific issues must be considered when deciding upon a motion for provisional release. Primarily, the court must assess the risk of flight, which often increases when an accused party is aware of the available evidence against him and the concrete sentence he can expect if the charges are proven beyond a reasonable doubt.[48] One cause of concern over this issue is the lack of scrutiny on part of the ICTY and the ICTR regarding the *writ of habeas corpus*. The tribunals do not require a repeated review of detention. In the words of the ECtHR:

> The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty.... Where such grounds are "relevant" and "sufficient," the Court must also ascertain whether the competent . . . authorities displayed "special diligence" in the conduct of proceedings . . .[49]

¶24 Rule 65 of the ICTY and ICTR Rules stipulates the substantive prerequisites of a provisional release. For example, sub-paragraph (B) stipulates that "[r]elease may be ordered by a Trial Chamber only after giving the host country and the State to which the

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[46] *Cf.* Prosecutor v. Milan Lukić & Sredoje Lukić, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case in Chief, ¶ 10 (Oct. 16, 2008).

[47] Cassese, *supra* note 1, at 334 (the privilege of hosting a criminal tribunal should encompass this burden, which is part and parcel of every criminal proceeding).

[48] Prosecutor v. Jadranko Prlić, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "Décision Relative à la Demande de Mise en Liberté Provisoire de l'accusé Pušić" (Apr. 14, 2008); Prlić, Dissenting Opinion of Judge Schomburg, ¶ 3 (Apr. 23, 2008).

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

accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."[50]

¶25 Overall, one must keep in mind that the process of deciding upon provisional release is a dynamic one that takes place over four different stages of the proceedings. The first stage encompasses preliminary proceedings. At this stage of the proceedings, when the existence of a *prima facie* case allows for the confirmation of an indictment, the basis for an arrest warrant is rather fragile and may change from day to day. There is no possibility of determining definitively whether or not the Prosecutor's case is strong enough to justify the continued deprivation of liberty, as there would be in a civil law system.[51] Nonetheless, the Trial Chamber in *Hadžihasanović* granted the defendant provisional release from pre-trial detention at this stage pursuant to Rule 65(B) of the Rules, and specifically relied upon the standards set out in the ICCPR and the ECtHR.[52]

¶26 The second stage occurs if the defendant files a Rule 98*bis* motion for acquittal after the Prosecution's case. The impact of denying such a motion has to be considered when assessing the risk of flight and the danger to victims and witnesses. In *Prlić*, the Appeals Chamber found that the Trial Chamber failed to assess the requirements of Rule 65(B), particularly in light of its imminent 98*bis* ruling. It further considered that such a ruling "constitutes a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight posed by the accused pursuant to Rule 65(B)."[53]

¶27 The third stage to consider follows the end of hearings and the exchange of final arguments and precedes the verdict and sentence. In *Milutinović et al,* the Appeals Chamber did not issue a definitive ruling on the standard for deciding on provisional release at this advanced stage of the proceedings.[54] However, in a separate opinion, the court pointed out that a Trial Chamber has two obligations at this stage:

> First, it must consider . . . whether the accused will be acquitted or whether any sentence imposed will be less than the time the accused has already spent

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[50] ICTY R. P. & Evid. 65(B).

[51] *See* Strafprozeßordnung (StPO*)* [German Code of Criminal Procedure], §§ 117, 121.

Section 117

(1) As long as the accused is in remand detention, he may at any time apply for a court hearing as to whether the warrant of arrest is to be revoked or its execution to be suspended in accordance with Section 116 . . .

(5) Where remand detention has continued for three months and the accused has neither applied for review of detention nor lodged a complaint against the remand detention, the review of detention shall be conducted upon the court's own motion, unless the accused has defense counsel . . .

Section 121

(1) As long as a judgment has not been given imposing imprisonment … remand detention for one and the same offense exceeding a period of six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention.

[52] Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision granting provisional release to Enver Hadžihasanović, Mehmed Alagic, and Amir Kubura, ¶ 2 (Dec. 19, 2001).

[53] Prosecutor v. Prlić, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused, ¶¶ 19-20 (Mar. 11, 2008).

[54] Prosecutor v. Milutinović, Case No. IT-05-87-AR65.6, Decision on Prosecution's Appeal from Decision on Lazarević Motion for Temporary Provisional Release dated 26 September 2008, ¶ 11 (Oct. 23, 2008.

> in pre-trial detention. If so, the Trial Chamber has an obligation to release the accused immediately. If not, the Trial Chamber in a second step must assess *de novo* how far the flight risk of the accused has changed *in concreto*. Indeed, from the perspective of an accused the higher the likelihood of a conviction and the higher the sentence to be expected, the higher becomes the incentive to flee . . . [A] Trial chamber must dynamically assess the specific flight risk of each individual accused in each particular stage of the proceedings before it is allowed to grant provisional release.[55]

¶28 The fourth stage is the period when the appeal judgment is pending. This stage has to be considered from a different point of view, as the appellant is challenging an already existing judgment while still in custody. In *Strugar*, the Appeals Chamber stated that "the specificity of the appeal stage is reflected by Rule 65(I)(iii) of the Rules which provides for an additional criterion, ... that 'special circumstances exist warranting such release.'"[56] Furthermore, the Chamber concluded that where an application for provisional release is made pending the appellate proceedings, "special circumstances related to humane and compassionate considerations exist where there is an acute justification," a notion "inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage of the proceedings before the Tribunal."[57]

¶29 At all four stages, issues to take into consideration include the principle of proportionality, the existence of sufficiently compelling humanitarian reasons, and the imperative to conduct proceedings as expeditiously as possible. On the other hand, one must consider that people, especially victims and their relatives, may be outraged if an alleged war criminal is permitted to be free in the region when they would expect him to be standing trial before the International Tribunal.[58]

¶30 As to the existence of sufficiently compelling humanitarian reasons for release, due to the hybrid legal systems of the International Tribunals, the question arises at what point during criminal proceedings the accused can no longer be presumed innocent. Whereas countries with a civil law tradition consider that the presumption of innocence ends following a final verdict on appeal, common law countries predominantly tend to consider that the presumption ends once the accused has been convicted by the court of first instance. However, it remains unclear which position prevails in the jurisprudence of the International Tribunals, as highlighted in a separate opinion to a decision of the Appeals Chamber in *Krajišnik,* in which Judge Shahabuddeen stated that the general position in common law countries "lacks a sufficient measure of universality to be convincing."[59] In *Simić*, the Appeals Chamber rejected the Prosecution's argument that the accused's right to be presumed innocent was not applicable since he had already been convicted by the Trial Chamber. The Appeals Chamber stated correctly that "the fact that

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[55] *Id.* (Schomburg, J., concurrence) ¶¶ 3-4.
[56] Prosecutor v. Strugar, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, ¶ 11 (Apr. 2, 2008) (citations omitted).
[57] *Id.* ¶12.
[58] *See* Milutinović, Case No. IT-05-87-AR65.6, ¶ 9.
[59] Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's request to self-represent, on Counsel's Motions in relation to appointment of amicus curiae, and on the Prosecution Motion of 16 February 2007, ¶ 7 (May 11, 2007) (Shahabuddeen, J., concurring).

the person has already been sentenced is a matter to take into account when balancing the probabilities."[60]

¶31 In general, a verdict does not become final until several years after the commencement of a case. Measures must be developed to ensure in a more adequate way the respect for the accused's right not to be deprived of liberty during that period.[61]

## V. Article 14(3)(a) of the ICCPR – Everyone shall be entitled "to be informed promptly and in detail in a language which he understands of the charges brought against him."[62]

¶32 The right to be informed promptly and in detail of the charges set out in Article 14(3)(a) of the ICCPR has to be distinguished from the right to be informed of the reasons of arrest pursuant to Article 9(2) of the ICCPR.[63] Unlike Article 9(2) of the ICCPR, which applies to any detained person, Article 14(3)(a) is solely applicable to individuals who are charged or about to be charged with a criminal offense. Thus, the reasons of the detention must be provided at the moment of the arrest. The ICTY Statute and the Rules as well as the relevant provisions of the ICTR are silent on the right to be informed promptly of the reasons of one's arrest, since Rule 40*bis* merely obliges the Prosecution to communicate a provisional charge to the Registrar when requesting the transfer and a provisional detention of a suspect. No reference is made to the rights of a suspect that are triggered upon his arrest.

