



# General Rules and Principles of International Criminal Procedure

and

## Recommendations of the International Expert Framework

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# Table of Contents

Introduction .....	4
A. Initiation of Investigations and Selection of Cases .....	7
Principles.....	7
Rules .....	8
Recommendations .....	8
B. Investigation, Coercive Measures, Arrest and Surrender .....	10
Principles.....	10
Rules .....	12
Recommendations .....	15
C. Charges, Confirmation, Res Judicata, Lis Pendens, Iura Novit Curia.....	20
Principles.....	20
Rules .....	22
Recommendations .....	23
D. Trial Process .....	26
Principles.....	26
Rules .....	34
Recommendations .....	44
E. Appeals, Reviews, and Reconsideration .....	53
Principles.....	53
Rules .....	55
Recommendations .....	56
F. Law of Evidence.....	58
Principles.....	58
Rules .....	59
Recommendations .....	63
G. Deliberation, Dissent, Judgment .....	65
Principles.....	65
Rules .....	66
Recommendations .....	66
H. Defence Issues .....	68
Principles.....	68
Rules .....	71
Recommendations .....	74
I. Victim Issues: Participation, Protection, Reparation, and Assistance.....	81
Principles.....	81
Rules .....	81
Recommendations .....	83
J. Negotiated Justice .....	87
Principles.....	87
Rules .....	87
Recommendations .....	88
List of IEF Researchers and Board Members .....	90

# Introduction

International criminal procedure is the body of international law that has as an objective the effective and fair enforcement of substantive international criminal law and has been developed for operation in the context of the international legal order. Barely in existence two decades ago, this legal phenomenon has undergone a tremendous growth as result of the rapid proliferation of international and hybrid criminal courts in the post-Cold War era (ICTY, ICTR, Special Court for Sierra Leone, ICC, Special Panels for Serious Crimes in East Timor, ECCC and most recently STL). The frantic institution-building in the realm of core crimes adjudication in the international arena required the development of a sophisticated criminal procedure. This took place in an individualized, ad hoc and uncoordinated way and could not but lead to diversification and fragmentation among various courts.

There is truth in the assertion that international tribunals are better enabled to deliver justice in the fairest and most efficient manner possible with tailored institutional frameworks and procedures. On the other hand, the existence in the law of international criminal procedure of multiple legislative solutions that address the same procedural issues somewhat differently might call in question the coherence and authority of that body of law. In particular, in their quest for the highest standards of international procedural justice and the best trial practices in cases of international crimes, national criminal justice systems have increasingly turned, and may be expected to continue doing so in the future, to the seminal experience of international courts. However, for now, it is our view that the guidance they could draw from the latter is on many essential matters too contradictory, unprincipled or inconclusive to be useful.

The three-year Research Project of International Expert Framework on International Criminal Procedure (IEF) was launched jointly by the Amsterdam Center for International Law of the University of Amsterdam and the Hague Institute for the Internationalization of Law in 2009. The aim has been to address the perceived problem of the disparate and fragmented nature of procedural law in international crimes adjudication. The hypothesis at the heart of the IEF project is that despite the many differences, a number of fundamental and shared standards, being the 'principles' and 'general rules', of international criminal procedure can nevertheless be identified. These principles and rules are the normative core of that body of law which cements it together into a unified corpus of norms.<sup>1</sup>

The starting point is that they can be discerned by systematically and uniformly analyzing and comparing the procedural law and practice of nine major historical and contemporary international or hybrid criminal courts (or courts of internationalized character) that have existed to date: IMT, IMTFE, ICTY, ICTR, SCSL, ICC, SPSC, ECCC and STL. The shared standards could be qualified as general rules or principles of international criminal procedure only if they are of such nature and authority as to withstand the rigorous and multi-layered test under a number of external evaluative parameters. The benchmark criteria which the Project members agreed to use include: international human rights law; comparative criminal procedure; goals of international criminal justice; and other considerations, such as overall coherence, expediency and practical concerns.

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<sup>1</sup> The working definitions adopted by the Project are the following. 'Principles' are general prescriptions that must be shared by all procedural models due to their fundamental and mandatory nature. 'Rules' refer to more specific prescriptions that accord with and give effect to the principles and are not as fundamental and mandatory as to require uniform adherence.

In presenting the first results of this study, this publication pursues a two-fold objective. First, it inventories the general rules and principles of international criminal procedure identified by the Expert Framework in ten major areas of the international tribunals' procedural law and practice. There are two limitations on the Expert Groups' ambition with respect to this object of its study: (i) The standards it ascertained are believed to embody the present status of the law as opposed to a progressive interpretation thereof or reflection of what such standards must or will be (*de lege ferenda*); (ii) It does not mean to offer a full-fledged codification of international criminal procedure such as could readily be borrowed by a newly created international or hybrid criminal court, inasmuch as it does not purport to establish every possible principle or rule or to provide a comprehensive normative regime. Yet it could be, as the Expert Framework members hope, a first step toward a comprehensive codification effort. Second, the present compilation also includes recommendations of the Expert Framework for improved international criminal procedure advanced on the basis of painstaking and critical evaluation of the law and practice of international criminal tribunals. While the recommendations give expression to the Project's normative aspiration, it has generally not been our objective to revolutionize the current approaches to conducting international criminal proceedings but rather to offer a number of restrained yet motivated and constructive proposals meant to cover legal gaps or refine the practice.

The general rules and principles as well as recommendations listed below are extracted from the forthcoming book *International Criminal Procedure: Towards a Codification of General Rules and Principles* (Oxford University Press), in which the research of the Expert Group will be published in its entirety. The full study encompasses the structured, detailed and systematic description of the status of international criminal procedure and practice, the analyses of both law and practice in light of the evaluation criteria, the principles and rules and the recommendations. It also includes an introduction explaining the project methodology and the 'framework chapter', co-authored by the members of the specially assigned working group, elaborating on the distinctive features of the tribunals' legal and institutional context that are critical for a fair evaluation of their procedures. By releasing this brochure prior to the main work, the Expert Framework wishes to inaugurate its core findings under the understanding that the standards and recommendations included in this publication should be read in the context of the IEF research as a whole. This inquiry has been the essence and indeed the bulk of the Expert Group's work in the three years that precede the present publication. Another rationale for this publication is to invite critical comments and other feedback on the Expert Group's work, which can be communicated to Managing Editor (s.v.vasiliev@uva.nl). The presentation of the General Rules and Principles below corresponds to the structure of the forthcoming volume by Chapter. The general rules and principles are proposed and the recommendations are made in the following ten areas:

- A. Initiation of Investigations and Selection of Cases
- B. Investigation, Coercive measures, Arrest and Surrender
- C. Charges, Confirmation, Res Judicata, Lis Pendens, Iura Novit Curia
- D. Trial Process
- E. Appeals, Reviews, and Reconsideration
- F. Law of Evidence
- G. Deliberation, Dissent, Judgment
- H. Defence Issues
- I. Victim Issues: Participation, Protection, Reparation, and Assistance
- J. Negotiated Justice

The individual principles and rules are followed by references to the provisions of statutes, rules of procedure and evidence and/or other sources, including case law, which support the finding. Finally, we take this opportunity to thank all those without whom the Project could never have been possible, much less accomplished. We warmly thank all IEF researchers for their collegial spirit, unwavering commitment and the time they invested in the Project. Our sincere appreciation goes to the members of Advisory Board for their invaluable contributions to, and unstinting support of, the Project from its inception. We are also greatly indebted to the institutional partners – the Hague Institute for Internationalisation of Law and the Amsterdam Center for International Law – for their generous funding and assistance provided in organising a series of board meetings and expert conferences in Amsterdam and The Hague (2008-2011). At last, but not the least, the financial support of the Netherlands Organisation for Scientific Research (NWO) is gratefully acknowledged.

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**Disclaimer**

Certain members of the International Expert Framework hold or held positions in the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the International Criminal Court (ICC), the Special Panels for Serious Crimes in Dili District Court of East Timor (SPSC), the Extraordinary Chambers in the Courts in Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). The views expressed herein are those of the individual authors alone and do not necessarily reflect the views of the ICTY, ICTR, ICC, SPSC, ECCC, STL or the United Nations in general.

# A. Initiation of Investigations and Selection of Cases

M. deGuzman and W.A. Schabas

## Principles

### 1. Equality

- **All persons are equal before the law.**

[Articles 21(1), 21(4) of the ICTY Statute; Articles 20(1), 20(4) of the ICTR Statute; Articles 17(1), 17(4) of the SCSL Statute; Articles 21(3), 67(1) of the ICC Statute; Section 2.1 of UNTAET RCP; ECCC Law, Article 35; Articles 16(1), 16(4) of the STL Statute; Judgment, Prosecutor v. Delalić et al., IT-96-21-A, A. Ch., ICTY, 20 February 2001, para. 602]

### 2. Non-discrimination

- **In making and reviewing selection decisions prosecutors and judges should not discriminate on any ground impermissible under international law including, gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.**

[Article 21(3) of the ICC Statute; Judgment, Prosecutor v. Delalić et al., IT-96-21-A, A. Ch., ICTY, 20 February 2001, para. 611]

### 3. Impartiality

- **In making and reviewing selection decisions prosecutors and judges should not exercise bias in favor or against any person or group.**

[Articles 13, 21(1) of the ICTY Statute; Articles 12(1), 20(1) of the ICTR Statute; Articles 13(1), 17(4) of the SCSL Statute; Article 67(1) of the ICC Statute; Section 23.2 of the UNTAET Statute; ECCC Law, Articles 10 new, 25; Articles 9(1), 16(4) of the STL Statute]

### 4. Independence

- **Prosecutors should not take direction from outside persons or entities with regard to the selection of particular defendants or charges.**

[Article 16(2) of the ICTY Statute; Article 15(2) of the ICTR Statute; Article 15 of the SCSL Statute; Article 42(1) of the ICC Statute; ECCC Law, Articles 10 new, 19, 25; Article 11(2) of the STL Statute; Decision on Preliminary Motions, Prosecutor v. Milošević, Case No. IT-02-54, T. Ch., ICTY, 8 November 2001, para. 15]

### 5. Sufficiency of Evidence

- **Prosecutors should not bring charges unless there is sufficient evidence of guilt.**

[Article 19(1) of the ICTY Statute; Article 18(1) of the ICTR Statute; Article 53(2) of the ICC Statute; Article 18(1) of the STL Statute]

# Rules

## 1. Criteria for exercising discretion

- **When exercising discretion concerning whether to prosecute and what charges to bring prosecutors should consider the gravity of offense and the extent of perpetrator's culpability.**

[Rules 11 bis (C) and 28 (A) ICTY RPE; Articles 17 (1) (d) and 53 (2) (c) ICC Statute; Decision for the Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis, Prosecutor v. Ademi & Norać, Case No. IT-04-78-PT, T. Ch., ICTY, 14 September 2005, para. 29; Decision on Referral of Case Pursuant to Rule 11 bis, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, T. Ch., ICTY, 5 April 2007, para. 27; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic in Kenya, ICC-01/09-19, PT. Ch. II, ICC, 31 March 2010, paras 60-62]

# Recommendations

Only a small number of general principles and one rule currently constrain the discretion of international prosecutors to select cases for investigation and prosecution. Additionally, at the ICC, the prosecutor has significant power to determine what situations are investigated. Nor are there obvious principles or rules that could be developed to narrow the scope of this discretion. As such, the success or failure of international courts currently hinges substantially on how prosecutors exercise their discretion. In light of the importance of the issue, it is expedient for proponents of international criminal justice to consider whether the current system of broad prosecutorial discretion should be reconsidered – especially for the ICC.

When the ICC Statute was created in Rome, little consideration was apparently given to how the prosecutor would or should make selection decisions. In fact, the prosecutor was granted substantial discretion in this area largely because the primary alternative under consideration – control by the Security Council – was unacceptable to most states. Some of the drafters may have assumed that the situations the Court should investigate would be obvious – they would resemble Nazi Germany or genocidal Rwanda. Reality has turned out to be more complicated.

The exercise of prosecutorial discretion would be relatively straight forward if general agreement existed as to the goals of international criminal law and the appropriate priorities among them. Unfortunately, no such consensus exists. In national systems, the overarching goal is to punish all serious wrongdoing, which is usually justified in terms of deterrent and/or retributive objectives. Of course, there is some leeway around the margins to enable prosecutors to pursue secondary objectives. For example, in some systems, prosecutors may permit one offender to plead guilty and provide evidence against another offender to promote efficiency. For international criminal justice, however, the situation is quite different. International courts generally can prosecute only a tiny fraction of the serious crimes over which they have jurisdiction. Prosecution of certain crimes often serves very different purposes than prosecution of others. For example, prosecuting the recruitment of child soldiers when ample evidence exists of murders and rapes may be considered inappropriate from a retributive perspective. Aren't those who recruit fourteen year olds to fight



less culpable than those who plan and commit mass murder and rape? On the other hand, prosecuting the recruitment of child soldiers sends a message that this (relatively new) crime is now being enforced. Such a message might deter the recruitment of child soldiers in a way that enforcing the more established norms against murder and rape would not. The problem is that there is little agreement within or among relevant communities about whether it is more important to, for example, exact retribution from the worst offenders or to send deterrent messages to broader audiences.

Arguably, such fundamental policy decisions should not be left to a single prosecutor acting with minimal judicial oversight. Various alternatives can be envisioned. First, responsibility for selection decisions could be spread more broadly within the court. There could be a 'college of prosecutors' that makes selection decisions jointly or the judges could be granted a more active role in the process. For example, the judges could be given *proprio motu* power to review all decisions not to proceed with investigations or prosecutions rather than merely those based on the interests of justice in referred situations. Alternatively, responsibility for selection decisions could be reallocated outside the court, in whole or in part. For example, political actors such as the Security Council, General Assembly, or Assembly of States Parties could be tasked with selecting situations for the ICC to investigate or at least could have a voice in that process. With regard to case selection, a greater role could be given to civil society in the affected territory, perhaps with a particular emphasis on including victim groups. For example, the prosecutor could be required to explain his strategy in detail to such groups and to take their input into consideration.

Finally, assuming no structural change is undertaken, a number of commentators have argued that the prosecutor should issue public guidelines concerning how selection decisions are made.<sup>2</sup> Such guidelines exist in many systems characterized by significant prosecutorial discretion. Prosecutorial guidelines are generally not binding but lower-level prosecutors are accountable to their superiors if they fail to implement them appropriately. Proponents of guidelines urge that they would enhance perceptions of legitimacy by bringing to light the factors that influence selection decisions rather than leaving them clouded in secrecy. Such guidelines would also encourage consistency in decision-making, which could contribute to positive perceptions of the court's work. The prosecutor of the ICC is reportedly on the verge of issuing a policy document laying out the criteria for case selection decisions.

We express here no opinion concerning any of the above courses of action. We merely recommend further consideration of these issues in light of the high stakes involved in continuing on the current course. At a minimum, prosecutors and other relevant actors should focus increased attention on the ways in which selection decisions effectuate and prioritize particular goals of international criminal law.