¶33 Nonetheless, the ICTR Appeals Chamber has confirmed the rights of a suspect at the time of his detention. In *Barayagwiza*, the Appeals Chamber held that "[i]nternational standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him"[64] because it provides the "elementary safeguard that any person arrested should know why he is deprived of his liberty."[65] The Appeals Chamber subsequently confirmed this position in *Semanza*: "The Appeals Chamber holds that a suspect arrested by the Tribunal has the right to be informed promptly of the reasons for his or her arrest. In accordance with the norms of international human rights law, the Appeals Chamber has also accepted that this right comes into effect from the moment of arrest and detention."[66] Similarly, in *Kajelijeli*, the ICTR Appeals Chamber held: "Although the Appellant was lawfully apprehended pursuant to Rule 40 of the Rules, the manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest."[67]

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

[61] *See infra* chapter VI.

[62] ICCPR, *supra* note 3, art. 14(3)(a); *see also* Organization of American States, ACHR, *supra* note 3, art. 8(2)(b); ECHR, *supra* note 3, art. 6(3)(a); ICTY Statute, *supra* note 2, art. 21(4)(a); ICTR Statute, *supra* note 2, art. 20(4)(a). ACHPR, *supra* note 3 (no particular reference of this right is made).

[63] ICCPR, *supra* note 3, art. 14(3)(a). *See also* ACHR, *supra* note 3, art. 7(4); ECHR, *supra* note 3, art. 5(2). *But see* ACHPR, *supra* note 3 (no particular reference of this right is made).

[64] Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, ¶ 80 (Nov. 3, 1999) (footnote omitted).

[65] *Id.* ¶ 81 (quotation omitted).

[66] Semanza v. Prosecutor, Case No. ICTR-97-20-A, Decision, ¶ 78 (May 31, 2000).

[67] Kajelijeli, *supra* note 12, ¶ 226.

Moreover, the Appeals Chamber stressed that "85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue."[68]

## VI. ARTICLE 14(3)(B) OF THE ICCPR – EVERYONE SHALL BE ENTITLED "TO HAVE ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF HIS DEFENSE AND TO COMMUNICATE WITH COUNSEL OF HIS OWN CHOOSING."[69]

¶34 This principle is reflected in Article 21(4)(b) of the ICTY Statute and Article 20(4)(b) of the ICTR Statute. It encompasses two elements. The first element is the right of an accused to have adequate time and facilities for the preparation of his defense during all stages of the trial. The second element is the right of an accused to communicate with counsel of his own choosing, which is particularly relevant to the preparation for trial.[70]

¶35 Regarding the first element, the specific circumstances of the International Tribunals' work have to be borne in mind. Indeed, language and translation are important considerations when assessing the amount of time adequate for the preparation of a defense.[71] The importance of a precise translation or interpretation should never be underestimated, as a lack thereof is one of the primary reasons for a miscarriage of justice in an international context. Thus, it is difficult to set adequate time limits, as the time necessary for an appropriate translation varies significantly from case to case.[72]

¶36 It must be kept in mind that conflicts with another very important element of the right to a fair trial, namely the right to be tried without undue delay, are inevitable.[73] Time limits set out in the Rules and Statutes afford the accused more time for the preparation of his defense than would be given at a domestic level because they reflect the need for translation and other issues unique to the functioning of the International Tribunals. Moreover, variations of time limits are possible upon showing of good cause by motion, pursuant to the Rules. However, the International Tribunals keep a watchful eye on the principle of the expeditiousness in each case.

¶37 In *Haxhiu*, the Appeals Chamber of the ICTY rejected the Notice of Appeal, which was filed after the given deadline, as inadmissible and stated, "[T]he time-limits in the

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[68] *Id.* ¶ 231.

[69] ECHR, *supra* note 3, art. 6(3)(b); ACHPR, supra note 3, art. 7(1)(c); ACHR, supra note 3, art. 8(2)(c)-(d); ICTY Statute, *supra* note 2, art. 21(4)(b); ICTR Statute, *supra* note 2, art. 20(4)(b).

[70] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 332-333 (2d ed. 2005).

[71] Unfortunately, this issue is often ignored by practitioners. However, it is becoming more and more apparent. In a recent article on the September 11 trials in the U.S., the quality of interpretation at pre-trial hearing has been qualified as "ridiculous" by a New York University scholar. A former federal prosecutor further stated that he had "never experienced a situation where it was so obvious that no one understood what was being said." In the same article, the high standard of interpretation set out by the ICTY was referred to and commended. *Cf.* Peter Finn, Lawyers Criticize Quality of Guantanamo Interpreters, WASH. POST, Oct. 14, 2008, at A15.

[72] In *Nahimana*, the Appeals Chamber of the ICTR "agree[d] with the Human Rights Committee that 'adequate time' for the preparation of the defence cannot be assessed in the abstract and that it depends on the circumstances of the case." Ferdinand Nahimana, The Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 220 (Nov. 28, 2007).

[73] *See infra* chapter VI.

Rules must be observed. Finality is an important component of any criminal trial. Parties cannot reopen the proceedings at will."[74] Moreover, the Appeals Chamber referred to the ICTR Appeals Chamber in *Clément Kayishema and Obed Ruzindana*, which stated, "Procedural time-limits are to be respected, and . . . they are indispensable to the proper functioning of the Tribunal and to the fulfillment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated."[75]

¶38 As far as the second element is concerned, a comprehensive set of rules regarding the appointment of counsel to a suspect or an accused party, as well as the duty of counsel, has been established in the Rules and Directives.[76] Counsel is assigned to a suspect or an accused party who lacks financial means. Alternately, a suspect or an accused can hire counsel of his own choosing if he or she meets the requirements set out in the Rules. However, in *Gotovina*, the Appeals Chamber declared that "one of the limits to the accused's choice is the existence of a conflict of interest affecting his counsel."[77]

## VII. Article 14(3)(c) of the ICCPR – Everyone shall be entitled "to be tried without undue delay."[78]

¶39 The procedural guarantee of the right to liberty obligates the detaining authorities to take the necessary steps to avert or cease arbitrary or unlawful deprivation of that right.[79] Any restriction of that right must be suitable and necessary, and the scope of the restriction must be reasonably related to the other right's preference.[80]

¶40 Unlike the ECtHR and the ACHPR, the ICCPR distinguishes between the right to "trial within a reasonable time," incorporated in Article 9(3), and the right "to be tried without undue delay," set out in Article 14(3)(c). Hence, a violation of Article 14(3)(c) can overlap with a violation of Article 9(3) in cases of excessive periods of pre-trial detention, a fact reflected in the jurisprudence of the HRComm, which has defined cases of unjustified long periods of pre-trial detentions as violations of Article 14(3)(c).[81]

¶41 The HRComm and the ECtHR apply fact-intensive legal standards to determine whether a violation of Article 9(3) and Article 14(3)(c) of the ICCPR or Article 5(3) and Article 6(1) of the ECHR, respectively, took place.[82] Thus, their findings of reasonableness depend on the circumstances of each case.[83] The ECtHR applies four

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[74] Prosecutor v. Baton Haxhiu, Case No. IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against Trial Judgment, ¶ 16 (Sep. 4, 2008).
[75] Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 46 (Jun. 1, 2001).
[76] *Cf.* ICTR Rules, *supra* note 6, Rules 44-45; ICTY Rules, *supra* note 6, Rules 44-45; ICTR, Directive on the Assignment of Defence Counsel, Directive 1/96 (Jan. 9, 1996, as amended Jul. 1, 1999).
[77] Prosecutor v. Ante Gotovina, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest and Finding of Misconduct, ¶ 37 (May 4, 2007).
[78] ECHR, *supra* note 3, at art. 6(1); ACHPR, *supra* note 3, at art. 7(1) (d); ACHR, *supra* note 3, at art. 8(1); ICTY Statute, *supra* note 2, at art. 21(4) (c); ICTR Statute, *supra* note 2, at art. 20(4) (c).
[79] Nowak, *supra* note 70, at 212.
[80] *Cf.* Krajišnik, *supra* note 59, at ¶ 69.
[81] *See* ICCPR, *supra* note 6; Sextus v. Trinidad & Tobago, ¶¶ 7.2, 7.3, U.N. Doc. CCPR/C/72/D/818/1998 (July 16, 2001); Kelly v. Jamaica, ¶ 5.11, U.N. Doc. CCPR/C/41/D/253/1987 (Apr. 10, 1991).
[82] Robert Kolb, *The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters from 1992 to the End of 1998*, 21 Hum. Rts. L.J. 348, 363 (2000).
[83] *See, e.g.*, *Bunkate v. Netherlands*, 248-B Eur. Ct. H.R. (ser. A) 24, 30 (1993).

criteria to the determination of a violation of Article 6(1) of the ECHR: the breadth and complexity of the case, the handling of the case by state organs, the behavior of the accused, and importance of the end of the procedure to the applicant.[84] The use of these fact-intensive standards led to judgments that found a violation of Article 6(1) of the ECHR in proceedings that lasted five years and two months but found no violations in proceedings that lasted eight years and six months.[85]

¶42 One unfortunate shortcoming of the International Tribunals is the long time that their proceedings require. Accordingly, there are serious concerns regarding an accused party's right to be tried without undue delay. For instance, data provided by the United Nations Detention Unit in The Hague, indicate that as of October 31, 2008, the average time of detention was five years. For all people arrested on behalf of the ICTY and detained through a trial and an appeal, the average time spent in pre-trial detention was 511 days. The average time spent in detention during trial was 489 days. The average time spent in detention while awaiting the finalization of appeal proceedings was 663 days. [86]

¶43 Even more concerning are some individuals' numbers, particularly when one takes into account the presumption of innocence until a judgment has become final.[87] Dario Kordić, who was convicted by the Trial Chamber to a sentence of twenty-five years, spent more than seven years in detention between his arrest and the Appeals Chamber's confirmation of his sentence.[88] Momčilo Krajišnik spent nearly nine years in detention before receiving his final sentence.[89] Pasko Ljubičić spent almost five years in detention before the proceedings against him were referred to the Republic of Bosnia and Herzegovina.[90] Moreover, eleven alleged war criminals have been acquitted by the ICTY after spending lengthy periods in detention.[91] Appallingly, the Statutes of the International Tribunals do not even provide for the possibility of compensation in such circumstances.[92]

¶44 Although similarly detailed information is not available from the ICTR, individual numbers reveal that the situation there gives reason for even more concern. Indeed, several of the accused have been in detention since 1995 with no end to their cases in the near future. In general, the situation remains highly unsatisfactory and cannot be reconciled with the standards required by human rights treaty bodies.

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[84] Kolb, *supra* note 82, at 363.
[85] *Compare Philis v. Greece* (No.2), 1997-IV Eur. Ct. H.R. 1074, 1086 *with Hozee v. Netherlands*, 1998-III Eur. Ct. H.R. 1091, 1102.
[86] These statistics of October 31, 2008 have been provided by the Deputy Commanding Officer of the United Nations Detention Unit. The statistics apply to all the accused being presently or formally detained in this Unit, located in The Hague. These numbers take account of the fact that several accused parties were granted extensive provisional release.
[87] *See supra* chapter III.
[88] Prosecutor v. Kordić, Case No. IT-95-14/2, Appeals Judgment, 309 (Dec. 17, 2004) (stating that Kordić voluntarily surrendered to The Hague on Oct. 6, 1997).
[89] Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Judgment, 271 (Mar. 17, 2009), Prosecutor v. Krajišnik, Case No. IT-00-39-I, Indictment (Mar. 21, 2000).
[90] Prosecutor v. Ljubičić, Case No. IT-00-41, Decision to Refer the Case to Bosn. & Herz. Pursuant to Rule 11*bis* (Sept. 22, 2006); Prosecutor v. Ljubičić, Case No. IT-00-41, Indictment (Sept. 26, 2000).
[91] *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-A, Appeals Judgment, 5 (July 3, 2008) (However, it has to be taken into account that in a number of cases provisional release has been granted, sometimes for a substantial amount of time).
[92] *See infra* chapter XIV.

¶45 The reasons for these unduly long detention times are manifold. They include the initial lack of cooperation of certain states and the different times of arrests of accused parties who ultimately were tried together. The common law structure of the proceedings also contributes to the detention times because a chamber is generally dependent on the parties' submissions, so the schedule is therefore in their hands. It is extremely difficult to comprehend why there is a preponderance of common law rules in the proceedings of the International Tribunals when the accused come from countries governed by civil law systems. Very often, neither the accused, nor the counsel, nor the witnesses (all coming from former Yugoslavia or Rwanda) are acquainted with the adversarial procedure that the International Tribunals follow. Moreover, a major obstacle to guaranteeing expeditious proceedings is the accused's nearly absolute right to self-representation, which often entails pretending not to have counsel when counsel simply coaches from backstage.[93]

¶46 There are other major obstacles to guaranteeing expeditiousness. One is the fact that, as mentioned above, the Statutes and Rules of the International Tribunals do not provide for a mandatory repeated review of detention.[94] Another fact that detracts from the ability of the International Tribunals to conduct trials within a reasonable time is the complexity of the cases before them. To some extent, this is attributable to the initial prosecution policy of indicting individuals for a great number of offenses, encompassing long periods and numerous crime sites. To allow judges to maintain control over complex trials, it would be more reasonable to indict alleged offenders only for offenses that carry the greatest weight.[95]

## VIII. Article 14(3)(d) of the ICCPR – Everyone shall be entitled "to be tried in his presence."[96]

¶47 The guarantee of this right has not been a major issue within the work of the International Tribunals since proceedings *in absentia* are not foreseen by the Statutes, both of which specifically mention the right of the accused to be tried in his presence. A comprehensive assessment shows that, whenever possible, the International Tribunals have tried to guarantee the presence of the accused at his own trial. For instance, in *Simić*, because of the poor health condition of the accused, the ICTY provided for a two-way closed circuit video-link system, which enabled him to follow the proceedings, and a two-way telephone link between Simić in the Detention Unit and his counsel in the courtroom, which enabled him to communicate with his counsel.[97]

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[93] *See infra* chapter VIII.

[94] *See supra* chapter III; *see also* R.P. Evid. 101, Spec. Trib. for Leb., Part 5, § 5 (June 10, 2009) (stating that :"(D) The Pre-Trial Judge or a Chamber, as appropriate, shall periodically review its ruling on the release or detention of the person, and may do so at any time upon the request of the Prosecutor or the person detained. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require (E) The Pre-Trial Judge or a Chamber, as appropriate, shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Pre-Trial Judge or a Chamber, as appropriate, may consider releasing the person, with or without conditions.")