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<sup>2</sup> A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', (2003) 97 American Journal of International Law 510, at 541; G.-J. A. Kooops, 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective', (2004) 15 Criminal Law Forum 365, at 388; M. Bergsmo, 'The theme of selection and prioritization criteria and why it is relevant', in M. Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Oslo: Prio, 2009) 16.

## B. Investigation, Coercive Measures, Arrest and Surrender

K. de Meester, K. Pitcher, R. Rastan and G. Sluiter

### Principles

#### 1. Investigation phase: delineation and scope

- **The Prosecutor shall conduct investigations independently and shall not seek or receive instructions from any external source.**

[Article 16 (2) ICTY Statute, Article 15 (2) ICTR Statute and Article 15 (1) SCSL Statute; Article 42 (1)-(2) ICC Statute; Article 11 (2) STL Statute; Article 19 (2) ECCC Law; Article 6 ECCC Agreement; Section 4.2. UNTAET Regulation 2000/16]

- **A duty of due diligence in the conduct of investigations is incumbent on the parties.**

[Rule 119 (A) ICTY RPE, Rule 120 (A) ICTR RPE; ICTY case law, ICTR case law; Article 84 (1) (a) ICC Statute; Section 41.2 TRCP; Rule 112 (1) (a) ECCC IR; Rules 186 (C) and 190 (A) STL RPE]

#### 2. Collection of Evidence

##### 2.1. Non-coercive investigative acts

###### *Interrogation of suspects and accused persons*

- **The Prosecutor has the power to question suspects and accused persons.**

[Article 15 (C) IMT Charter; Article 18 (2) ICTY Statute, Article 17 (2) ICTR Statute, Article 15 (2) SCSL Statute, Rule 39 (i) and Rule 63 ICTY, ICTR and SCSL RPE; Article 54 (3) (b) ICC Statute, Rules 111 and 112 ICC RPE, Article 11 (5) STL Statute, Rule 85 STL RPE, Section 7.4 (b) TRCP]

- **The suspect and accused have the right to be assisted by counsel during interrogation.**

[Rule 42 (A) (i) and (B) ICTY, ICTR and SCSL RPE, Rule 63 (A) ICTY, ICTR and SCSL RPE; Article 55 (2) (c) ICC Statute, Article 67 (1) (d) ICC Statute, Article 24 new ECCC Law, Rule 58 (2) ECCC IR, Article 15 (e) STL Statute, Rule 65 (B) STL RPE, Rule 85 (A) STL RPE]

- **Prior to the interrogation, the suspect or accused shall be informed of the existence of such right.**

[Rule 42 (A) ICTY, ICTR and SCSL RPE, Rule 63 ICTY, ICTR and SCSL RPE and Article 21 (4) (d) ICTY Statute, Article 20 (4) (d) ICTR Statute and Article 17 (4) (d) SCSL Statute; Article 55 (2) ICC Statute, Article 15 STL Statute, Rule 65 and 85 of the STL RPE]

- **The right to counsel can be waived, provided that the waiver is given voluntarily.**

[Rule 42 (B) ICTY, ICTR and SCSL RPE, Rule 63 (A) ICTY, ICTR and SCSL RPE; Article 55 (2) (d) ICC Statute; Rule 65 (B) and 85 STL RPE]

- **The suspect or accused has the right to remain silent during the interrogation.**

[Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE, Rule 63 (B) ICTY, ICTR and SCSL RPE; Article 55 (2) (b) and Article 67 (1) (g) ICC Statute; Rule 21 (d) ECCC IR, Section 6.3 (h) and 6.2 (a) TRCP; Article 15 (b) STL Statute, Rule 65 (A) (iv) and 85 STL RPE]

- **No adverse inferences may be drawn from the silence of the suspect or accused.**  
[Article 55 (2) (b) and Article 67 (1) (g) ICC Statute; Section 6.3 (h) and 6.2 (a) TRCP; Article 15 (b) STL Statute]
- **The use of coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment during interrogation is prohibited.**  
[Article 55 (1) (b) ICC Statute; Rule 21 (3) ECCC IR; Section 6.3 (i) TRCP, Rule 162 STL RPE]
- **Prior to interrogation, an accused person (a person against whom one or more charges have been confirmed) shall be informed in detail, in a language he or she understands, about the nature and cause of the charges against him or her before interrogation takes place.**  
[Article 21 (4) (a) ICTY Statute, Article 20 (4) (a) ICTR Statute and Article 17 (4) (a) SCSL Statute; Article 67 (1) (a) ICC Statute; Section 6.3 (b) TRCP; Article 16 (4) (a) STL Statute]
- **Where the suspect or accused cannot understand or speak the language used for interrogation, he or she has a right to free assistance of an interpreter during interrogation.**  
[Rule 42 (A) (ii) ICTY, ICTR and SCSL RPE, Article 21 (4) (f) ICTY Statute, Article 20 (4) (f) ICTR Statute, and Article 17 (4) (f) SCSL Statute; Article 55 (1) (c) and 67 (1) (f) ICC Statute, Article 24 new ECCC Law; Section 6.3 (c) TRCP; Rule 65 (A) (iii) and 85 STL RPE, Article 15 (C) STL Statute]
- **Interrogations of suspects or accused shall be audio-recorded or video-recorded.**  
[Rule 43 and 63 (B) ICTY, ICTR and SCSL RPE; Rule 112 ICC RPE, Rule 25 IR ECCC; Rule 66 and 85 (B) STL]

#### *Questioning of Witnesses*

- **The Prosecutor has the power to question witnesses.**  
[Article 18 (2) ICTY Statute, Article 17 (2) ICTR Statute, Article 15 (2) SCSL Statute; Rule 39 (i) ICTY, ICTR and SCSL RPE; Article 54 (3) (b) ICC Statute; Rule 50 (4) IR ECCC (preliminary examination); Article 11 (5) STL Statute and Rule 61 (i) STL RPE; Section 7.4 (b) TRCP]
- **The Prosecutor shall make a record of the witness interview.**  
[Rule 111 ICC RPE; Rule 55 (7) IR ECCC; ICTY, ICTR and SCSL case law]
- **The use of coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment during witness interviews is prohibited.**  
[Article 55 (1) (b) ICC Statute; Rule 21 (3) ECCC IR; Section 34.2 TRCP, Rule 162 STL RPE]

#### 2.2. Non-custodial coercive investigative acts

- **The prosecutorial power to collect evidence includes the power to make use of non-custodial coercive measures.**

[Article 18 (2) of the ICTY Statute, Article 17 (2) of the ICTR Statute, Article 15 (2) of the SCSL Statute, Rule 39 (i) and (ii) of the RPE of the ICTY, ICTR and SCSL; Articles 54 (3) (a) ICC Statute; Article 11 (5) STL Statute, Rule 61 (i) STL RPE; Section 7.4 UNTAET Regulation 2000/30]

### 3. Restriction and deprivation of liberty

- **A warrant for an individual's arrest must be based on sufficient evidence – a reasonable basis to conclude that an individual may have committed a relevant crime - and must be issued by a judge.**

[Article 19 ICTY St, Article 18 ICTR St., Article 58 (1) (a) ICC St, case law SCSL, Section 19A.1 SPSC UNTAET Regulation 2001/25, Article 18 STL St.]

- **Every detained person has the right to challenge his or her detention and to apply for interim release.**

[Rule 65 and related case law ICTY, ICTR and SCSL RPE, Article 60 (2) ICC St., Section 6.k UNTAET Regulation 2001/25 and related case law, Rule 64 ECCC IR, Rule 101 STL RPE]

### 4. Remedies

#### 4.1. General framework for imposing remedies for procedural violations

- **Upon violation of the Rules of Procedure and Evidence or other applicable rules of procedure, the judge or chamber has the power to impose a remedy.**

[Rule 5 ICTY RPE, Rule 5 ICTR RPE, Section 55 SPSC Transitional Rules, Rule 4 STL RPE; Barayagwiza Appeals Decision (I), Barayagwiza Appeals Decision (II), Lubanga Appeals Decision (Jurisdiction), Nuon Chea Pre-Trial Decision; Lubanga Appeals Decision (Disclosure I)]

## Rules

### 1. Investigation phase: delineation and scope

- **The Prosecutor shall conduct investigations and be responsible for the prosecution of cases.**

[Article 16 (1) ICTY Statute; Article 15 (1) of the ICTR and SCSL Statute; Article 42 (1), ICC Statute; Article 11 (1) STL Statute; Section 7.1 TRCP]

- **The Defence may conduct its own investigations.**

[Article 16(e) IMT Charter; Article 9 (d), (e) IMTFE Charter; Article 21 (4)(b), (e) ICTY Statute; Article 20 (4)(b),(e) ICTR Statute; Article 17 (4)(b), (e) SCSL Statute, Article 67 (1)(b), (e) ICC Statute (equality of arms and the right of the accused to have adequate time and facilities for the preparation of his or her defence. Cf. ECCC case law)]

- **The Prosecutor may continue his investigations after the confirmation of charges.**

[Rule 2 ICTY, ICTR and SCSL RPE; (case law ICC); Rule 2 STL RPE; Section 1(n) UNTAET Regulation 2000/30]

- **The purpose of the Prosecutor's investigations is to discover the truth. To this end, the Prosecutor must investigate incriminating and exonerating circumstances equally.**

[Article 54 (1) (a) ICC Statute; Section 7.2 UNTAET Regulation 2000/30]

## 2. Collection of Evidence

### 2.1. Non-coercive investigative acts

#### *Interrogation of suspects and accused persons*

- **Prior to interrogation, the suspect or accused should be cautioned that his or her statement may be used in evidence at trial.**

[Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE, Rule 63 (B) ICTY, ICTR and SCSL RPE; Article 15 (b) STL Statute, Rule 65 (A) (iv) and 85 (B) STL RPE]

- **Prior to interrogation, a suspect shall be informed that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court.**

[Article 55 (2) (a) ICC Statute; Article 15 (a) STL Statute; Rule 65 (A) (i) STL RPE]

- **A suspect or accused may be interrogated without the interrogation being audio-recorded or video-recorded if circumstances prevent such recording from taking place.**

[Rule 112 (2) ICC RPE; Rule 25 (2) ECCC IR]

- **The questioning of other persons [i.e. persons not suspected of committing a crime] may also be audio-recorded or video-recorded, particularly where such recording would assist in reducing subsequent traumatisation.**

[Rule 112 (4) ICC RPE; Rule 25 (4) ECCC IR]

#### *Questioning of Witnesses*

- **Witnesses enjoy a privilege against self-incrimination during the investigation.**

[Article 55 (1) (a) ICC Statute; Rule 28 IR ECCC]

- **Every witness interviewed has the right to the free assistance of an interpreter during questioning.**

[Article 55 (1) (c) ICC Statute]

- **During defence investigations, the Defence may interview witnesses.**

[Article 16(e) IMT Charter; Article 9 (d), (e) IMTFE Charter; Article 21 (4)(b), (e) ICTY Statute; Article 20 (4)(b), (e) ICTR Statute; Article 17 (4)(b), (e) SCSL Statute, Article 67 (1)(b), (e) ICC Statute (equality of arms and the right of the accused to have adequate time and facilities for the preparation of his or her defence. Cf. ECCC case law)]

### 2.2. Non-custodial coercive investigative acts

- **Unless otherwise authorized, the Prosecutor shall request the assistance of the competent judicial or prosecutorial authorities for the execution of non-custodial coercive measures.**

[ICTY case law; Article 99 (4) ICC Statute (compare Article 57 (3) (d) ICC Statute)]

- **Non-custodial coercive investigative action shall be proportionate.**  
[ICTY case law, ICC case law, Rule 21 (2) ECCC IR]
- **An inventory shall be made of all items and documents seized from the accused.**  
[Rule 41 (B) ICTR and SCSL RPE, Rule 50 (2) and (5) ECCC IR, Rule 61 (2) and (3) ECCC IR, Section 15 (5) UNTAET Regulation 2000/30)]
- **Assets belonging to the suspect or accused may be provisionally seized or frozen in the course of the investigation.**  
[ICTY, SCSL case law; Article 57 (3) (e) and 93(1)(k) ICC Statute]

### 3. Restriction and deprivation of liberty

- **The risk that a person at liberty will not appear for trial and the risk that a person at liberty will interfere with ongoing investigations (including the risk of interference with victims, witnesses or other persons) are relevant factors in restriction and deprivation of liberty, either as grounds which have to be satisfied to issue an arrest warrant or as conditions for ordering interim release.**  
[Rule 65 (B) ICTY, ICTR and SCSL RPE, Article 58 (1) (b) and Article 60(2) ICC Statute, Section 20.8 SPSC UNTAET Regulation 2001/25, Rule 63 (3) ECCC IR, Rule 79 STL RPE]

### 4. Remedies

#### 4.1. General framework for imposing remedies for procedural violations

- **Any remedy imposed shall be proportionate to the violation.**  
[Semanza Appeals Decision; Barayagwiza Appeals Decision (II); Nikolić Appeals Decision; Ieng Thirith Pre-Trial Decision (Abuse of Process)].

#### 4.2. Permanent stays of proceedings

- **In cases where serious and irreparable violations of the suspect's rights would damage the integrity of the proceedings or be inconsistent with the right to a fair trial, the proceedings shall be stayed permanently.**  
[Barayagwiza Appeals Decision (I), Nikolić Trial Decision, Nikolić Appeals Decision, Lubanga Appeals Decision (Jurisdiction), Duch Trial Decision, Ieng Thirith Pre-Trial Decision (Annulment), Ieng Thirith Pre-Trial Decision (Abuse of Process); Lubanga Appeals Decision (Disclosure I).]
- **The involvement of (one or more organs of) the Court in the violation of the rights of the suspect or accused shall be a factor weighing heavily in favour of staying the proceedings permanently.**  
[Barayagwiza Appeals Decision (II), Nikolić Trial Decision; Lubanga Appeals Decision (Jurisdiction)]
- **Where the proceedings are stayed permanently, the suspect or accused shall be released immediately.**  
[Barayagwiza Appeals Decision (I), Lubanga Appeals Decision (Release)]

#### 4.3. Compensation

- **In cases of unlawful arrest, unlawful detention or other related human rights violations, the judge or chamber has the power to order financial or other appropriate compensation.**

[Article 85 ICC Statute, Rules 173, 174 and 175 ICC RPE, Section 52.2 SPSC Transitional Rules; Rule 170 (D) and (E) of the STL RPE; Barayagwiza Appeals Decision (II), Semanza Appeals Decision, Kajelijeli Appeals Judgment, Rwamakuba Trial Decision, Rwamakuba Appeals Decision]

## Recommendations

### 1. Investigation phase: delineation and scope

In light of the complexity of the cases and difficulties encountered by defendants in conducting investigations, it is recommended that the obligation on the Prosecutor to search for the truth and examine incriminating and exonerating facts and evidence equally become a general principle. To a certain extent, it may reduce the problems of existing inequalities between the parties in the investigation. Moreover, since the Prosecutor has extensive 'inquisitorial' investigative powers at his or her disposal available via state cooperation, including compulsory powers related to arrest and detention or search and seizure, conferring such obligations on the Prosecutor may help to restore any imbalance between the parties.

In addition, it is recommended that the defence investigative evidence-gathering powers and the obligations of States and other actors to provide judicial assistance to defence teams be formulated more clearly. At present, such powers derive from the equality of arms principle and from the general right of the accused to have adequate time and facilities for the preparation of his or her defence, to examine and to have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. To this end, the ability of the Defence to request international cooperation and judicial assistance should be expressly stipulated, rather than requiring such requests to be channeled through Chambers of the Court.

### 2. Collection of Evidence

#### 2.1. Non-coercive investigative acts

##### *Interrogation of suspects and accused persons*

Some of the rules identified should become principles. Firstly, the ICC should adopt the rule that every suspect or accused should be cautioned, prior to interrogation, that his or her statement may be used in evidence. In this regard, it should be noted that the ICC Prosecutor seems to apply this rule in practice. Secondly, before questioning starts, every suspect should be informed that there are reasonable grounds to believe that he or she has committed a crime within the jurisdiction of the court, in order to allow the suspect to make an informed decision as to whether or not to waive his or her right to counsel. Thirdly, it is good practice to provide for the audio-recording or video-recording of the questioning of other (vulnerable) persons. This example should be followed by other tribunals, because it can help reduce traumatizing effects of the interrogation.

The use, during questioning, of inducements to coerce the suspect or accused into cooperating should be explicitly prohibited. The use of deception as an interrogation technique should also be prohibited, as this practice does not seem to be in line with human rights law.

### *Questioning of Witnesses*

Unlike interrogations of suspects and accused, witness interviews do not have to be audio-recorded or video-recorded at the international criminal tribunals. Nevertheless, the ECCC and ICC procedural frameworks encourage such practice, especially in relation to vulnerable witnesses. The STL only provides for the audiovisual recording of witness interviews where a deposition is taken by the Pre-Trial Judge (Rule 123 juncto Article 1 (9) of the Practice Direction on the Procedure for Taking Depositions and for Taking Witness Statements) or by the national state (Rule 125 (C) STL RPE). It is recommended that audiovisual recordings should be made of witness interviews as far as practicably possible. Such recordings may enhance the transparency of the witness statement recording process and enable control over the conduct of witness interviews. To a certain extent, this requirement may remedy some of the problems linked to pre-trial interviews of witnesses, including the existence of inconsistent witness statements.

As pre-trial witness statements are increasingly allowed in evidence at trial, clear guidelines should be available outlining the procedure for the conduct of witness interviews and the taking of witness statements. These guidelines would enhance the transparency of the questioning and statement-recording processes.

The privilege against self-incrimination should become a principle. The status of the person interviewed may change. A person who is interviewed as a witness may later become a suspect. Providing witnesses with a privilege against self-incrimination takes this situation into account and ensures protection against self-incrimination at the early stages of the investigation. Only the ECCC's procedural framework requires the witness to be informed of the privilege against self-incrimination prior to the commencement of the interview (Rule 28 IR). While no such obligation appears to follow from human rights law, it would ensure the effective realisation of this right.

### **2.2. Non-custodial coercive investigative acts**

The absence of a requirement to obtain judicial authorisation from a Tribunal Judge or (Pre-)Trial Chamber before coercive measures can be used is problematic from a human rights perspective. Besides, the prior judicial authorisation of non-custodial coercive acts was found to be indispensable to avoid any lacunae in the protection of the defendant. Therefore, it is strongly recommended that the international criminal tribunals adopt, in line with the ECCC and SPSC, a rule requiring judicial authorisation for the use of non-custodial coercive measures. An exception to this rule could be made for situations of urgency, by providing for some form of ex post judicial control (consider the interpretation given to Rule 40 (ii) ICTY RPE and Rule 40 (A) (ii) ICTR and SCSL RPE)).

It is further recommended that the international criminal tribunals adopt a minimum threshold for the adoption of non-custodial coercive measures (such as 'probable cause'). No specific threshold currently exists in international criminal procedure. The only exception can be found in UNTAET Regulation 2000/30, which requires in relation to searches that there be 'reasonable grounds to believe that such search would produce evidence necessary for the investigation or would lead to the arrest of a suspect whose arrest warrant has previously been issued'. The drafting history of the ICC reveals that a proposal was made to make search and seizures dependent on judicial authorization, requiring an 'adequate cause'. However, this provision was not adopted.

Given that non-custodial coercive measures infringe on individual rights, the principle of proportionality should entail that any judicial warrant stipulate the places that may be searched, the items that may be seized, the persons involved in the operation or, in case of the interception of



communication, that any judicial warrant indicate the duration of such interception and the procedure to be followed in transcribing or drawing up a log of such intercepted communications. The rule that an inventory should be made of items and documents seized during a search operation should become a principle.

### **3. Restriction and deprivation of liberty**

As a result of the significant divergence among international criminal tribunals' approaches to arrest and detention, recommendations have to be made in order to fill certain gaps and sort out inconsistencies. In respect of each recommendation we provide a short explanation.

#### **3.1. General**

In addition to the rights of the accused, Statutes of international criminal tribunals shall contain each individual's right to liberty and not to be subjected to arbitrary arrest or detention. It is felt that in addition to a reference to the fair trial rights of the accused, Statutes should also contain the right to liberty. This would serve to demonstrate the tribunals' strong adherence to this right and also function as a safety net in case there are gaps in the tribunals' positive law.

#### **3.2. Issuance of arrest warrant**

Before issuing an arrest warrant a judge must be satisfied that the arrest is necessary for at least one of the following purposes:

- a. to ensure the person's appearance at trial;
- b. to ensure that the person does not obstruct or endanger the investigation or the court proceedings;
- c. where applicable, to prevent the person from continuing with the commission of international crimes; and
- d. to protect public safety and security.

An arrest warrant for the purpose of protecting public safety and security may only be issued when there is direct and convincing evidence that the suspect's liberty is likely to directly endanger public safety and security.

The above recommendation follows to a significant degree Article 58 (1) (b) of the ICC Statute, but it adds the protection of public order and safety as a ground justifying arrest and detention. This ground is available under human rights law and also applies, for example, to the ECCC and many national jurisdictions. There is thus in principle no objection to make this ground also available to international criminal justice. However, we are aware of the risk that such ground, when interpreted loosely, would make detention in case of accusations of crimes against humanity, war crimes, or genocide almost automatic. Therefore we recommend, on the basis of ECHR case law, that this ground can only be applied with a high evidentiary burden.

Before issuing an arrest warrant a judge must be satisfied that a summons to appear, with or without conditions restricting liberty (other than detention), does not suffice to meet the purposes a-d.

It is a general principle of criminal procedure that coercive measures should only be used when other less invasive alternatives are not available; these are the rules of subsidiarity and proportionality. Although the ICC Statute allows for the summons to appear, in Article 58 (7), it should be considered as a rule and proprio motu in each case.

In case of urgency, the Prosecutor of international criminal tribunals may request any State to arrest a suspect provisionally, when the Prosecutor has in his possession evidence indicating that the person concerned may have committed a crime within the jurisdiction of the Tribunal/Court. The

suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment or an application for an arrest warrant within twenty days of the date on which the request was received by the requested State.

The law of the ad hoc Tribunals provides for arrest and detention at the request of the Prosecutor in situations of urgency and this recommendation is modeled on that law. We recommend that in situations of urgency the Prosecutor of international criminal tribunals is in a position to request the provisional arrest of a suspect. This power is available in every jurisdiction where urgent situations demand for immediate action. We do not see any compelling reason why the ICC Prosecutor should not have this power, especially when the power is surrounded by sufficient safeguards. It is in the interests of justice when there is a 'unique arrest'-opportunity to empower the Prosecutor to request provisional arrest. Withholding such power furthermore displays a non-justified and undesirable degree of lack of confidence in the Prosecutor.

### **3.3. Execution of arrest warrant**

A person who is the subject of an arrest warrant shall be arrested in accordance with a procedure established by law, in which his rights under national and international law shall be respected. We felt that in respect of the execution of arrest warrant, the arrested person lacks adequate protection from the law of international criminal tribunals. It is proposed that a person who is the subject of an arrest warrant is entitled to basic minimum rights as to how he/she is arrested. From a human rights perspective, this means that the arrest shall take place in accordance with a procedure established by law, and that the individual's rights under relevant law are respected. This recommendation is just a shorter way of expressing the requirements of Article 59 of the ICC Statute.

### **3.4. Detention on remand**

A judge shall periodically (alternative: every 30/60/90 days) review the detention of the accused at the seat of the Tribunal/Court. He shall proprio motu or at the request of either party satisfy himself that there continues to be a reasonable basis to believe that the detained person has committed a crime within the jurisdiction of the Tribunal/Court and that detention continues to be necessary for one of the purposes a-d.

We felt there is generally a lack of judicial supervision of detention at international criminal tribunals. The initiative of challenging detention should not only lie with the defendant; it is also in the interests of justice – and serves the economic use of resources – that judges regularly inquire proprio motu whether the detention is still justified and necessary. This system functions in many national criminal jurisdictions this way and also best corresponds to protecting the right to liberty. A suspect may be kept in detention at the seat of the Tribunal/Court prior to the commencement of the trial/confirmation hearing for a fixed period from the date of arrest. After commencement of the trial, the judge shall ensure that a person is not detained for an unreasonable period.

There has been some disagreement in the Working Group over this recommendation. The main and direct purpose behind it is of course to respect each individual's right not to be detained for an unreasonable period of time. Fixed terms help in securing this right. But there is an ulterior motive, namely that fixed terms – either 6 months, or even a longer period of a year – drive the criminal process forward. Without these terms there is the risk – as proven in practice of both ICTY and ICC – that proceedings drag on too long. But the other opinion in the Working Group is that there should be room in international criminal justice for more flexibility. There may be complex factors and reasons embedded in the Court's legal framework militating against the imposition of fixed terms

and favouring a set of overarching principles, such as those found in article 60(3)-(4) of the ICC Statute.

#### **4. Remedies**

Where a violation of the rights of the suspect or the accused is established, in addressing that violation, the judge or chamber shall consider all of the available remedies *proprio motu*. The judge or chamber shall give reasons for any determination made in this regard.

Where a violation of the rights of the suspect or the accused is established, the suspect or accused shall have an enforceable right to financial or other adequate compensation, including sentence reduction.

When both financial compensation and sentence reduction are available and appropriate, the selection of remedy shall depend on the facts and circumstances of the case.

Where a violation of the rights of the suspect or the accused is established but minimal or no material prejudice is caused to such person, declaratory relief shall be the appropriate remedy.

# C. Charges, Confirmation, Res Judicata, Lis Pendens, Iura Novit Curia

H. Brady, M. Costi, H. Friman, F. Guariglia and C.-F. Stuckenberg

## Principles

### 1. Bringing charges

#### 1.1. Form and content of the indictment

- **The indictment or document containing the charges shall set out the name of the accused, a statement of the facts (cause) and a legal characterization of the facts (nature) both with respect to the crime and the mode of liability.**

[Rule 47(C) ICTY RPE, Rule 47(C) ICTR RPE, Rule 47(C) SCSL RPE, ICC Regulation 52, Rule 68(D) STL RPE, Section 24(1) SPSC Regulations, Rule 67(2) ECCC Internal Rules. See also Art. 16(a) IMT Charter, Art. 9(a) IMTFE Statute, ICTY, ICTR, SCSL, ICC, STL, ECCC case law]

- **Material facts must be set out in a sufficiently clear and detailed manner to enable an accused to prepare a defence effectively and efficiently. Evidence need not be included in the indictment itself.**

[ICTY, ICTR, SCSL, ICC, STL, ECCC case law]

### 2. Confirming charges

#### 2.1. Judicial review of the charges and committal for trial

- **Charges against an accused person shall be judicially reviewed prior to committing the person to stand trial.**

[Art. 18 (4) ICTY Statute, Rule 47 (A) & (B) ICTY RPE, Art. 17 (4) ICTR Statute, Rule 47 (A) & (B) ICTY RPE, Rule 47 (C) SCSL RPE, Art. 61 ICC Statute, Art. 18 (1) STL Statute, Rule 68 (B) STL RPE]

- **The reviewing judicial body shall assess the charges to see if a prima facie case/substantial grounds exist to believe that an accused has committed an offence as charged.**

[Art. 19 (1) ICTY Statute, Rule 47 (E) & (F) ICTY RPE, Art. 18 (1) ICTR Statute, Rule 47 (E) & (F) ICTY RPE, Rule 47 (E) & (F) SCSL RPE, Art. 61 (7) ICC Statute, Rule 68 (F) STL RPE; ICC, ICTY, ICTR, SCSL, STL case law]

#### 2.2. Application of iura novit curia principle when confirming the charges

- **None.**

### 3. Amending, adding and withdrawing charges

#### 3.1. Amendment of charges before confirmation

- **The Prosecution may amend charges without leave at any time before their confirmation.**

[Rule 2a IMT RPE, Rule 1a IMTFE RPE, Rule 50 (A)(i)(a) ICTY RPE, Rule 50 (A)(i) ICTR RPE, Art. 61 (4) ICC Statute, Rule 121 (4) ICC RPE, Rule 50 (A) SCSL RPE, Rule 71 (A) (i) STL RPE]

### 3.2. Amendment of charges after confirmation

- **If an amendment is sought after charges have been confirmed, leave from a court is required. The court may grant leave if the amendment sought meets the standard for the confirmation of charges and does not affect the accused's right to a fair trial.**

[Rule 50 (A)(i)(b) and (c) ICTY RPE, Rule 50 (A)(i) ICTR RPE, Art. 61(9) ICC Statute, Rule 128 (1) and (2) ICC RPE, Rule 50 (A) SCSL RPE, Rule 71 (A) (ii) and (iii), (B), (C) and (D) STL RPE. See also ICTY, ICTR, ICC, SCSL, STL case law]

### 3.3. Amendment of charges after initial appearance

- **If leave to amend is sought after an accused's initial appearance and the amendment amounts to a new or more serious charge, a further appearance must be held to enable the accused to enter a plea on the new charge and an additional period will be granted to file preliminary motions.**

[Rule 50 (B) and (C) ICTY RPE, Rule 50 (B) and (C) ICTR RPE, Art. 61(9) ICC Statute, Rule 128 (3) ICC RPE, Rule 50 (B) SCSL RPE, Rule 71 (E) and (F) STL RPE. See also ICTY, ICTR, ICC, SCSL, STL case law]

## 4. Deciding charges

### 4.1. Halfway determinations or 'no case to answer' proceedings

- **None.**

[Rule 98bis ICTY RPE, Rule 98bis ICTR RPE, Rule 98 SCSL RPE. See also ICTY, ICTR, SCSL case law]

### 4.2. Iura novit curia and final determination on the charges

- **None.**

[ICC Regulation 55, Section 32(4) SPSC Regulations, Rule 98(2) ECCC Internal Rules, ICC and SPSC case law. Cf. ICTY case law]

## 5. Lis pendens, res judicata and ne bis in idem

### 5.1. Horizontal (internal) ne bis in idem

- **A person shall not be tried before an international criminal court or tribunal for conduct which formed the basis of crimes for which he or she has already been tried by that court or tribunal.**

[Art. 20 (1) ICC Statute; Art. 5 (1) STL Statute, Section 11.1 SPSC Regulations]

### 5.2. Vertical downwards ne bis in idem vis-à-vis national and other international courts

- **A person shall not be tried by another court for a crime prescribed in the law of the international court or tribunal for which he or she has already been tried by the international criminal court or tribunal.**

[Art. 10 (1) ICTY Statute, Art. 9(1) ICTR Statute, Art. 20 (2) ICC Statute, Section 11.2 SPSC Regulations; compare Art. 5 (1) STL Statute, Art. 9 (1) SCSL Statute.]