[95] *See, e.g.,* StPO, *supra* note 51, §§ 154, 154a.

[96] ICCPR, *supra* note 6, art. 14(3) (d). The ECHR, ACHPR, and ACHR do not mention the right to be present.

[97] Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment, ¶¶ 7-8 (Oct. 17, 2002). *Cf.*

¶48 In *Zigiranyirazo*, the ICTR Appeals Chamber excluded the testimony of a witness given before the Trial Chamber sitting in the Netherlands while the accused participated by video-link from Tanzania because otherwise the integrity of the proceedings would have been seriously damaged.[98] The Chamber emphasized in its ruling that "the physical presence of an accused before the court as a general rule, is one of the most basic and common precepts of a fair criminal trial."[99] Moreover, the Chamber found that the legal framework and practice of both International Tribunals provide for the physical presence of an accused at trial, as opposed to his facilitated presence via video-link.[100] However, the Chamber also acknowledged that the right of an accused to be tried in his presence is not absolute, with the qualification that "pursuant to which any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective."[101] Having considered the specific circumstances of the case, the Appeals Chamber found that the restrictions of the accused's right to be present were unwarranted and excessive and thus failed the test of proportionality.[102]

¶49 Despite the *Zigiranyirazo* holding, courts must consider the careful and professional use of a video-link only in cases in which the accused cannot possibly be present. If the court allows a video-link, the assessment of testimony's probative value has to take into account the fact that there was no physical confrontation and any other issues related to the defendant's absence.

## IX. ARTICLE 14(3)(D) OF THE ICCPR – EVERYONE SHALL BE ENTITLED "TO DEFEND HIMSELF IN PERSON OR THROUGH LEGAL ASSISTANCE."[103]

¶50 The right to be assisted by counsel is "paramount to the concept of due process," since it is a guarantee of protection from being arbitrarily arrested, charged or prosecuted.[104] Since the right to self-representation has been addressed in the jurisprudence of the International Tribunals from their establishment onwards, this part of the article will focus primarily on the ongoing struggle to define that right. As this analysis will show, the ICTY's conception of the right to self-representation has undergone several shifts, from an absolute right facilitated by an *amicus curiae*, to a right facilitated by standby counsel, to a right facilitated by counsel imposed in the interest of justice, to an absolute right to pretend to defend oneself, and finally to a right to pretend to defend oneself while assisted both by counsel behind the scenes and by counsel in court accompanied by an *amicus curiae*.[105]

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Bundesgerichtshof [BGH], Sept. 15, 1999, 45 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 188 (196), 2000 (F.R.G.).

[98] Zigiranyirazo v. Prosecutor, Case No. ICTR 2001-73-AR73, Decision on Interlocutory Appeal, ¶ 24 (Oct. 30, 2006).

[99] *Id.* ¶ 11.

[100] *Id.* ¶ 12.

[101] *Id.* ¶ 14.

[102] *Id.* ¶ 22.

[103] ECHR, *supra* note 3, art. 6(3) (c); ACHPR, *supra* note 3, art. 7(1) (c); ACHR, *supra* note 3, art. 8(2) (d), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; ICTY Statute, *supra* note 2, art. 21(1) (d); ICTR Statute, *supra* note 2, art. 20(1) (d).

[104] BASSIOUNI, *supra* note 34, at 615.

[105] *See, e.g.,* the appellate proceedings in Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A,

¶51 Before taking a look at the history of self-representation within the UN *ad hoc* International Tribunals, it is necessary to understand what motivates an accused party to defend himself, given the conventional wisdom "that a lawyer who represents himself has a fool for a client."[106] Unlike in civil law systems, where the accused is entitled to intervene in the trial proceedings whenever he deems it necessary, in common law systems the accused does not enjoy this right. Instead, he becomes the mere object of his own proceedings as soon as he decides to be represented by counsel. His only opportunity to address the court directly is to give testimony on his own behalf. Given that the proceedings at the ICTY and the ICTR are driven by an adversarial model rather than an inquisitorial model, parties have to make a decision to either play an active part in the proceedings or not. However, as M. Cherif Bassiouni rightly observes, "representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process."[107] Consequently, it is critical for the court to ensure the adequacy and effectiveness of self-representation.[108] Moreover, whenever the court deems it to be in the interest of justice and in the interest of providing for effective representation of the accused, it must assign counsel to him, of his own choosing, if possible. The disjunction of "self-representation or counsel" in Article 14(3)(d) of the ICCPR was never meant to be understood as a dichotomy.[109] Instead, "the right to defence ensures that the accused has an active role in the proceedings, the role of a subject rather than an object."[110] Based on a sound interpretation, the word "or" in Article 14(3)(d) of the ICCPR has to be replaced by the word "and," thus reflecting the proper approach to a holistic understanding of "defence" forming part of the fair trial guarantee.

¶52 In 2001, the Trial Chamber in *S. Milošević* stated that "it would be wrong for the Chamber to impose counsel on the accused, because that would be in breach of the position under customary international law."[111] Upon examination, however, this assertion does not prove entirely true. In civil law countries like Germany, France and Belgium, defense counsel may be assigned to the accused even against his will.[112] For instance, in *Croissant v. Germany,* a German regional court designated an additional defense counsel when the defendant was already represented by two lawyers of his own choice.[113] The ECtHR confirmed this position when it "affirmed the right of States to assign a defense counsel against the will of the accused in the administration of justice."[114] The ECtHR emphasized that the right to self-representation is indeed subject to limitations and that "it is for the courts to decide whether the interests of justice require that the accused be

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Judgment, at 15 (Mar. 17, 2009).

[106] *See generally* Nina H.B. Jørgensen, *The Right of the Accused to Self-representation before International Criminal Tribunals*, 98 AM. J. INT'L L. 711, 711-726 (2004).

[107] BASSIOUNI, *supra* note 34, at 618.

[108] *Id.*

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

[110] TRECHSEL, *supra* note 23.

[111] Transcript of Status Conference at 18, Prosecutor v. Milošević, Case No. IT-99-37-PT (Aug. 30, 2001).

[112] Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-representation in War Crimes Trial?*, 20 Ohio St. J. on Disp. Resol. 3, 13-14 (2005).

[113] Croissant v. Germany*,* App. No. 13611/88 (ser. A) 16 Eur. Ct. H.R. 135, 146-147 (1992).

[114] NOWAK, *supra* note 70, at 338.

defended by counsel appointed by them. When appointing defense counsel, the national courts must certainly have regard to the defendant's wishes. . . . However, they can override those wishes when there are relevant and sufficient grounds for holding that it is necessary in the interests of justice."[115]

¶53 In 2004, the Appeals Chamber in *S. Milošević* had an opportunity to address the issue of self-representation. The Trial Chamber had initially decided to assign counsel to Milošević due to his poor state of health.[116] However, the Appeals Chamber, though it affirmed the Trial Chamber's decision and agreed that the right to self-representation was not absolute, limited the basis upon which counsel may be assigned to the accused.[117] Because it considered "the right to self-representation [to be] an indispensable cornerstone of justice," the Appeals Chamber concluded that "any restrictions on Milošević's right to represent himself must be limited to the minimum extent necessary to protect the International Tribunal's interest in assuring a reasonably expeditious trial."[118] Hence, the Appeals Chamber allowed Milošević to represent himself, as long as he was "physically capable of doing so."[119]

¶54 The Trial Chamber had ordered the assignment of *amici curiae* to assist the court in the proper determination of the case, [120] but the Appeals Chamber altered their role from friends of the court to friends of a party to the proceedings. In its "Decision on Appeal by Amici Curiae," the Appeals Chamber confronted the question of whether *amici curiae* may appeal decisions or judgments even though Rule 73 of the ICTY Rules entitles only parties to the case to bring an appeal. Despite affirming that the status of *amici curiae* is not tantamount to that of parties, the Appeals Chamber decided to consider the appeal brought by the *amici curiae*, due to the "identity of interests between the amici and the accused with respect to the issue presented in this appeal" and the fact that Milošević's interests were not infringed.[121] In his separate opinion, Judge Shahabuddeen stressed that the Appeals Chamber had illegitimately modified the role of an *amicus curiae* and that "under the system of the Tribunal, he is not legally competent to act as counsel for the accused, and he certainly is not an intervener."[122] In sum, the misuse of *amicus curiae* as a kind of mediator between the bench and the accused has proven to be a fundamental mistake. The true purpose of *amici curiae* is to submit arguments of states or others who do not have standing at trial, but nevertheless want the judges to hear their perspective. *Amici curiae* cannot serve both as pseudo-counsel for an accused pursuant to Article 14(3)(d) of the ICCPR and as pseudo-assistants to the bench. The conflict of interests in such circumstances is blatantly obvious.

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[115] Croissant, *supra* note 113.
[116] Prosecutor v. Milošević, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, (Sept. 22, 2004).
[117] Milošević v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 19 (Nov. 1, 2004).
[118] *Id.* ¶¶ 11, 17.
[119] *Id.* ¶ 19.
[120] Prosecutor v. Milošević, Case No. IT-02-54, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001); Prosecutor v. Milošević, Case No. IT-02-54, Order Concerning Amici Curiae (Jan. 11, 2002).
[121] Prosecutor v. Milošević, Case No. IT-02-4-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence case, ¶ 4 (Jan. 20, 2004).
[122] *Id.* ¶ 15 (Shahabuddeen, J., separately concurring).

¶55 In contrast to *S. Milošević*, another Trial Chamber in *Šešelj* adopted a different approach when dealing with disruptive defendants exercising their right to self-representation. In response to a request by the Prosecution to assign a defense counsel to Šešelj due to the complexity of the case and the risk that Šešelj might harm the International Tribunal by using the trial as a platform for political interests, among other factors, the Trial Chamber appointed a "standby counsel."[123] Some of his responsibilities were to assist the accused in the preparation and presentation of the case whenever he requested to participate in the proceedings and to take over the defense from the accused whenever he was to be removed from the courtroom pursuant to Rule 80(B) of the ICTY Rules.[124] The Trial Chamber granted him access to all court documents, including confidential materials.[125] However, the Trial Chamber emphasized that "the accused's right to defend himself is absolutely untouched and that standby counsel is not an *amicus curiae.*"[126] Additionally, the court distanced itself from the Trial Chamber in *S. Milošević* by declaring that "[i]t would be a misunderstanding of the word 'or' in the phrase 'to defend himself in person or through legal assistance of his own choosing' to conclude that self-representation excludes the appointment of counsel to assist the accused or vice versa."[127] The advantage of a standby counsel is that he might deter the accused from engaging in obstructive behavior, because the standby counsel's presence would ensure that his conduct would not lead to a delay of the proceedings.[128]

¶56 In response to Šešelj's obstructive behavior, the Trial Chamber assigned him counsel in August 2006.[129] However, the Appeals Chamber reversed that decision because the Trial Chamber had failed to issue a formal warning to Šešelj prior to assigning counsel.[130] In November 2006, the Trial Chamber once again assigned counsel to Šešelj, who had been on a hunger strike.[131] The Appeals Chamber was in the delicate position of reacting to Šešelj's deteriorating health while trying to uphold the integrity of the International Tribunal.[132] In December 2006, the Appeals Chamber not only reversed the assignment of counsel to Šešelj but also ordered the Trial Chamber not to impose standby counsel "unless Šešelj exhibits obstructionist behavior fully satisfying the Trial Chamber that, in order to ensure a fair and expeditious trial, Šešelj requires the assistance of

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[123] Prosecutor v. Šešelj, Case No. IT-03-67-PT, Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, ¶ 30 (May 9, 2003); Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, ¶ 27 (May 9, 2003).
[124] *Id.* ¶ 30.
[125] Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order of Non-Disclosure, ¶¶ 2-3 (Mar. 13, 2003).
[126] *Id.* ¶ 28.
[127] *Id.* ¶ 29.
[128] *See* Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT'L L. 155, 167 (2006).
[129] Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 79 (Aug. 21, 2006).
[130] Prosecutor v. Šešelj, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, ¶ 52 (Oct. 20, 2006).
[131] Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Assignment of Counsel, ¶ 81 (Nov. 27, 2006).
[132] It appears, however, that it did not succeed in doing so. *See* Alexander Zahar, *Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal*, 19 CRIM. L. F. 241 (2008); *see also* Goran Sluiter, *Comprising the Authority of International Criminal Justice: How Vojislav Šešelj Run His Trial*, 5 J. INT'L CRIM. JUST. 529 (2007).

standby counsel."[133] Hence, the Appeals Chamber restored the full right to self-representation.[134] The situation deteriorated as another judge ordered the ICTY to pay Šešelj's defense expenses with the International Tribunal's legal aid budget, even though the Registrar argued that only indigent accused parties are entitled to such assistance. This development led to the absurd situation in the ICTY in which an accused party represents himself, but counsel in the background, presumably paid for in part by taxpayers worldwide, assist him.[135]

¶57 Scholars and practitioners have criticized the Appeals Chamber decision as being of "lamentable quality, as it distorts the law in an effort to achieve the desired result."[136] Some have suggested that the Appeals Chamber decision was a betrayal of the Trial Chamber's effort to conduct the trial in an optimal manner and that Šešelj had finally succeeded in playing the Appeals Chamber against the Trial Chamber.[137]

¶58 The ICTY once again confronted the issue of self-representation in May 2007. This time, however, the question was whether a convicted person can represent himself on appeal. The Appeals Chamber ruled in the affirmative, stating, "Article 21(4)(d) of the Statute draws no distinction between the trial stage and the appeal stage of a case…. there is no obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require an a priori distinction between the two."[138] However, a dissenting opinion argued:

> The expeditiousness and fairness of the proceedings are intertwined. Therefore, when deciding whether the right to self-representation can be limited or qualified in appellate proceedings, it must be assessed whether such a step would benefit an appellant by ensuring his fundamental right to be the subject, not the object, of a fair and expeditious appeals process. An accused cannot waive his right to fair proceedings, under whatever circumstances.[139]

¶59 The ICTR adopted a far more stringent position on the assignment of counsel as early as 2003. This position is mirrored in Rule 45*quater* of the ICTR Rules. The ICTY amended its Rules only in November 2008 by *verbatim* repeating the wording of the ICTR. Rule 45*quater* of the ICTR Rules and 45*ter* of the ICTY Rules now read as follows: "The Trial Chamber may, if it decides that it is in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused."[140]

¶60 Rule 45*quater* of the ICTR Rules was introduced following *Barayagwiza*. In that case, the defense counsel asked to withdraw from the case due to the accused's refusal to appear in court and his demand not to be represented by them. The Trial Chamber firmly rejected this request by stressing that Barayagwiza's "instructions" not to defend him

[133] Prosecutor v. Šešelj, Case No. IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, ¶ 28 (Dec. 8, 2006).
[134] *Id.* ¶ 30.
[135] Zahar, *supra* note 132, at 245-48.
[136] Sluiter, *supra* note 132, at 531.
[137] Zahar, *supra* note 132, at 260-61; Sluiter, *supra* note 132, at 531-535.
[138] Krajišnik, Case No. IT-00-39-A, ¶ 11 (Shahabuddeen, J., concurring).
[139] Krajišnik, Case No. IT-00-39-A, ¶ 68, (Schomburg, J., dissenting); *see also supra* chapter VI.
[140] ICTR Rules, *supra* note 6, Rule 45.