### 5.3. Vertical upwards ne bis in idem vis-à-vis national and other international courts

- **A person who has been tried by a national court for acts constituting offences under the law of the international court or tribunal may be subsequently tried by an international court or tribunal only if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.**

[Art. 10 (2) ICTY Statute, Art. 9 (2) ICTR Statute, Art. 20 (3) ICC Statute, Art. 9 (2) SCSL Statute, Art. 5 (2) STL Statute, Section 11.3 SPSC Regulations]

### 5.4. Lis pendens

- **None.**

### 5.5. Res judicata (general)

- **A final decision on the merits [of a procedural issue] cannot be re-litigated between the same parties. However, the court may reconsider the issue and alter its decision.**

## Rules

### 1. Bringing charges

#### 1.1. Cumulative charges

- **Cumulative charges for the same conduct are permitted so long as each crime charged requires proof of a material fact not required by the other charged crime(s).**

[ICTY, ICTR, SCSL, STL, ECCC case law. Cf. ICC case law]

### 2. Deciding charges

#### 2.2. Halfway determinations or 'no case to answer' proceedings

- **If after the close of the prosecution case, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged, the Trial Chamber, on motion of the accused or proprio motu, shall order the entry of judgment of acquittal in respect of those counts.**

[Rule 98bis ICTY RPE, Rule 98bis ICTR RPE, Rule 98 SCSL RPE; ICTY, ICTR, SCSL case law. Cf. Articles 64 (2), (3)(a) and 8(b) ICC Statute and ICC case law]

- **Cumulative convictions for the same conduct are permitted so long as each crime requires proof of a material fact not required by the other crimes.**

[ICTY, ICTR, SCSL, STL, ECCC case law]

## Recommendations

### 1. Bringing charges

No particular recommendations, but see sections (c) (on facts in the indictment and orders to reduce the scope of the charges) and (d) (on cumulative charging) below.

### 2. Confirming charges

#### 2.1. Process of confirming charges

Although the ICC has recognized that the confirmation is not meant to be a 'mini-trial', its protracted disclosure process, its robust confirmation hearing and its confirmation decisions which run into the hundreds of pages, have significantly lengthened proceedings overall. While the quick and uncontested confirmation procedure at the ICTY, ICTR, SCSL and STL may lean too far in the other direction, a better balance must be struck between ensuring a fair and proper judicial screening of charges prior to sending a person to trial, and expedition in their final resolution. A return to a more written procedure and shorter decisions would help achieve this balance. The Banda and Jerbo decision is a useful precedent in this regard; however this was largely the result of an agreement between the Prosecution and the Defence to conduct the confirmation proceedings on the basis of written evidence, and the Defence taking the strategic decision not to challenge the Prosecution's evidence for the purpose of the confirmation hearing.

#### 2.2. Application of the *iura novit curia* principle (pre-trial)

The application of the *iura novit curia* principle at the confirmation stage seems at odds with prosecutorial discretion, the role of the Trial Chamber and the fundamentally adversarial nature of the ICC's proceedings. Pre-Trial Chambers at the ICC should limit their review of charges brought by the Prosecutor to an evidentiary one and leave their final legal characterization for the Trial Chamber's determination in the trial stage. See further section (d) below.

### 3. Amending, adding and withdrawing charges

No major recommendations are suggested for the current law and practice governing the procedure to amend charges. Yet, two rules adopted by the SCSL and the ICTY should be discouraged in the future.

First, Rule.47 of the SCSL RPE requires the Prosecution to set out its factual allegations in a Case Summary separately from the indictment. This allows the Prosecution to amend material factual allegations without the court's scrutiny even after charges are confirmed.

Second, Rule 73bis(D) of the ICTY RPE allows a Trial Chamber to 'reduce the scope' of a confirmed indictment by reducing the crime sites or incidents on which the Prosecution may present evidence. De facto this allows a Trial Chamber, without any evidentiary assessment, to set aside part of the Prosecution's case before a trial begins. This may interfere with prosecutorial discretion. Moreover, a Trial Chamber's ability to abdicate its responsibility to decide charges before it seems questionable. Similarly, ICC Regulation 54, by which a Trial Chamber may issue orders on

evidentiary matters prior to the commencement of trial, should not be interpreted as empowering a Trial Chamber to 'reduce the scope' of the charges.

#### **4. Deciding charges**

##### **4.1. 'No case to answer' proceedings**

'No case to answer' proceedings are a useful tool in international trials. Removing from the Prosecution case those areas where evidentiary substantiation does not exist ensures both fairness to the defence and efficiency in trial proceedings. Since the adversarial matrix of ICC trial proceedings now appears consolidated through practice, ICC Trial Chambers should consider importing such a device into their trial proceedings. Rule 140 provides an adequate avenue for those purposes. However, 'no case to answer' proceedings should be approached with caution, with the understanding that the ICC trial contains elements that diverge from a 'pure' adversarial model and that its overarching goal is the establishment of the truth. Further, lessons should be gleaned from the mistakes made by the ad hoc Tribunals in their initial approach to this device; in particular, 'no case to answer' proceedings should not be misused to prematurely delve into the quality or credibility of the Prosecution's evidence. Nor should the device duplicate efforts already undertaken at the confirmation stage.

##### **4.2. Application of the *iura novit curia* principle at trial**

Considering the complexity and remaining uncertainties with respect to international crimes, it is reasonable for international criminal courts and tribunals to apply the *iura novit curia* principle so long as an accused is protected against 'surprise' judicial legal re-characterizations and he or she is not unduly burdened in defending against any new legal recharacterization. The accused's rights as to being properly informed and having adequate time to prepare must be respected. The Prosecution and the court must also, as stressed by the ICTY Trial Chamber in Kupreškić, be in a position to exercise all the powers that are necessary to fulfil their mission efficiently and in the interests of justice. As highlighted by the ICC Appeals Chamber in Lubanga, the facts and circumstances must be set out in an indictment (and any amendment thereto) and this must be respected if there is a legal re-characterization of the facts. If the Prosecutor is responsible for bringing charges, the principle should only apply at the trial stage.

##### **4.3. Cumulative convictions**

The problem of *concursum delictorum* occurs in all criminal jurisdictions and is particularly pertinent with respect to complex international crimes and modes of criminal liability. The techniques to resolve the problem are indicators of the internal consistency, sophistication and overall rationality of the criminal law and the criminal system. Hence, it is an issue that should be resolved in the international criminal arena. It seems advisable for international criminal jurisdictions to adhere to the Čelebići test, as almost all the courts and tribunals under review do. This approach is manageable in practice and does not foreclose any substantive questions that should be decided at the sentencing stage.

#### **5. *Lis pendens*, *res judicata* and *ne bis in idem***

##### **5.1. Ordinary crime exception**

Although rejected at the Rome Conference, a rule for an 'ordinary crime' exception to upwards *ne bis in idem* seems desirable, e.g. for cases of a preceding bona fide prosecution in a State which does not (yet) have offence definitions sufficiently equivalent to crimes under international law. Any concern that the notion of 'ordinary crimes' may be too imprecise is unwarranted since the issue of whether a national offence definition is (substantially) identical with a crime within the jurisdiction of an international court or tribunal can be fairly easily ascertained.



### **5.2. Principle of deduction in subsequent trials**

Insofar as a subsequent trial on the same facts is possible due to the limited subject matter jurisdictions of the international criminal courts and tribunals or due to the unsatisfactory nature of a prior national trial, the second court should be required by a rule of international law to take into account any penalties already served.

### **5.3. Definition which decisions become res judicata**

It is also desirable to indicate more precisely what kinds of decisions entail the double jeopardy prohibition, e.g. the standard 'has been [finally] convicted or acquitted' is clearer than the standard 'has been tried'.

## D. Trial Process

G. Acquaviva, N.A. Combs, Y. McDermott, M. Heikkilä, S. Linton and S. Vasiliev

### Principles

#### 1. General issues

##### 1.1. Joinder and severance

- **1. Persons accused of the same or different crimes may be jointly charged and tried, provided they are charged with offences allegedly committed in the course of the same transaction.**  
**2. Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together.**  
**3. “In the course of the same transaction” means a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.**  
**4. The rights that an individual accused enjoys are also enjoyed by individuals who are tried jointly. In particular, the right to an expeditious trial is guaranteed to all accused in a joint trial, and an accused has a right to be tried in his or her presence and to challenge those who testify against him or her.**

[ICTY Statute Art. 20, 21(4)(c); RPE Rules 2, 48, 49, 82(A); ICTR Statute Art. 20, RPE Rules 48, Rule 48bis; SCSL Statute Art. 17; RPE Rules 2, 48, 49, 82(A); ICC Statute, in Article 64(5), Rule 136 of the ICC’s RPE, etc.]

- **Persons accused jointly may be tried separately if it is necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, and to protect the interests of justice.**

[ICTY RPE Rules 2, 72, 73, 82(B); ICTR RPE Rules 82(B), 72(A); SCSL RPE Rule 82(B) etc.]

##### 1.2. Single and bifurcated trials

- **The parties (and participants) may submit to the Trial Chamber any information relevant to the determination of an appropriate sentence after the evidence on the guilt or innocence of the accused.**

[Article 76(2) ICC Statute; Rule 100 SCSL RPE; Rules 171 and 87(C) STL RPE; Judgement, Prosecutor v. Tadić, Case No. IT-94-1-A, A. Ch., ICTY, 15 July 1999, para. 28; ECCC case law]

#### 2. Structure of contested trial

##### 2.2 Opening statements

- **Each party is entitled to make an opening statement.**

[Article 15 (c) IMTFE Charter; Rule 84 ICTY, ICTR, SCSL RPE; Rule 89 (1) ICC RPE and Regulation 54 (a) RoC ICC; Rule 89 bis (2) IR ECCC; Rule 143 STL RPE]

- **The parties may make their opening statement before the presentation of the evidence in their respective cases.**  
[Article 24 (c) IMT Charter; Article 15 (c) IMTFE Charter; Rule 84 ICTY, ICTR RPE; Rule 89 bis (2) IR ECCC; Rule 143 STL]
- **The Trial Chamber shall exercise control over the length and contents of the opening statement. It may do so among others by scheduling orders and during the delivery of such statements acting proprio motu or by sustaining objections.**  
[Rule 54 ICTY, ICTR, SCSL RPE; Article 64 (2) and (8) (b) ICC Statute and Regulation 54 (a) Regulations of the Court]

### 2.3. Order of presenting evidence

- **Each party is entitled to call witnesses and to present evidence as directed by the Trial Chamber.**  
[Article 24 (e) IMT Charter; Article 15 (e) IMTFE Charter; Rule 85 (A) ICTY, ICTR, SCSL RPE; Article 64 (8) (a), 67 (e) and Rule 140 (1); Section 33.1 TRCP; Rule 91 bis ECCC IR; Rule 146 (A) STL RPE]

### 2.4. Order and modes of examining witnesses

- **When examining witnesses, parties and/or participants shall refrain from long, compounded or repetitive questions.**  
[Article 18 (a), (b) IMT Charter; Article 12 (a), (b) IMTFE Charter; Rule 90 (F) ICTY, ICTR and SCSL RPE and jurisprudence; Regulation 43 ICC Regulations of the Court and ICC jurisprudence; Section 36.7 TRCP; Rule 91 bis ECCC IR; Rule 150 (G) STL RPE]

### 2.5. Closing arguments

- **Each party is entitled to present closing arguments after the presentation of all evidence in the case.**  
[Article 15 (f), (g) IMTFE Charter; Rule 86 (A) ICTY, ICTR RPE; Rule 141 (2) ICC RPE; Section 38 TRCP (SPSC); Rule 94 (1) ECCC IR; Rule 147 (A) STL RPE. Cf. Article 24 (h), (i) IMT Charter and Rule 86 (A) SCSL RPE]
- **The Defence may present a closing argument irrespective of whether or not the Prosecutor decides to do so.**  
[Article 24 (h) and (i) IMT Charter; Article 15 (f) and (g) IMTFE Charter; Rule 86 (A) ICTY, ICTR, SCSL RPE; Rule 141 (2) ICC RPE; Section 38 TRCP (SPSC); Rule 94 (1) ECCC IR; Rule 147 (A) STL RPE]
- **Where the parties choose to present closing arguments, first the Prosecutor and then the Defence may address the Court. The Defence shall in any event be entitled to speak last.**  
[Rule 86 (A) ICTY, ICTR, SCSL RPE; Rule 141 (2) ICC RPE; Section 38 TRCP (SPSC); Rule 94 (1) ECCC IR; Rule 147 (A) STL RPE. Cf. Article 24 (h) and (i) IMT Charter; Article 15 IMTFE Charter]
- **The Prosecutor may present a rebuttal argument to which the Defence may present a rejoinder argument.**  
[Rule 86 (A) ICTY, ICTR RPE; Rule 141 (2) ICC RPE; Rule 94 (2) ECCC IR; Rule 147 (1) STL RPE. Cf. Section 38 TRCP (SPSC); Rule 86 (A) SCSL RPE]

- **The Trial Chamber may limit the length and control the content of closing arguments.**

[Article 18 (a), (b) IMT Charter; Article 12 (a), (b) IMTFE Charter; Rule 54 ICTY, ICTR RPE and Rule 86 (C) SCSL RPE; Regulation 54 (a) RoC (ICC); Rule 85 (1) ECCC IR; Rule 130 (A) STL RPE]

- **The Trial Chamber may order the parties to inform it on the anticipated length and/or content of closing arguments.**

[ICTY case law, Rule 86 (C) SCSL RPE; Regulation 54 (a) RoC (ICC); ECCC case law]

### 3. Judicial powers

#### 3.1. Fact-finding powers

- **The Trial Chamber has the power either to order a party to produce additional evidence or to summon witnesses and order their attendance when doing so is useful for the ascertainment of truth and the accurate resolution of the case.**

[Article 17 IMT Charter; Article 11 IMTFE Charter; Rule 98 ICTY and ICTR RPE; Rule 85(A)(iv) SCSL RPE; Articles 64(6)(b) and (d) and 69 (3) ICC Statute; Section 33.2 TRCP; Rule 87(4) and 93 ECCC IR; Rule 165 STL RPE]

- **Trial Chambers are empowered to issue subpoenas or orders requiring the appearance and testimony of witnesses. The issuance of subpoena may be subject to a showing that the proposed testimony is relevant to the fair determination of the matter and that the party has undertaken efforts to secure the testimony without a subpoena.**

[Article 17 IMT Charter; Article 11 IMTFE Charter; Article 29 (2) ICTY Statute; Article 28 (2) ICTR Statute; Rule 54 ICTY, ICTR and SCSL RPE; Articles 64(6)(b) and 91(3)(e) ICC Statute and Rule 65 ICC RPE; Section 36.9 TRCP; Rule 41(1) ECCC IR; Rules 77(A) and 78 (A) STL RPE]

- **Trial Chambers may conduct on-site visits when the interests of justice warrant them.**

[Rule 4 ICTY, ICTR and SCSL RPE; Articles 66 ICC Statute; Section 37.2 TRCP; Rule 55(8) ECCC IR]

#### 3.2. Courtroom management powers

- **The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time. Such control must not prejudice the accused's right to a fair trial and the right to cross-examine witnesses.**

[Article 18 (a), (b) IMT Charter; Article 12 (a), (b) IMTFE Charter; Rule 90 (F) ICTY, ICTR and SCSL RPE and jurisprudence; Regulation 43 ICC Regulations of the Court and ICC jurisprudence; Section 36.7 TRCP; Rule 91 bis ECCC IR; Rule 150 (G) STL RPE]

- **The Trial Chamber may depart from the established sequence of presenting evidence in the interests of justice.**

[IMT and IMTFE practice; Rule 85 (A) ICTY, ICTR and SCSL RPE; ICTY, ICTR and SCSL case law; Article 64(8)(b) ICC Statute and Rule 140(1) ICC RPE; Section 33.1 TRCP; Rule 91 ECCC IR; Rule 146(B) STL RPE]

- **The Trial Chamber may authorize recalling a witness only where good cause exists for the witness to be recalled and where the proposed testimony is of significant probative value and not of a cumulative nature.**
- **The Trial Chamber may allow a party to reopen its case by presenting additional evidence after the close of its case, provided that such evidence is newly obtained and could not have been obtained before the close of its case through the exercise of reasonable diligence.**
- **In deciding whether to authorize the party to reopen its case, the Trial Chamber shall among other factors consider the stage of the trial at which the evidence is sought to be adduced, the delay likely to be caused by the re-opening, the effect of presenting new evidence against one accused in a multi-accused case, and the nature of the evidence sought to be presented**

[ICTY, ICTR and SCSL case law; Rule 87 (4) ECCC]

### 3.3. Ensuring integrity of the proceedings

#### *Contempt and False Testimony*

- **Witness interference, intimidation or bribery and interference with other persons so as to obstruct the course of justice are contempt offences, punishable by the court.**

[Rule 77(A) ICTY RPE; Rule 77(A) ICTR RPE; Rule 77(A) SCSL RPE; Article 70(1) ICC Statute; Rule 35(1) ECCC IR; Rule 60bis(A) STL RPE]

- **Witnesses can be held in contempt of court for failing to obey an order to appear before or present documents before a court, for giving false testimony, or for refusing to answer questions.**

[Rule 77(A) ICTY RPE; Rule 77(A) ICTR RPE; Rule 77(A) SCSL RPE; Article 70(1) ICC Statute; Rule 35(1) ECCC IR; Rule 60bis(A) STL RPE]

- **Giving false testimony, i.e., the making of an untrue statement under oath or solemn declaration knowingly and wilfully with the intent to mislead, is a crime.**

[Rule 91 ICTY RPE; Rule 91 ICTR RPE; Rule 91 SCSL RPE; Article 70(1) ICC Statute; Rule 36 ECCC IR; Rule 152 STL RPE]

- **Contempt offences are punishable by imprisonment, a fine, or both.**

[Rule 77(G) ICTY RPE; Rules 77(G) and 77bis ICTR RPE; Rule 77(G) SCSL RPE; Rule 166 ICC RPE; Section 48.3 SPSC TRCP; Rule 35(4) ECCC IR; Rules 60bis(I) and (K) STL RPE]

- **When a Chamber has cause to believe that a contempt offence has been committed, it may direct the Prosecutor to investigate further with a view to preparing an indictment.**

[Rule 77(C) ICTY RPE; Rule 77(C) ICTR RPE; Rule 165 ICC RPE; Rule 35(2) ECCC IR; Rule 60bis(E) STL RPE]

- **A separate trial may be held to examine allegations of contempt or false testimony; such proceedings must be carried out in accordance with the Rules of Procedure and Evidence of the tribunal, and with respect for the rights of the accused individual.**

[Rule 77(E) ICTY RPE; Rule 77(E) ICTR RPE; Rule 77(E) SCSL RPE; Rule 163 ICC RPE; Rule 35(3) ECCC IR; Rule 60bis(H) STL RPE]

#### *Disruption of proceedings*

- **Where the accused or any other person is found to have acted in a disruptive manner, or to have interfered with the dignity or directives of the Tribunal, he or she may be excluded from the court and/or be issued with a fine.**

[Article 18(c) IMT Charter; Rule 5 IMT RPE; Article 12(c) IMTFE Charter; Rule 3 IMTFE RPE; Rule 80 ICTY RPE; Rule 80 ICTR RPE; Rule 80 SCSL RPE; Articles 63(2) and 71 ICC Statute; Rule 170 ICC RPE; Section 48.2 SPSC TRCP; Rules 37(1), 37(2) and 37(5) ECCC IR; Rule 138 STL RPE]

### 3.4. Ensuring fair trial

#### *General*

- **Every accused person has the right to a fair trial.**

[Article 16 IMT Charter; Article 9 IMTFE Charter; Article 17 SCSL Statute; Article 21 ICTY Statute; Article 20 ICTR Statute; Article 67 ICC Statute; Section 2 SPSC TRCP; Article 35 ECCC Establishment Law; Article 16 STL Statute]

- **The duty to ensure that proceedings are fair and expeditious rests with the judiciary.**

[Articles 16 and 18(b), IMT Charter; Articles 9 and 12(b), IMTFE Charter; Article 20(1) ICTY Statute; Article 19(1) ICTR Statute; Rule 26bis SCSL RPE; Article 64(2) ICC Statute.]

#### *Judicial Impartiality*

- **The accused has a right to trial by an impartial tribunal.**

[Articles 21(3) ICTY Statute, 20(3) ICTR Statute, and 17(3) SCSL Statute; Articles 36(3)(a), 40(2), 41(2)(b), and 67(1) ICC Statute; Rule 34 ICC RPE; Rule 34 ECCC IR; Section 2 SPSC TRCP; Article 16 STL Statute; Rule 25 STL RPE]

- **Any decision of bias or appearance of bias against a judge will be cause for him or her to be removed from the chamber involved.**

[Rule 15(A) ICTY RPE; Rule 15(A) ICTR RPE; Rule 15(A) SCSL RPE; Articles 36(3)(a) and 41(2) ICC Statute; Rule 34 ICC RPE; Rule 34 ECCC IR; Rules 25(B)-(D) STL RPE]

- **The question of a judge's impartiality is to be decided by the remaining judges on the bench on which he sat or by a special chamber appointed by the President for the purpose of assessing the issue.**

[Rule 15(B)(ii) ICTY RPE; Rule 15(B) ICTR RPE; Rule 15(B) SCSL RPE; Articles 40(4) and 41(2)(c) ICC Statute; Rule 34(3) ICC RPE; Rules 25(B)-(D) STL RPE]

- **A substitute judge will be appointed to replace any judge who has been disqualified or recused himself or herself on the grounds of impartiality.**

[Rules 15(A) and (B) ICTR RPE; Rule 15(A) and (B) ICTY RPE; Rule 15(C) SCSL RPE; Rule 38 ICC RPE]

*Trial without undue delay*

- **The accused has a right to trial without undue delay.**

[Article 17(4)(c) SCSL Statute; Article 20(4)(c) ICTR Statute; Article 21(4)(c) ICTY Statute]

*Equality of arms*

- **Defence and prosecution teams must be put in a position of equality in terms of the time and facilities for the preparation of their cases.**

[Article 21(4)(b) ICTY Statute, Article 20(4)(b) ICTR Statute; Article 17(4)(b) SCSL Statute; Rule 45(A) ICTY RPE; Article 67(1)(b) ICC Statute]

*Remedies*

- **Compensation may be given to an accused who has suffered a breach of his or her right to a fair trial.**

[Article 85 ICC Statute; Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, T. Ch. III, ICTR, 31 January 2007, paras 23-24; Decision (Prosecutor's Request for Review or Reconsideration), Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, A. Ch., ICTR, 31 March 2000, para. 74]

## 4. Witnesses: Protection and Testimony

### 4.1. Protection and Special Measures for Witnesses

- **While trials are generally public, appropriate protection shall be provided for witnesses. Protective measures may include the protection of the witness's identity and the conduct of in camera proceedings. Protective measures shall be consistent with the rights of the accused person.**

[ICTY Rule 69(B), 75(B); ICTR Rule 69(B), 75(B); ICC Rule 87(3)(a); STL Rule 133; SCSL Rule 34(A), 69(B)+(C), Rule 75(A)+(B)]

- **Appropriate measures should be adopted to facilitate the testimony of vulnerable victims and witnesses. Such measures must be consistent with the rights of the accused.**
- **Protective measures should be proportional to the perceived harm, and must be objectively and specifically justified not only in relation to whether to grant them, but also as to the modalities.**

[Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., ICTY, 10 August 1995; Decision on Motion for Clarification and Motions for Protective Measures, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-PT, T. Ch., ICTY, 13 October 2003; Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39-T, T. Ch., ICTY, 9 March 2005, 10192-10194 (Decision on Closed Session for Witness 646); Ruling on Motion for Modification of Protective Measures for Witnesses, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, T. Ch., SCSL, 18 November 2004; Decision on Confidential Prosecution Motion for Additional Protective Measures for the Trial Proceedings of Witnesses TF1-515, 516, 385, 539, 567, 388, and 390, Prosecutor v. Taylor, Case No. SCSL-03-1-T, T. Ch. II, SCSL, 13 March 2008; Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., ICTY, 30 July 2002; Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, Prosecutor v. Renzaho, Case No. ICTR-97-31-I, T. Ch. II, ICTR, 17 August 2005]

- **Protective measures can also be directed towards persons, who due to the testimony of another person, are put in risk or whose privacy due to such testimonies is threatened.**

[ICC Rule 87(3); Decision on Jean de Dieu Kamuhanda's Motion for Protective Measures for Defence Witnesses, Prosecutor v. Kamuhanda, Case No. ICTR-99-54-T, T. Ch. III, ICTR, 22 March 2001; Decision on Defendant Ivan Čermak's Motion for Admission of Evidence of Two Witnesses Pursuant to Rule 92 bis and Decision on Defendant Ivan Čermak's Third Motion for Protective Measures for Witnesses IC-12 and IC-16, Prosecutor v. Gotovina et al., Case No. IT-06-90-T, T. Ch. I, ICTY, 11 November 2009]

- **Witnesses should be allowed to request protective measures. When protective measures are decided upon or amended, the views and concerns of witnesses should be considered.**

[ICTY Rule 69(B) 75(A); ICTR 69(B) 75(A); ICC Rule 86, 88(1); STL Rule 133; SCSL Rule 69(B), 75(A)]

- **Disclosing information in a knowing violation of a decision on protective measures constitutes a punishable act.**

[ICTY Rule 77A(ii)&(iv); ICTR Rule 77A(ii)&(iv), STL Rule 60(A)(iii); SCSL Rule 77(A)(ii)]

#### 4.2. Regular witness testimony

##### *Live Witness Testimony*

- **All witnesses shall make a solemn declaration before testifying that they vow to speak the truth.**

[Rule 6(a) IMT RPE, Rule 4(a) IMTFE RPE, Rule 90(A) ICTY RPE, Rule 90(B) ICTR RPE, Rule 90(B) SCSL RPE, Rule 66(1) ICC RPE, Section 36.2 SPSC TRCP, Rule 24(1) ECCC IR, Rule 150(A) STL RPE]

- **Child witnesses shall not be forced to make a solemn declaration, so long as the Chamber is satisfied that they are capable of understanding their duties as a witness.**

[Rule 90(B) ICTY RPE, Rule 90(C) ICTR RPE, Rule 90(C) SCSL RPE, Rule 66(2) ICC RPE, Rule 24 ECCC IR, Rule 150(B) STL RPE]

- **A witness has the right to object to making a statement that may tend to incriminate him or her. However, a Chamber may compel a witness to answer a question, with the assurance that testimony obtained in this way will not be used against the witness, save in proceedings for false testimony.**

[Rule 90(E) ICTY RPE, Rule 90(E) ICTR RPE, Rule 90(E) SCSL RPE, Rule 74 ICC RPE, Rule 28 ECCC IR, Rule 150 STL RPE]

- **Communications made in the context of the professional relationship between lawyer and client shall be not compellable, unless the client consented to such disclosure or voluntarily disclosed the content of the communications to a third party, and that third party then gave evidence of that disclosure.**

[Rule 97 ICTY RPE; Rule 97 ICTR RPE; Rule 97 SCSL RPE; Rule 73(1) ICC RPE; Section 35.3 SPSC TRCP; Rule 87(7) ECCC IR; Rule 163 STL RPE]



*Written statements, affidavits, depositions and transcripts*

- **Depositions are to be taken before a presiding officer, with both parties having the opportunity to cross-examine the witness.**

[Article 17(e) IMT Charter; Article 11(e) IMTFE; Rule 71(C) SCSL RPE; Rule 71(C) ICTY RPE; Rule 71(C) ICTR RPE; Rules 123(C) and 157 STL RPE; Public redacted transcript, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-T-322-Red-FRA, T. Ch. I, ICC, 11 November 2010]

4.3. Testimony of expert witnesses, journalists, ICRC and UN officials and experts on mission

*Expert Witness*

- **The Trial Chamber may admit a person as an expert witness to provide objective and impartial assistance that can aid it in reaching its decision.**

[RPE ICTY/ICTR/SCSL Rule 94bis, ICC Regulation 44, STL Rule 161, ECCC Internal Rule 31]

*ICRC*

- **1. A tribunal or court of law shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of present or past official or employee of the ICRC, any information, documents or other evidence which it came into possession of in the course, or as a consequence, of the performance by the ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement.**  
**2. Notwithstanding point 1 above, such information, documents or other evidence may be tendered in evidence if: (a) After consultations, the ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.**

[Prosecutor v. Simić et al., Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, Prosecutor v. Nyiramasuhuko & Ntabobali, Decision on Ntahobali's extremely urgent Motion for inadmissibility of Witness TQ's testimony, Prosecutor v. Muvunyi, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, ICC RPE Rule 93, STL RPE Rule 164]

*UN Officials and Experts on Mission*

- **1. All UN Officials and Experts on Mission, past or present, are immune from legal process in accordance with the 1946 Convention on the Privileges and Immunities of the United Nations. They cannot be compelled to appear before an international court or tribunal.**  
**2. The immunity of UN Officials and Experts on Mission may be waived by the UN Secretary-General, who may impose conditions. The UN Officer or Expert on Mission may also request special measures to facilitate the testimony.**  
**3. UN Officials and Experts on Mission who do testify cannot be compelled to reveal their sources of information, unless that privilege has been waived along with the waiver of immunity.**

[1946 Convention on the Privileges and Immunities of the United Nations, Prosecutor v. Delalić et al., Prosecutor v. Blaškić, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, Prosecutor v. Akayesu, Decision on the Motion to Subpoena a Witness, etc.]