"should rather be seen as an attempt to obstruct judicial proceedings. In such a situation, it cannot reasonably be argued that counsel is under an obligation to follow them, and that not do so would constitute grounds for withdrawal."[141] In the view of the Chamber, the fact that counsel is assigned, not appointed "does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings."[142] Ideally, counsel and accused act together in perfect harmony.

¶61 The overly doctrinal approach to permitting self-representation must yield to the fundamental right to a fair, public, and expeditious trial. Before International Tribunals, assistance of a highly qualified counsel is a must. Nonetheless, the accused's right to participate actively in the proceedings (i.e., to defend himself or herself) must be protected.[143] Joint efforts of accused and counsel are feasible and finally serve best the interests of justice and the accused.

## X. Article 14(3)(e) of the ICCPR – Everyone shall be entitled "to examine the witnesses against him and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him."[144]

¶62 The right enshrined in Article 14(3)(e) of the ICCPR was adopted in the International Tribunals' Statutes with exactly the same wording. As it guarantees the examination of witnesses by all defendants under the same conditions as the prosecution, it is an essential element of "equality of arms."[145] In the practice of the International Tribunals, as long as the accused is represented by counsel, the counsel conducts the examination of witnesses. Nevertheless, a trial chamber can authorize an accused party with counsel to participate in the examination in person, a right vested in the accused pursuant to Article 14(3)(e) of the ICCPR. In such a case, pursuant to Rule 90(f) of the Rules, the Trial Chamber exercises control over the manner in which such an examination

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[141] Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Decision on Defense Counsel Motion to Withdraw, ¶ 24 (Nov. 2, 2000).

[142] *Id.* ¶ 21. In this regard, note the separately concurring opinion of Judge Gunawardana, who went a step further and considered that art. 20(4)(d) of the ICTR Statute envisioned the appointment of standby counsel. ICTR Statute, *supra* note 2, art. 20(4)(d); *see also* the recent report from former President of the ICTY, Patricia Wald, Tyrants at Trial: Keeping Order in the Courtroom 37-46, 51-58, 61-62 (2009), *available at* http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/tyrants_2009011/tyrants_20090911.pdf [hereinafter Wald].

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

[144] ICCPR, *supra* note 6, art. 14(3)(e); *see also* ECHR, *supra* note 3, art. 6(3) (d); ACHR, *supra* note 3, art. 8(2) (f); ICTY Statute, *supra* note 2, art. 21(4)(e); ICTR Statute, *supra* note 2, art. 20(4)(e). No specific mention is made of the right to examine witnesses in the ACHPR. Interestingly enough, no distinction is made here between the right to cross-examine a witness personally and the right to have counsel cross-examine a witness.

[145] *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, *supra* note 8, at 249, 250, 254, 256, 260.

is conducted, including ensuring that it is not impeded by useless and irrelevant questions.[146]

¶63 In *Prlić*, the Appeals Chamber confirmed the Trial Chamber's finding that a strict application of the rules regulating the examination of witnesses by an accused party with counsel is justified in order to protect the rights of the appellant's co-accused to "an expeditious and fair trial,"[147] as well as the rights of the appellant. An analysis of the Appeals Chamber's decisions shows that recently the Trial Chambers have allowed an accused party to examine a witness when appropriate, even if defense counsel is present, thus reconciling the approaches of common law and civil law.

¶64 Another related issue is granting anonymity to witnesses. As mentioned above, a Trial Chamber granted the Prosecution's motion to withhold some of the identities of witnesses from the accused in *Tadić*.[148] The Chamber stated that such anonymity does not necessarily violate Article 21(4)(e) of the ICTY Statute "as long as the defense is given ample opportunity to question the anonymous witness."[149] Moreover, the Chamber stated, "Witness anonymity will restrict this right to the extent that certain questions may not be asked or answered but … as is evidenced in national and international jurisdictions applying a similar standard, it is permissible to restrict this right to the extent that is necessary."[150] However, neither of the International Tribunals has ever again granted such complete anonymity.

## XI. ARTICLE 14(3)(F) OF THE ICCPR –EVERYONE SHALL BE ENTITLED "TO HAVE THE FREE ASSISTANCE OF AN INTERPRETER IF HE CANNOT UNDERSTAND OR SPEAK THE LANGUAGE OF THE COURT."[151]

¶65 This right is provided for in Articles 21(4)(f) and 20(4)(f) of the ICTY and ICTR Statutes. Its further implementation in the Rules shows that the International Tribunals have followed an approach similar to that of the ECtHR. That court has interpreted the analogous provision in the ECHR in broad terms, assuming a right of the accused to the translation of relevant written materials and oral statements pertaining to the criminal trial, since he or she must be able to understand them to have the benefit of a fair trial.[152]

¶66 The working languages of the International Tribunals are French and English. However, there is a wide diversity of working and communicating languages among the participants in the proceedings. Therefore, Rule 3 affords the accused and other parties appearing before court the right to actively use their own languages, which is separate from the accused's right to passively follow proceedings in a language he understands.[153]

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[146] Prosecutor v. Prlić, Case No. IT-04-74-AR73.11, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses, ¶ 19 (Sept. 11, 2008).
[147] Prosecutor v. Prlić., Case No. IT-04-74-AR73.5, Decision on the Mode of Interrogating Witnesses, ¶ 10 (May 10, 2007).
[148] *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Aug. 10, 1995).
[149] *Id.* ¶ 67.
[150] *Id.*
[151] ICCPR, *supra* note 6, art. 14(3)(f). *See also* ECHR, *supra* note 6, art. 6(3)(e); ACHR, *supra* note 3, art. 8(2)(a); ICTY Statute, *supra* note 2, art. 21(4)(f); ICTR Statute, *supra* note 2, art. 20(4)(f). No specific mention is made thereof in the ACPHR. *Cf.* NOWAK, *supra* note 70, at 343.
[152] ECHR, *supra* note 6, art. 6(3)(e).
[153] ICTY Rules, *supra* note 6, Rule 3. In this regard, it is interesting to note that the Rules of the ICTY were

Also, counsel is allowed to use a language other than the working languages of the International Tribunals if doing so does not violate the rights of the defense and the interests of justice.

¶67 Statutes and Rules of the International Tribunals guarantee that any participant in the proceedings is able to communicate with the parties and the bench and to actively follow the proceedings. In this regard, it should be noted that the high standards afforded by the International Tribunals have been commended in comparison to those applied in certain domestic trials with international implications. However, this right is not absolute, a fact that judges may have overlooked in some cases in which a deluge of irrelevant documents, including whole books, had to be translated. The full translation of the most critical documents to the proceedings (i.e., indictments, arrest warrants, interlocutory decisions, and judgments) has to suffice, again balancing this right of the accused against the obligation to hold a fair, expeditious trial. The translation of documentary evidence is only necessary to the degree required to ensure that the accused understands the content of the evidence.

## XII. Article 14(3)(g) of the ICCPR – Everyone shall be entitled "not to be compelled to testify against himself or to confess guilt."[154]

¶68 The right of an accused not to be compelled to testify against himself, (i.e., the freedom from compulsory self-incrimination) is set out in Article 14(3)(g) of the ICCPR. Its main intention is to prevent the admission of evidence derived from confessions coerced through physical or psychological pressure. Because Article 14 of the ICCPR does not expressly prohibit the admission of coerced testimony, the HRComm stressed that judges have the authority "to consider any allegations made of violations of the rights of the accused during any stage of the prosecution."[155]

¶69 In accordance with their mandate, the ICTY and ICTR have incorporated this authority in Article 21(4)(g) and Article 20(4)(g) of their respective Statutes. Whereas those provisions simply prohibit coercing the accused to testify, Rule 90(E) of the ICTY and ICTR Rules draws a distinction between the accused and witnesses appearing before the court: "A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony."[156] Fortunately,

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changed in 2003 in line with human rights standards. For instance, Rule 62(A)(ii) now stipulates that the indictment should be read to the accused in a language the accused "understands," as opposed to the former wording that read, "a language the accused speaks and understands." *Id*. Rule 62(A)(ii).

[154] ICCPR, *supra* note 6, art. 14(3)(g). *See also* ACHR, *supra* note 3, arts. 8(2)(g)-8(3); ICTY Statute, *supra* note 2, art. 21(4)(g); ICTR Statute, *supra* note 2, art. 20(4)(g). As far as the European Court of Human Rights is concerned, this right can be deduced from Article 6, the right to fair trial. *See* NOWAK, *supra* note 70, at 345. The European Court Human Rights confirmed the prohibition of self-incrimination in Saunders v. United Kingdom, 1996-VI Eur. Ct. H.R. 2044, 2064 (1996). *See also* John Murray v. United Kingdom, 1996-I Eur. Ct. H.R. 30, 49 (1996); Funke v. France, 256-A Eur. Ct. H.R. (ser. A) 22 (1993). The ACHPR does not specifically mention this right.

[155] *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, *supra* note 8, at 187.

[156] ICTY Rules, *supra* note 6, Rule 90(e); ICTR Rules, *supra* note 6, Rule 90(e).

no Chamber has ever attempted to "compel the witness," which would be irreconcilable with the underlying fundamental right at stake.

¶70 Before the ICTY, the issue of self-incrimination was *de facto* limited to the question of whether self-incriminatory statements of the accused may be tendered as evidence at trial. In *Halilović*, the Appeals Chamber pointed to the Trial Chamber's considerable discretion on evidentiary matters by referring to Rule 89(c) of the ICTY Rules, which state that "a Chamber may admit any relevant evidence which it deems to have probative value."[157] The Appeals Chamber held:

> An accused has the right to refuse to give statements incriminating himself prior to trial, and he had the right to refuse to testify at trial. But where the accused has freely and voluntarily made statements prior to trial, he cannot later on alter or choose to invoke his right against self-incrimination retroactively to shield those statements from being introduced, provided he was informed about his right to remain silent before giving this statement.[158]

¶71 In answering the question of under what circumstances a witness has been informed about his right to remain silent, the Trial Chamber in *Prlić et al* first noted that neither the ICTY Statute nor the Rules oblige a Trial Chamber to inform a witness of the existence of that right.[159] More importantly, however, the Trial Chamber stressed:

> [T]he right to remain silent if something he says could be incriminating is to be interpreted as a minimum guarantee which *a witness* called to testify before a Chamber enjoys. In addition, however, for this right to be not merely theoretical but truly effective, the witness much [sic] know not only that, should this be necessary, he may refuse to answer the questions if his answers might incriminate but also that, if despite everything, he chooses to answer such questions voluntarily, his statements might, depending on the case, be used against him. Only in this last scenario, that is, when a witness is aware of the existence of this right and the consequences deriving from a possible waiver of this right, can the waiver be valid.[160]

¶72 ICTY not only applied a high standard regarding the protection against self-incrimination, but also it enhanced the development of international criminal procedure by imposing an express obligation on Trial Chambers to inform witnesses of their right to remain silent.

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[157] ICTY Rules, *supra* note 6, Rule 89(c).
[158] Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, ¶¶ 14-15 (Aug. 19, 2005). *See also* Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Prosecution's Motion to Admit Documentary Evidence, ¶ 44 (Oct. 10 2006).
[159] Prosecutor v. Jadranko Prlić, Case No. IT-04-74-T, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelić and Martinović, ¶ 18, (Sept. 5, 2007).
[160] *Id*. ¶ 19 (emphasis added); *see also* Prosecutor v. Prlić, Case No. IT-04-74-T, Decision on Prosecution Motion for the Admission of Evidence of the Testimony of Milivoj Petković's Given in Other Cases before the Tribunal, ¶ 15 (Oct. 17, 2007).

## XIII. Article 14(4) of the ICCPR – Procedures against Juvenile Persons[161]

¶73 The International Tribunals have never dealt with cases involving juvenile suspects.

## XIV. Article 14(5) of the ICCPR – "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[162]

¶74 The Statutes of both International Tribunals provide for appellate proceedings.[163] Moreover, Part VII of the Rules sets out further details of appellate proceedings. Importantly, if the accused appeals his sentence, the Appellate Chamber cannot increase its severity.[164]

## XV. Article 14(6) of the ICCPR – "When a person has been… convicted of a criminal offence and when subsequently his conviction has been reversed… the person who has suffered punishment shall be compensated according to law."[165]

¶75 The right to compensation provided for in Articles 14(6) and 9(5) of the ICCPR has to be distinguished from the right to an effective remedy stipulated in Article 2(3) of the ICCPR. Whereas the entitlement to an effective remedy arises from any violation of the rights recognized in the ICCPR, the right to compensation comes into effect in the event of a sentence based on a miscarriage of justice (Article 14(6) of the ICCPR) or in the case of a violation of the right to liberty and security (Article 5(5) of the ECHR). An additional distinction is that the right to compensation is limited to situations in which a person has been convicted of a criminal offence and his conviction has subsequently been reversed.[166] Consequently, Article 14(6) does not itself provide for any compensation if the accused is acquitted in the first instance.[167]

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

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[161] ICCPR, *supra* note 6, art. 14(4). This article has not been implemented in major regional human rights instruments.

[162] ICCPR, *supra* note 6, art. 14(5). *See also* ECHR, *supra* note 6, art. 2(1); ACHR, *supra* note 3, art. 8(2)(h); ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), Nov. 22, 1984, E.T.S. No. 117 [hereinafter Protocol No. 7]; no specific mention of this right is made in the ACHPR.

[163] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24.

[164] Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-A, ¶ 170 (Aug. 29, 2008); Prosecutor v. Martić, Case No. IT-95-11-A, ¶ 1 (Oct. 8, 2008) (Schomburg, J. concurring).

[165] ICCPR, *supra* note 6, art. 14(6). *See also* ECHR, *supra* note 6, art. 5; Protocol No. 7, *supra* note 161, art. 3; ACHR, *supra* note 3, art. 10. The right is not addressed specifically in the ACHPR.

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

[167] *See, e.g.,* Prosecutor v. Halilović, Case No. IT-01-48-T, (Nov. 16, 2005); Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Sentence (Feb. 25, 2004).