# Rules

## 1. Joinder and severance

### 1.1. Joinder

- **In considering whether to order joinder of charges or proceedings, the Trial Chamber shall evaluate whether the offences were allegedly committed in the course of the same transaction. To aid its determination, the Trial Chamber shall consider whether there appear to be sufficient linkages or inherent connections between the indictments, such as:**
  - a. connection to the material elements of a criminal act, and the acts said to be connected must be capable of specific determination in time and space;**
  - b. whether these connected criminal acts are alleged to be part of a common scheme, strategy or plan, which does not have to be static but can change in form and substance over time;**
  - c. whether these acts are of a same or similar character;**
  - d. whether there appears to be a sufficient nexus or linkage between the several accused, including the role of the accused in relation to other proposed co-accused.**
- **In considering whether to order severance of charges or proceedings, the Chamber shall also view the following as illustrative in assessing whether it is in the interest of justice to order the severance of charges or proceedings:**
  - a. Judicial economy;**
  - b. Impact on witnesses;**
  - c. Undue delay and the right to an expeditious trial;**
  - d. The availability of co-accused for trial;**
  - e. Temporal matters such as the timing of the motion.**

[Prosecutor v. Kordić & Čerkez, Decision on Accused Mario Čerkez' Application for Separate Trial, Prosecutor v. Brđanin and Talić, Decision on Motions by Momir Talić for Separate Trial and for Leave to File a Reply, Prosecutor v. Bagosora et al., Decision on Request for Severance of Three Accused, Prosecutor v. Nsabimana et al., Decision on Nsabimana's Motion for Severance, Prosecutor v. Nahimana et al., Decision on the Motion of the Defence for Severance and Separate Trial, Prosecutor v. Ntabakuze & Kabiligi, Decision on the Defence Motion Requesting an Order for Separate Trials, etc.]

### 1.2. Severance

- **In considering whether to order severance of charges or proceedings, the Trial Chamber shall view the following as illustrative in determining whether there is a conflict of interest that might cause serious prejudice to the accused:**
  - a. The risk of co-accused pursuing different strategies, or blaming or incriminating other co-accused is not sufficiently serious in itself;**
  - b. The different roles in a hierarchy played by the various accused does not in itself equate with a conflict of interests if they are charged or tried jointly.**
  - c. The proceedings should be severed where a person jointly accused has made an admission of guilt and can be proceeded against in accordance with the procedure for admissions of guilt.**

- **In considering whether to order severance of charges or proceedings, the Chamber shall also view the following as illustrative in assessing whether it is in the interest of justice to order the severance of charges or proceedings:**
  - a. **Judicial economy;**
  - b. **Impact on witnesses;**
  - c. **Undue delay and the right to an expeditious trial;**
  - d. **The availability of co-accused for trial;**
  - e. **Temporal matters such as the timing of the motion.**

[Prosecutor v. Kordić & Čerkez, Decision on Accused Mario Čerkez' Application for Separate Trial, Prosecutor v. Brđanin and Talić, Decision on Motions by Momir Talić for Separate Trial and for Leave to File a Reply, Prosecutor v. Bagosora et al., Decision on Request for Severance of Three Accused, Prosecutor v. Nsabimana et al., Decision on Nsabimana's Motion for Severance, Prosecutor v. Nahimana et al, Decision on the Motion of the Defence for Severance and Separate Trial, Prosecutor v. Ntabakuze & Kabiligi, Decision on the Defence Motion Requesting an Order for Separate Trials, etc.]

### 1.3. Opening statements

- **If he or she so wishes, the accused may make a statement, subject to the authorization and under the control of the Chamber. In this case, the Trial Chamber shall ensure that the accused has been informed of his or her rights. The accused will not be examined about the content of the statement. The Chamber will decide on the probative value, if any, of the statement.**

[Rule 84 bis ICTY RPE; Article 67 (1) (h) ICC Statute; Rule 144 (A), (B) and (C) STL RPE]

- **The victims admitted for participation in the proceedings may make opening statements through common legal representatives, subject to the authorization and under the control of the Chamber.**

[Rule 89 (1) ICC RPE; Section 12.5 TRCP; Rule 143 STL RPE cf. Rule 89 bis (2) IR ECCC]

- **The Defence may choose to make its opening statement before the presentation of the prosecution evidence or defer it until the close of the prosecution case.**

[Rule 84 ICTY, ICTR RPE; Rule 143 STL RPE]

- **Where the accused is entitled to make a statement, he or she may do so after the opening statements by the parties or, where the Defence defers its opening statement until the close of the prosecution case, after the opening statement of the prosecution.**

[Rule 84 bis ICTY RPE; Article 67 (1) (h) ICC Statute]

- **The opening statements by the parties shall be concise and confined to outlining the relevant facts and evidence.**

[Article 15 (c) IMTFC Charter; Rule 84 SCSL RPE; Rule 89 bis (b) ECCC IR]

### 1.4. Order of presenting evidence

- **Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial may be presented in the following sequence:**
  - (i) **evidence for the prosecution;**
  - (ii) **evidence for the defence;**

- (iii) prosecution evidence in rebuttal;
  - (iv) defence evidence in rejoinder;
  - (v) evidence ordered by the Trial Chamber proprio motu;
  - (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty.
- **The Trial Chamber may authorize a party to submit rebuttal evidence only where a new issue is raised in the opposing party's case that the party could not reasonably have anticipated.**  
 [Article 24 (e) IMT Charter and Article 15 (e) IMTFE Charter; Rule 85 (A) ICTY, ICTR RPE; Article 64 (8) (b) ICC Statute, Rule 140 (1) ICC RPE and ICC jurisprudence; Section 33.1-2 TRCP. Cf. on (iii) and/or (iv): ICC jurisprudence and Rule 85 (A) SCSL RPE; on (vi): Rule 85 (A) SCSL RPE; Section 39.2 TRCP; Rule 146 (B) and 171 STL RPE. Cf. in general: IR 90 and 91 (1) ECCC]
  - **Where victims participate in the trial proceedings, the Trial Chamber may allow them to call witness and present evidence under the control of the Trial Chamber, provided that it is admissible and conducive to the ascertainment of the truth. In that case, the victims' evidence may be presented after the evidence for the prosecution and before evidence for the defence, if any.**  
 [ICC jurisprudence; Rule 87 (B) and 146 (A) and (B) STL RPE]

#### 1.5. Order and modes of examining witnesses

- **Where a party calls a witness, that party shall be the first one to examine the witness, upon which the witness may be cross-examined by the other parties and re-examined by the calling party. Unless otherwise ordered by the Trial Chamber, the examination of the Chamber witnesses will start with the questions of the Trial Chamber followed by the questions of the parties and participants. The accused shall have the right to be last in questioning the witness.**  
 [Article 24 (g) IMT Charter; Article 15 (d) IMTFE Charter; Rule 85 (B) ICTY, ICTR and SCSL RPE and jurisprudence; Rule 140 (2) ICC RPE; Rule 145 (B) STL RPE; Cf. Section 36.6 TRCP; IR 91 bis ECCC; Rule 145 (A) STL RPE]
- **The party who called a witness shall be allowed to examine him or her in chief. Unless otherwise directed by the Trial Chamber, leading, closed and other questions affecting credibility are not allowed.**  
 [Article 24 (g) IMT Charter; Article 15 (d) IMTFE Charter; Rule 85 (B) ICTY, ICTR and SCSL RPE; Rule 140 (2) (a) ICC RPE; Rule 145 STL RPE]
- **The other party may conduct further questioning (cross-examination) of the witness on:**
  - a. the subject-matter of examination-in-chief;
  - b. matters affecting the credibility of the witness;
  - c. the subject-matter of the case for the questioning party, where the witness is able to give such evidence; and
  - d. additional matters as authorized by the Trial Chamber.
- **Unless otherwise directed by the Trial Chamber, leading, closed and other questions that may affect credibility are permitted at further questioning (cross-**

examination), except for when the witness is examined on the subject-matter of the case of the questioning party.

- **In the further questioning (cross-examination) of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of that party which is in contradiction of the evidence given by the witness.**

[Article 24 (g) IMT Charter; Article 15 (e) IMTFE Charter; Rule 85 (B) ICTY, ICTR and SCSL RPE, Rule 90 (H) ICTY RPE and Rule 90 (G) ICTR RPE; Rule 140 (2) (a) ICC RPE and ICC jurisprudence; Rule 150 (I)-(K) STL RPE]

- **The party who called a witness may re-examine the witness on matters arising out from further questioning (cross-examination). Unless otherwise directed by the Trial Chamber, leading, closed and other questions affecting credibility are not allowed.**
- **The party which has not called the witness may be allowed to conduct further cross-examination on the matters arising from re-examination or questioning by the Trial Chamber. The accused shall have the right to be last in questioning the witness.**

[Rule 85 (B) ICTY, ICTR and SCSL RPE; Rule 140 (2) (d) ICC RPE and ICC jurisprudence; Rule 145 STL RPE]

- **Where victims participate in the trial proceedings, the Trial Chamber may allow them to examine witnesses through their legal representatives with a view to ascertaining the truth.**

[Rules 69 (3) and 91 (3) ICC and ICC jurisprudence; Rules 91 (2) and 91 bis IR ECCC; Rule 87 (B) STL RPE; cf. Article 24 (e) IMT and Article 15 (e) IMTFE; Rule 85 (B) ICTY, ICTR and ICTR RPE]

- **Judges may at any stage put any question to the witness as they deem necessary for the establishment of the truth.**

[Article 17 (a) and 24 (f) IMT Charter; Article 11 (a) and 15 (f) IMTFE Charter; Rule 85 (B) ICTY, ICTR, SCSL RPE; IR 91 (2) ECCC IR. Cf. Rule 140 (2) (c) ICC RPE and ICC jurisprudence]

#### 1.6. Closing arguments

- **Where the Trial Chamber allows victims to participate at trial, they may present their closing arguments.**

[Rule 89 (1) ICC RPE; Rule 94 (1) (a) ECCC IR; Rule 147 (A) STL RPE]

- **The accused may address the Court with a closing statement.**

[Article 24 (j) IMT Charter; Article 67 (1) (h) ICC RPE; Section 30.7 TRCP (SPSC); Rule 94 (1) (d) ECCC RPE; Rule 147 (C) STL RPE]

- **Where victims are allowed to participate at trial, the closing arguments may be delivered on their behalf, after the closing arguments of the Prosecution, if any, and before those of the Defence, if any.**

[Rules 89 (1), 141 (2) ICC RPE; Rule 147 (1) STL RPE. Cf. Rule 94 (2) ECCC IR]

- **Where closing arguments are delivered on behalf of participating victims, they may also present rebuttal arguments.**

[Rules 89 (1), 141 (2) of the ICC RPE; Rule 94 (2) ECCC IR. Cf. Rule 147 (1) STL RPE.]

- **Where the Chamber hears information relevant to the determination of appropriate sentence along with the evidence relevant to the determination of guilt or innocence, the parties shall also be permitted to address the matters of sentencing in their closing arguments.**

[Rule 86 (C) ICTY, ICTR RPE]

- **The Trial Chamber may order the parties to file their final trial briefs (5 days) before presenting closing arguments.**

[Rule 86 (B) ICTY, ICTR, SCSL RPE; ECCC case law; Cf. Rule 147 (B) STL RPE]

## 2. Judicial powers

### 2.1. Ensuring integrity of proceedings

#### *Contempt and false testimony*

- **Aiding individuals to evade the jurisdiction of the court is a contempt offence punishable by fine or imprisonment, or both.**

[Rule 35(1)(f) ECCC IR; Rule 77(A) (vi) SCSL RPE]

- **Revealing the identity of a protected witness or other information subject to a confidentiality order before the court is a contempt offence, when committed intentionally.**

[Rule 77(A) ICTY RPE; Rule 77(A) ICTR RPE; Rule 77(A) SCSL RPE; Rule 35(1) ECCC IR; Rule 60bis STL RPE; Finding of Contempt of the Tribunal, Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, T. Ch. I, ICTY, 11 December 1998; Order Regarding the Disclosure of a Protected Witness TF1-081, Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-PT, T. Ch. I, SCSL, 8 March 2005; Public Redacted Version of Second Decision on Prosecutor's Motion under Rule 77 concerning further breaches of protective measures (three books) issued on 3 February 2010, Prosecutor v. Šešelj, Case No. IT-03-67-R77.3, T. Ch. II, ICTY, 4 February 2010]

- **When a Chamber has cause to believe that a contempt offence has been committed, it may investigate the issue itself, or direct an independent counsel or an amicus curiae to do so with a view to preparing an indictment.**

[Rule 77(C) ICTY RPE; Rule 77(C) ICTR RPE; Rule 77(C)(i) and (iii) SCSL RPE; Rule 60bis(E) STL RPE]

- **A tribunal can refer contempt proceedings to a national tribunal.**

[Rule 70(C)(ii) SCSL RPE; Article 70(4) ICC Statute; Rule 162 ICC RPE; Rule 60bis(E) STL RPE]

#### *Disruption of proceedings*

- **Where an accused boycotts or absconds from a tribunal's jurisdiction, trial against him or her may proceed in absentia, provided he or she has been informed of the charges against him or her.**

[Rule 82bis, ICTR RPE; Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, Prosecutor v. Gbao, Case No. SCSL-2004-15-T, T. Ch. I, SCSL, 12 July 2004, para. 8]

- **The tribunal may make adjustments to the trial schedule to facilitate an accused who cannot attend trial due to illness.**

[Order of the Tribunal Granting Postponement of Proceedings against Gustav Krupp von Bohlen, (1947) 1 IMT 143, 15 November 1945; Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Milošević v. Prosecutor, Case No. IT-02-54-AR73.7, 1 November 2004, para. 17; Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73.10, A. Ch., ICTR, 5 October 2007, para. 15; Decision on Defence Appeal of the Decision on Future Course of Proceedings, Prosecutor v. Stanišić et al., Case No. IT-03-69-AR73.2, A. Ch., ICTY, 16 May 2008, paras. 15-18.

## 2.2. Ensuring fair trial

### *General*

- **The right to a fair trial encompasses more than a set of mere minimum guarantees; fairness is an overarching requirement touching upon every aspect of the conduct of the trial.**

[Reasons for Decision on Assignment of Defence Counsel, Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., ICTY, 22 September 2004, para. 29; Decision on Defence Motion Challenging the Exercise of Jurisdiction, Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, ICTY, 9 October 2002, para. 110; Cf. Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR 73.4, A. Ch., ICTY, 30 September 2003, Separate Opinion of Judge Shahabuddeen, para. 16]

- **The Prosecutor and other actors at the trial, including victims and the international community, may be granted certain procedural rights to ensure that the fairness of the trial applies to all sides.**

[Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, Prosecutor v. Norman et al., Case No. SCSL-2003-09-PT, A. Ch., SCSL, 4 November 2003, para. 8; Decision on Severance of André Rwamakuba and Amendments of the Indictment, Prosecutor v. Karemera et al., Case No. ICTR-98-44-PT, T. Ch. III, ICTR, 7 December 2004, para. 26; Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, T. Ch. III, ICTR, 16 November 2006, para. 18; Decision on Prosecutor's Appeal on Admissibility of Evidence, Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, A. Ch., ICTY, 16 February 1999, para. 25; Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.4, A. Ch., ICTY, 6 February 2007, para. 14; Judgment, Prosecutor v. Haradinaj et al., Case No. IT-04-84-A, A. Ch., ICTY, 21 July 2010, paras 35-49]

### *Judicial impartiality*

- **Any judge who reviewed the indictment is not precluded from sitting on the trial of the accused.**

[Rule 15(C) ICTY RPE; Rule 15(C) ICTR RPE; Rule 15(D) SCSL RPE; Decision on Joint Defence Motion for Reconsideration of Trial Chamber's Decision to Review All Discovery Materials Provided to the

Accused by the Prosecution, Prosecutor v. Blagojević et al., Case No. IT-02-60-PT, T. Ch. II, ICTY, 21 January 2003, 3]

- **Any judge who sat on the trial of the accused may not serve on the bench of the accused's appeal.**

[Rule 15(D) ICTY RPE; Article 41(2)(a) ICC Statute]

- **Judges must not only be impartial, they must be seen to be impartial.**

[Rule 34, ICC RPE; Rule 34, ECCC IR; Judgment, Prosecutor v. Furundžija, Case No. IT-95-17/1-A, A. Ch., ICTY, 21 July 2000, para. 189; Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Prosecutor v. Norman, Case No. SCSL 2004-14-PT, A.Ch., SCSL, 28 May 2004, paras 2-7; Decision on Motion by Karemera for Disqualification of Trial Judges, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Bureau, ICTR, 17 May 2004, paras 8-11; Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, Prosecutor v. Katanga et al., Situation in DRC, Case No. ICC-01/04-01/07, A. Ch., ICC, 9 June 2008, para. 10]

#### *Trial without undue delay*

- **The question of whether a delay will be considered 'undue' will be assessed on a case-by-case basis.**

[Decision stating reasons for Appeals Chamber's Order of 29 May 1998, Prosecutor v. Kovačević, Case No. IT-97-24-AR73, A. Ch., ICTY, 2 July 1998, para. 30; Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, Prosecutor v. Karemera, Case No. ICTR-98-44-AR73, A. Ch., ICTR, 12 December 2003, para. 13]

- **When considering whether there has been a breach of the right to trial without undue delay, the following factors will be taken into account:**

- a. The length of the delay;**
- b. The complexity of the case;**
- c. The conduct of the parties, and**
- d. The prejudice to the accused.**

[Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-AR73, A. Ch., ICTR, 27 February 2004, 3; Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, Prosecutor v. Perišić, Case No. IT-04-81-PT, T. Ch., ICTY, 23 November 2007, para. 12]

#### *Equality of arms*

- **The structure of the tribunal may share the burden for ensuring that a trial is fair with other actors, such as the Registry and the public defender's office, but the ultimate responsibility lies with the judiciary.**

[Rule 27 ICC RPE; Regulation 83 ICC Regulations]

#### *Remedies*

- **A retrial may be ordered in recognition that a breach of the rights of the accused has occurred at trial.**

[Article 22(3) STL Statute; Judgment, Prosecutor v. Muvunyi, Case No. ICTR-00-55A-A, A. Ch., ICTR, 29 August 2008, para. 171; Judgment, Prosecutor v. Jelisić, Case No. IT-95-10-A, A. Ch., ICTY, 5 July 2001, para. 77]



- **A stay of proceedings may be ordered as an exceptional remedy to prevent perpetuation of the breach.**

[Public and Redacted Reasons for the Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Prosecutor v. Blagojević, Case No. IT-02-60-AR73, A. Ch., ICTY, 7 November 2003, para. 7; Decision on Second Motion by Brđjanin to Dismiss the Indictment, Prosecutor v. Brđjanin and Talić, Case No. IT-99-36-PT, T. Ch. II, ICTY, 16 May 2001, para. 5; Decision on Ngeze's Motion for a Stay of Proceedings, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, A. Ch., ICTR, 4 August 2004; Decision on "Motion for Relief from Rule 68 Violation by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters affecting Justice and a Fair Trial can be Resolved", Prosecutor v. Brđjanin, Case No. IT-99-36-PT, T. Ch. II, ICTY, 30 October 2002, para. 24; Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-772, P.-T. Ch., ICC, 14 December 2006, paras 36-39; Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-140, T. Ch. I, ICC, 13 June 2008, para. 90; Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-2517-Red, T. Ch., ICC, 8 July 2010, paras 20-24; Judgment on the Appeal of Prosecutor against the Oral Decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06-2583, T. Ch., ICC, 8 October 2010, para. 23; Decision on Khieu Samphan's Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, Khieu Samphan, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC15), 12 January 2011, para. 2]

### 3. Witnesses: Protection and Testimony

#### 3.1. Protection and Special Measures for Witnesses

- **If anonymity is accepted as a protective measure, strict procedural requirements must be established to ensure the fairness of the proceedings. Anonymous witness evidence may not function as the sole basis for a conviction.**

[Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., ICTY, 10 August 1995; STL Rule 159(B)]

#### 3.2. Regular witness testimony

##### *Live witness testimony*

- **Where a child witness testifies without making an oath, a decision shall not be based on their testimony alone.**  
[Rule 90(B) ICTY RPE; Rule 90(C) ICTR RPE]
- **Lawyer-client privilege may not be used to shield the commission of a crime.**  
[Rule 97(B) ICTR RPE; Rule 163 STL RPE]
- **During cross-examination, the examining party is required to put its case in general terms to the witness, to allow the witness to appreciate the context of the**

**question and respond to inconsistencies between the cross-examining party's position and his or her evidence.**

[Rule 90(H)(ii) ICTY RPE; Rule 90(G)(ii) ICTR RPE; Transcript, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, T. Ch. I, ICC, 9 February 2009, 122]

*Written statements, affidavits, depositions and transcripts*

- **Written evidence in lieu of oral testimony may be admitted where:**
  - a. The written evidence in question does not go to proving the acts and conduct of the accused; or**
  - b. The opposing party has been given the opportunity to cross-examine the witness, or**
  - c. The witness is before the Court and available for cross-examination.**

[Rules 92bis (A) and 92ter SCSL RPE; Rule 92bis (A) and 92ter ICTY RPE; Rule 92bis (A) ICTR RPE; Rule 156 STL RPE; Rule 68 ICC RPE; Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses, Prosecutor v. Lubanga, Situation in the DRC, Case No. ICC-01/04-01/06, T. Ch. I, ICC, 15 January 2009, para. 18]

- **Written statements in lieu of oral testimony may be admitted if the witness is not available for cross-examination for good reason, and the Chamber is convinced that previous statements and transcripts of their testimony have been taken reliably.**

[Rules 92quater and 92quinques, ICTY RPE; Rule 92quater SCSL RPE]

*Testimony via video link*

- **Testimony via video link will be admitted if the chamber is convinced of (i) the importance of the testimony to the case; (ii) the inability or unwillingness of a witness to attend, and (iii) that the reasons for that inability or unwillingness are significant enough to warrant non-attendance at trial.**

[Rule 81bis ICTY RPE; Rule 85(D) SCSL RPE; Section 36.3 SPSC TRCP; Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., ICTY, 25 June 1996, para. 19; Decision on Defence Motion for a Hearing by Video-Link for Witness BNZ60, Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, T. Ch. III, ICTR, 14 March 2007, para. 2]

- **Testimony via video link should be taken in a venue of appropriate solemnity, where the witness' safety can be ensured, and which is conducive to the giving of truthful testimony.**

[Rule 67(3) ICC RPE; Art. 2 STL Practice Direction for Video-Conference Links; Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch. II, ICTY, 25 June 1996, para. 22]

### 3.3. Expert Witnesses

- **Admission as an expert witness**
  - 1. The expert must have the appropriate qualifications:**
    - a. Qualifications are proven through a CV and relevant supporting documents such as publications.**
    - b. The expert must have relevant specialised knowledge acquired through education, experience or training in the required field.**

**2 The expert must be impartial:**

- a. A co-accused cannot be an expert witness for another co-accused.**
- b. The mere fact that a witness has been involved in the investigation or preparation of the case for one side does not disqualify him from being admitted as an expert witness. The court will assess on a case-by-case basis whether that association is so close as to render the person's objectivity and impartiality in doubt.**
- c. The party alleging bias may demonstrate that through cross-examination and by calling his own expert witness.**

**3 The expert must have relevant specialised knowledge that may assist the Court in understanding the evidence:**

- a. The expertise must be relevant and of probative value.**
- b. The expert does not need to have firsthand knowledge or experience.**

[Prosecutor v. Milošević, Decision on Admission of Expert Report of Robert Donia, Prosecutor v. Popović et al., Decision on Defence Rule 94bis Notice regarding Prosecution Expert Witness Richard Butler, Prosecutor v. Nahimana et al., Appeals Judgement]

- **Limits to the testimony of experts**

**1. The Trial Chamber is not bound by the expert's opinion:**

- a. Admissibility does not mean the evidence will be accepted as authentic or credible.**
- b. Admissibility and weight are to be distinguished.**

**2. Issues of bias of an expert who has been admitted will go towards the weight to be given to that testimony.**

**3. There must be a need for the evidence to be given:**

- a. The evidence has to be of assistance to the Court in understanding the evidence or in determining a fact in issue.**
- b. An expert is not needed for matters which are within the competence of the Trial Chamber to determine.**

**4. The expertise and the evidence given must be relevant to the matter at hand:**

- a. The evidence must relate to the person's expertise and relate to the matter for which the person's expertise sought.**

**b. Evidence that is not within the expert's area of expertise will be disallowed.**

**5. The expert cannot make decisions on ultimate issues. Only the Trial Chamber is competent to make judicial determinations on the facts and on the innocence or guilt of the accused.**

[Prosecutor v. Milošević, Decision on Admissibility of Prosecution Investigator's Evidence, Prosecutor v. Brđanin & Talić, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, Prosecutor v. Bagosora et al., Decision of Motion for Exclusion of Expert Witness Statement of Filip Reyntjens, etc.]

- **The Expert's Report**

**a. The full statement or expert report must be disclosed within a certain time limit (these are tribunal specific).**

**b. The opposing side must respond within a certain time limit (these are tribunal specific) and indicate either acceptance of the statement or report, if it wishes to cross-examine the expert or if it challenge the qualifications of the witness to be an expert, or the relevance of the statement or report, and if so, which parts.**

**c. If the opposing side does not object in accordance with the time limit, the report is admitted as evidence.**

[RPE ICTY/ICTR/SCSL Rule 94bis, RPE STL Rule 16]

# Recommendations

## 1. General issues

### 1.1. Joinder and severance

The Trial Chambers have discretion in this area, and this includes the power to order joinder or severance regardless of whether a party has made any application. If a specific rule were felt to be necessary, there could be provision for the court to order, on its own volition, joinder or severance if neither party objects. Should a party object, the Trial Chamber should take submissions from both parties in the matter, and its decision should be subject to appeal.

Timing of the application for joinder or severance is a matter that would benefit from regulation. Applications are usually made before trial starts, further to particular rules in the various RPE. But in principle, it is should already be permissible at any time if in the interests of justice.<sup>3</sup> Jones and Powles have previously recommended that the rules on time-limits for seeking severance set out in ICTY Rule 72(A)(iii) mirrored in ICTY Rule 72(B)(iii) be deleted.<sup>4</sup> They suggested this in light of several decisions where despite the 30-day time limit, the Trial Chambers have allowed motions for severance to be raised "whenever there is information that raises the issue of a conflict of interest".<sup>5</sup> The American Bar Association's Criminal Justice Section Standards provides (Standard 13-3.3) for governance of timing of applications for severance applications and could provide a basis for new regulation in international criminal law.<sup>6</sup>

### 1.2. Single and bifurcated trials

While there is no doubt that unitary proceedings do not per se lead to a breach of the accused's fair trial right, several considerations may favour a bifurcated structure, separating the determination on guilt from sentencing. Considering the often neglected importance of submissions on sentencing before international tribunals, the confusion ingenerated in hearing at the same trial stage both fact witnesses and 'character' witnesses, and the lack of evidence that a single procedure does in fact result in substantial saving of time and resources, it is recommended that a separate procedure be envisaged for sentencing, only when (and if) guilt is determined, unless possibly when the accused himself elects to deal with both issues of guilt and sentence together. Of course, parties would always maintain the possibility of eliciting character evidence during the proceedings, if they so choose. In this respect, a mandated short deadline for bringing sentencing evidence and submissions and a single deadline for appeals (i.e., after sentencing is concluded) may adequately address any issue of undue delay caused by a bifurcated procedure.

## 2. Structure of contested trial

### 2.1. Opening statements

The previous section identifies a number of standards qualifying as general rules or principles of international criminal procedure in part of opening statements, which reflect the current status of the law. Some of the standards not shared by all tribunals manifest progressive trends and could be

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<sup>3</sup> See Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, pp. 164-170 for discussion about whether severance at a later stage (i.e. during trial) was possible. It was not ruled out by the Trial Chamber, which ultimately did not rule for severance of the Kosovo case.

<sup>4</sup> J. Jones & S. Powles, *International Criminal Practice* (Oxford: Oxford University Press, 2003 (3d Ed)), p. 711.

<sup>5</sup> *Prosecutor v. Nyiramasuhuko & Ntahobali*, Decision on the Motion for Separate Trials, para. 11. The Trial Chamber refused to entertain a Defence 'continuous request', but held that it was not prevented from bringing a Motion for severance of crimes joined in one indictment under Rule 49 of the Rules or for separate trials under Rule 82(B) of the Rules, during the course of trial whenever there is information that raises the issue of a conflict of interests. Also see, inter alia, *Prosecutor v. Nzirorera et al.*, Decision on the Defence Motion in opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Joseph Nzirorera.