> The Appeals Chamber can identify no error on the part of the Trial Chamber in finding that it lacked authority to award compensation to Mr. Rwamakuba for having been prosecuted and acquitted. As the Trial Chamber observed, the Statute and Rules of the International Tribunal do not provide a basis for compensation in such circumstances. … In this respect, the International Covenant on Civil and Political Rights ("ICCPR") refers to a right of compensation only where an individual already convicted by a final decision has been exonerated by newly discovered facts. A person in such circumstances who has been convicted and has suffered punishment as a result of the conviction may receive compensation. Mr. Rwamakuba, however, was not convicted and punished; he was acquitted in the first instance.[168]

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

## XVI. ARTICLE 14(7) OF THE ICCPR – "NO ONE SHALL BE LIABLE TO BE TRIED OR PUNISHED AGAIN FOR AN OFFENCE FOR WHICH HE HAS ALREADY BEEN FINALLY CONVICTED OR ACQUITTED."[169]

¶78 The principle of *ne bis in idem*, the right not to be tried or punished for the same offence more than once, is enshrined in Article 14(7) of the ICCPR. The rationale of this rule can be addressed from different perspectives – that of inter-state relations (horizontal perspective) and that of relations between states and international criminal tribunals (vertical perspective).[170]

¶79 Regarding the horizontal perspective, it must be noted that even though protection from double jeopardy is an internationally recognized human right, it applies only to prosecutions within a single state.[171] However, in Europe, Article 54 of the Convention Implementing the Schengen Agreement explicitly provides for the application of the principle of *ne bis in idem* in the entire Schengen area, a group of States nearly identical to those that comprise the European Union.[172]

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[168] Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶ 10 (Sept. 13, 2007). *See also* Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appeal Against Decision on Appropriate Remedy, ¶ 26 (Sept. 31, 2006); Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appropriate Remedy, (Jan. 31, 2007).

[169] Protocol No. 7, *supra* note 161, art. 4; ACHR, *supra* note 3, art. 8(4); ICTY Statute, *supra* note 2, art. 10; ICTR Statute, *supra* note 2, art. 9. ACHPR, *supra* note 3 (No mention is made of this right).

[170] *See* Resolution of the XVII[th] International Congress of Penal Law, *Concurrent National and International Criminal Jurisdiction and the Principle of* 'Ne bis in idem,' 75 INTERNATIONAL REVIEW OF PENAL LAW 801 (2004).

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

[172] *See* Convention Implementing the Schengen Agreement, 22.9.2000 OFFICIAL J. EUROPEAN COMMUNITIES 19 (June 19, 1990), at art. 54 ( "A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is

¶80 Regarding the vertical perspective, the ICTY and the ICTR have acknowledged the principle of *ne bis in idem* in Article 10 and Article 9 of their respective Statutes. Additionally, this principle is reflected in the Rule 13 of the UN *ad hoc* International Tribunals. Article 10(1) of the ICTY Statute and Article 9(1) of the ICTR Statute provide that "no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried" by the Tribunal.[173] Thus, Article 10(1) of the ICTY Statute and Article 9(1) of the ICTR Statute represent the downward effect of the *ne bis in idem* principle. Moreover, Rule 13 stipulates that either International Tribunal can request a national court to discontinue a proceeding involving the prosecution of a person who has already been tried by the Tribunal, a right that the UN Security Council can help to enforce.

¶81 In the context of this article, it is impossible to address the full scope of *ne bis in idem* and the problems emanating from the fact that, as discussed above, the accused can be charged by the International Tribunals only for certain acts and not for the entirety of his alleged conduct.[174] However, on at least three occasions, a person acquitted by an International Tribunal has been charged on a domestic level, either for different acts or because he was acquitted for procedural reasons only.[175]

¶82 Article 10(2) of the ICTY Statute reflects the upward effect of *ne bis in idem*, providing that a person who has been tried by a national court for acts constituting serious violations within the jurisdiction of the International Tribunal, may subsequently be tried by the ICTY in only two cases: when the act for which the person was tried constituted an ordinary crime, and when the domestic proceedings were not impartial or independent, not diligently prosecuted, or designed to shield the accused from international criminal responsibility. In *Tadić*, the defense invoked Article 10(2) of the ICTY Statute and argued that the ICTY had no jurisdiction over the accused because he had already been tried by German authorities.[176] However, the Trial Chamber rejected that argument.[177]

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sentenced, the sentence has been served or is currently being served….").

[173] ICTR Statute, *supra* note 2, at art. 9(1).

[174] *See supra* Part VI.

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

[176] Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non Bis In Idem*, ¶¶ 2-4 (Nov. 14, 1995).

[177] *Cf. id*. ¶¶ 11-16 (explaining that it is within the discretion of the International Tribunal to invoke its primacy at any stage of the proceedings before a judgment had been rendered).

¶83 Given the strict interpretation of the downward effect of the *ne bis in idem* principle, an accused party runs the risk of being prosecuted by national authorities for crimes for which he has not been indicted by the UN *ad hoc* International Tribunals. To protect an acquitted defendant from facing never-ending prosecutions, a distinction must be made based on whether he was acquitted on substantive or procedural grounds. Regarding procedural grounds, the declaration appended to the Appeals Chamber Judgment in *Ntagerura et al* should be noted.[178]

## XVII. CONCLUSION

¶84 This analysis of the jurisprudence of the International Tribunals has shown that both institutions are well aware of their duties to apply the rights enshrined in Articles 9(3) and 14 of the ICCPR. Indeed, the International Tribunals have addressed nearly every aspect of fair trial rights. They not only ensure the compliance with international human rights standards but also help develop international due process standards by applying their own interpretations of the ICCPR.

¶85 However, there are several unresolved issues, most importantly, the possibility of compensation for unjustified deprivation of liberty.[179] It is also fair to state that at times, the periods of deprivation of liberty not attributable to the accused over doctrinal over doctrinal over doctrinal have been overly long.[180] These extensive periods of detention, in particular prior to trial, are not acceptable. However, one must consider that many delays occur because the International Tribunals are dependent upon the cooperation and willingness of all States involved. Thus, an effective remedy pursuant to Article 2(3)(a) of the ICCPR should be considered if the period of detention violated the right to be tried without undue delay.

¶86 Resolving the question of self-representation is not just seminal to a single case. The entire legacy of the ICTY may be at stake[181] if the last pending cases are not handled with sensitivity, firmness, and well-balanced judgment by the competent judges.[182]

¶87 Overall, a positive conclusion can be drawn from this analysis. Where impunity used to be the rule, International Tribunals have made it the exception. In doing so, they have safeguarded the rights of the accused while also protecting the fundamental rights of victims. By adopting all the detailed facets of fair trial rights, the Tribunals have not only enhanced their own legitimacy but also set a minimum standard with which any legitimate international criminal court must comply. In our globalized society, the

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[178] *See* Ntagerura, *supra* note 166, Judge Schomburg's Declaration, ¶3 : "*Par ailleurs, si l'on considère que [les actes d'accusations] sont entachés de nullité en tout ou en partie, il est à noter que ce n'est pas à la Chambre d'appel de déterminer si la maxime ne bis in idem (droit à ne pas être jugé ou puni deux fois) s'applique en l'espèce. C'est au Procureur de ce Tribunal, en premier lieu (cf article 8 du Statut), ou à tout autre représentant du ministère public près une juridiction compétente pour juger les crimes en question, de décider de l'opportunité d'engager de nouvelles poursuites sur la base d'un nouvel acte d'accusation dans la mesure où le principe de l'autorité de la chose jugée n'interdit pas de poursuivre à nouveau . . . [Ils]sont été principalement—pour des questions de procédure car il n'y avait pas, ne serait-ce que dans une certaine mesure, d'acte d'accusation—principal instrument des poursuites—qui puisse être purge . . .*"

[179] *See supra* chapter XIV.

[180] *See supra* chapter VI.

[181] *See supra* chapter IX; Wald, *supra* note 142, at 58.

[182] *Cf.* most recently Prosecutor v. Karadžić, IT-95-5/18-T, Decision on Appointment of Counsel on Further Trial Proceedings (Nov. 5, 2009).

importance of this standard, which has made the concept of justice more concrete at an international level, should not be underestimated.