<sup>6</sup> See American Bar Association Project on Standards for Criminal Justice, Standards Relating to Joinder and Severance, at [http://www.abanet.org/crimjust/standards/joinsev\\_blk.html#2.2](http://www.abanet.org/crimjust/standards/joinsev_blk.html#2.2). Standard 13-3.3. Timeliness of motion; waiver, double jeopardy.

recommended for adoption in all relevant jurisdictions, given their special normative and practical value for international criminal trials. In particular, two general rules may deserve to be promoted to the rank of general principles, or are likely to transform into such at a certain point.

Firstly, affording the accused an opportunity to make an unsworn statement at the opening phase of trial (or a conditional right to be heard in person throughout the proceedings) with leave and under the supervision of the Trial Chamber would be desirable in any court. It aligns the procedure with the latest tendency reflected in Rule 84 bis of the ICTY RPE, Article 67 (1) (h) of the ICC Statute and Article 16 (5) of the STL Statute and the STL Rule 144 (A). As such, this is not inconsistent with the accused's right to silence, where the accused is aware of that right and has had access to legal advice and where the Chamber vigilantly oversees the delivery of the statement. On the other hand, such statements could help judges to understand complex evidence or other matters relevant to the decision. Within reasonable limits, such statements make the personal perspective of the accused person on the charges heard. Thus, they could enhance the perceived legitimacy of international criminal proceedings both for the accused and for the public at large and directly contribute to reconciliation.

Secondly, the opportunity for the Defence to elect when to deliver its opening statement is currently a general rule rather than a principle, given that it finds support in some but not all international and internationalized criminal jurisdictions (cf. Rule 84 of the SCSL RPE). These choices may prove relevant both where the cases for each party are presented sequentially and where they proceed alternately on an issue-by-issue basis. The rationale behind the SCSL approach that leaves the Defence no option other than making an opening statement at the start of its own case is not self-evident, although it seems to follow the practice in some common law jurisdictions, including England and Wales and Canada. The sheer volume and complexity of evidence adduced in international criminal trials entails that the presentation of the prosecution case will normally be protracted and take months at least. Where the Defence is deprived of the opportunity to choose to make its opening at the beginning of the trial, it will face the reality of having no chance to start its presentation before the close of the prosecution case. The fixed timing for the defence opening may be an unnecessary restriction on that party's freedom to determine the best tactics to present the case. The more flexible approach adopted at the ICTY and ICTR, whereby the Defence may elect to deliver an opening speech before or after the prosecution evidence, is preferable in international criminal trials.

Finally, where victims are allowed to participate in trial proceedings, including the presentation of evidence and closing arguments, it is not advisable to refuse them the right to address the court with a brief opening statement through legal representatives. It goes without saying that such statements should be delivered with the Chamber's leave and under its control and that the Chamber shall ensure the proper length and relevance of any such statements.

## **2.2 Order of presentation of evidence**

No recommendations are entered with respect to the overall order of presentation of evidence at trial and the manner of submission of documentary and other evidence.

In the area of examination of witnesses, it is recommended to upgrade the identified general rule concerning judicial questioning to a principle of international criminal procedure: Judges shall at any stage put any question to the witness as they deem necessary for the establishment of the truth. In spite of the guideline in Rule 140 (2) (c) of the ICC Rules, which entitles the ICC trial judges to pose questions to witness before or after the witness is examined by the parties, the principle strongly entrenched in the law and practice of all other international criminal jurisdictions is that the

judges may ask any question at any time if they deem it necessary for the establishment of the truth. The deviation from this standard in the ICC RPE was aimed at accommodating the common law concern with the excessive judicial interference in the examination conducted by counsel and as such reflects the uneasy balance between the delegations representing different legal traditions at the PrepComm. However, even in the ICC regime, the said guideline is non-mandatory and may be applied flexibly. As elsewhere, the ICC judges ought not to feel prevented from asking a witness material questions as they come up without necessarily having to wait until the examining counsel finishes his questioning.

In order to further enhance the truth-finding competence of the judges, it is recommended to reformulate this prerogative as a positive obligation of the judges to ask any questions as they deem necessary for the determination of the truth. This power is already inherent in the broad discretion exercised by the judges, but the additional emphasis on the compelling nature of the truth-finding objective will clarify the terms on which it is to be exercised, without really removing the discretionary nature of the judicial power to interrogate, which is attested by the formula 'as they deem necessary'. Currently, this discretion is not governed by any overarching and uniform objective but rather merely by an accidental and arbitrary factor such as the origin and background of an individual judge. The lack of legal or policy reasons for such fragmentation invites exploring ways of ensuring more harmonization in the sensitive area of practice.

### **2.3. Closing arguments**

First, it is recommended that some of the standards identified as general rules of international criminal procedure, be upgraded to principles:

In any jurisdiction, the defendant must be given an opportunity to address the court with a final statement after the presentation of the closing and further arguments by the Prosecutor, victims (where applicable) and defence counsel. If the defendant chooses to make such a statement, after consultation with his counsel, it may be delivered on the conditions determined by the Trial Chamber and under its control. Furthermore, the requirement for the parties to submit final trial briefs in advance of the presentation of their closing arguments is a good practice which could merit recognition as a principle of international criminal procedure in the future.

Second, it is recommended that the authority of certain rules is reinforced by adherence to them of all relevant jurisdictions, without their becoming principles:

Where participating victims (or civil parties) are allowed to present a closing argument, they shall do so after the Prosecutor and before the Defence (cf. ECCC). Where participating victims (or civil parties) have presented a closing argument, they shall also be entitled to present a rebuttal argument (cf. STL).

Third, it is recommended that certain rules are repealed, in view of their impractical or prejudicial nature:

The present rule (ICTY/ICTR) that the parties shall address sentencing in their closing arguments should be replaced by a rule to the effect that the parties may address such matters in their closing arguments.

## **3. Structure of uncontested trial**

### **3.1. Judicial discretion in relation to the effects of an admission of guilt**

The ICC's rules governing the effect of an admission of guilt mediate between the common-law and civil-law approaches by permitting Trial Chambers to determine on a case-by-case basis whether to end trial proceedings or continue them following an admission of guilt. In some cases an admission of guilt will be sufficiently detailed and informative that it will in fact obviate the need for a trial at

the same time that it advances the tribunal's truth-seeking function. Other admissions of guilt may serve to obscure more than they reveal, and in such cases the interests of justice may call for the continuation of the trial. We recommend the ICC's approach because, by vesting in the Trial Chamber the discretion to end or continue the trial, the ICC has crafted a flexible system that allows the appropriate consideration of a variety of factors relevant to this important inquiry.

#### **4. Judicial powers**

##### **4.1. Fact-finding powers**

###### *i. Power to Order Additional Evidence and to Call Witnesses Proprio Motu*

In deciding whether to summon witnesses, Trial Chambers should be attentive to the difficulties that the parties might face in obtaining the appearance of witnesses that they themselves summon. When Trial Chambers do summon witnesses, they should ensure that the parties are given ample time and information to allow them to address the issues about which the witnesses will testify and to cross-examine the court witnesses effectively.

###### *ii. Power to Make On-Site Visits*

Despite their potential to enhance fact-finding accuracy, International Tribunals have made rather sparing use of on-site visits, perhaps because they are exceedingly expensive. Virtually all of the evidence presented at most of the international tribunals comes in the form of eyewitness testimony, and much of this testimony is contradicted by the testimony of witnesses from the opposing side.<sup>7</sup> When the allegations in the indictment allege the defendant's physical presence at a particular location or his direct involvement in the violence, an on-site visit can be a particularly valuable means for the Trial Chamber to assess those allegations. Most of the crimes charged at the ICTR, for instance, allege the defendants' direct participation in massacres, and the handful of on-site visits undertaken by those Trial Chambers appear to have been influential to the Trial Chamber's conclusions. In particular, in three of the ICTR trials in which defendants were acquitted, the Trial Chambers made on-site visits to the Rwandan crime scenes. On-site visits were made in a much smaller proportion of the ICTR trials that resulted in convictions, and in one of the latter trials in which an on-site visit was made – *Zigiranyirazo* – the Trial Chamber rigorously scrutinized prosecution witness testimony and rejected the vast bulk of it as unreliable. As noted, on-site visits are very costly and may not be particularly useful in 'leadership' cases in which the accused is not alleged to be at the crime scene himself. However, in light of the quantity of contested witness testimony appearing in international criminal trials and the difficulty of accurately assessing that testimony, we recommend that Trial Chambers make greater use of on-site visits in appropriate cases.

##### **4.2. Ensuring integrity of proceedings**

Aiding individuals to evade the jurisdiction of the court ought to be viewed as being as serious an offence as other contempt offences universally recognised by the tribunals, such as failing to appear before the court after an order has been issued for one's appearance.

When deciding whether to proceed with ordering an investigation with a view to preparing an indictment for offences against the administration of justice, tribunals ought to consider factors outside of whether there are grounds to believe the offence has been committed, namely- the cost in money and time resources to the tribunal of pursuing such a course of action; whether the offence in fact hampered or had the potential effect of seriously hampering the tribunals' judicial

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<sup>7</sup> N.A. Combs, *Factfinding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) 157-166.

function; and whether the interests of justice would be best served by taking another course of action.

We recommend that in order to ensure the integrity of proceedings, an offence of knowing disclosure of protected witnesses' identities or confidential information in contravention of an order of the court should be maintained.<sup>8</sup>

The tribunals should treat any instances of false testimony, witness interference or bribery with the utmost solemnity, as these offences strike to the very heart of the tribunals' ability to administer justice. Prosecutions on these matters to date have been sporadic and only occasionally successful. In the highly politicized environments within which they work, courts should be continuously conscious of the temptations inherent in giving false testimony or in interfering with witnesses or court officials and in the interests of justice should be more proactive in prosecuting such offences where there are strong grounds to suggest that false testimony has been given.

#### **4.3. Ensuring fair and expeditious trials**

The recognition of rights at trial for parties other than the accused has developed in a rather fragmented and unclear manner. A precise delineation of the rights of parties, in particular the rights of the prosecutor with regard to fairness of proceedings, and the scope of such rights would be a welcome development. The interrelationship of any such rights with the rights of the accused ought to be precisely set out, bearing in mind the primordial duty of the international judiciary to ensure that the rights of the accused are protected and respected in every case before it. In a similar vein, the elaboration of available remedies has been rather piecemeal and oftentimes confusing. It might be helpful to establish a sliding scale of remedies for breaches of fair trial rights, with a stay of proceedings and immediate release reserved for the most serious violations, compensation available for wrongful convictions and lesser breaches, and specific remedies such as exclusion of evidence for breaches of evidentiary rules affecting the rights of the accused; the overturning of decisions tainted by a chamber later held to have a reasonable appearance of bias, and so on. The ICC Statute does not foresee any compensation for the accused person whose rights are violated, save when he or she is victim of a miscarriage of justice, has been acquitted or where the violation is severe enough to warrant release on the grounds of a miscarriage of justice. This means that those convicted persons who, for example, have had their right to access to a lawyer denied or their right to trial without undue delay breached as a result of the actions of one of the organs of the Court, will not be entitled to compensation as a result (although time spent in detention will be deducted from the sentence, pursuant to Article 78(2), of course). This lacuna of protection ought to be filled with an alternative set of remedies for more asinine breaches of the rights of the accused.

### **5. Witnesses: Protection and Testimony**

#### **5.1. Protective and Special Measures for Witnesses**

First, there is a clear need for a workable standard on granting protective measure to be known by parties and other participants *in advance* of each case. This is essential in order to provide parties with guidelines on how to frame applications and oppositions to protective measures, but also for the appearance of a fair and public trial. It is evidently not enough to state that protective measures are the exception, when the public and the parties themselves do not know what kind of circumstances warrant such exception. Whether such a standard is identified in formal instruments

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<sup>8</sup> Written Reasons for the Decision on the standing of Independent Counsel and on Disclosure Obligations, *Prosecutor v. Samur, Brima (Margaret), Jalloh, Kamara (Anifa), Kamara (Ester)*, Case Nos. SCSL-2005-01 and SCSL-2005-02, T. Ch. I, SCSL, 23 June 2005, paras 17-19.



such as statutes and rules of procedure and evidence, or instead in case-law, is not as that significant as long as the standard is clearly spelled out somewhere.

The aforementioned problem is compounded by the lack of full transparency when decisions on protective measures are taken. These decisions should not only be rendered in public (which is not always the case), but must be issued in a way that allows the public to understand the legal principles and basic facts at stake – without of course going into the details of the specific reasons warranting protective measures, but allowing everybody the possibility to assess the rationale. This would appear to be an essential feature of the credibility of the institutions issuing such decisions and orders limiting public access to the filings and the evidence.

Third, the question whether protective measures must be adopted on a case-by-case basis or if the class/group decisions can be accepted should be settled. From the point of view of the fair trial rights of the accused and the public interest in criminal trials extensive group decisions are problematic. As such, the case-by-case approach followed by most international tribunals should be adopted.

Fourth, a clear rule has not yet developed on what is meant when stating that evidence from anonymous witnesses (or otherwise untested evidence, for that matter) cannot be used as a sole basis for conviction. Can two pieces of such evidence instead be used to convict? In other words, what is the necessary degree of corroboration required?

## **5.2. Regular witness testimony**

The analysis revealed a large divergence in the practice of witness proofing before international criminal tribunals. There is a clear need for an acceptable procedure to be elucidated before such proofing takes place, rather than a determination of appropriateness after the fact.

Documents and exhibits which accompany or are annexed to witness statements have been admitted with the statements in some cases and excluded in others. For the sake of clarity and avoiding admission of evidence through the back door, it is submitted that such documents should be subject to a separate admissibility assessment.

## **5.3. Testimony of expert witnesses, journalists, ICRC and UN staff**

### *i. Experts—Guidelines*

Given the continuing adversarial nature of proceedings before international courts and tribunals, it seems best to retain the entitlements of parties to seek to call their own experts, with the court retaining that right too. To ensure clarity and consistency in application, the principles and rules on expert witnesses that were earlier identified could be supplemented by guidelines for such experts. Outside of these, one form that could be relied on is from Australia, the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia.<sup>9</sup>

Having said that, it would seem to be conducive to expeditious trial to move towards a system where they choose from a list of internationally recognised experts maintained by the Registry. Where lists of experts are maintained, these experts should be identified on the basis of objective criteria that are transparently adopted, with reference to national standards of assessment of qualifications and expertise. Foremost among the examples to be drawn from would be the ECCC's Rule 31 (Internal Rules) and the guidelines set out in the Lubanga Decision on the procedures to be adopted for instructing expert witnesses.

### *ii. Journalists – Principles and Rules*

Domestic courts and human rights courts have ruled on whether journalists can be compelled to reveal their sources, and whether the journalist him or herself can be forced to testify as a witness.

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<sup>9</sup> Federal Court of Australia Practice Direction, *Guidelines for Expert Witnesses in proceedings in the Federal Court*, Practice Note CM7.

The two need to be separated. The landmark jurisprudence in the matter of the Randal Subpoena at the ICTY has been selectively applied and developed at the SCSL to cover protection of journalistic sources. The matter of the special protections for war journalists laid out in Prosecutor v. Brđanin & Talić is still not reflected in the statutes or RPE of any international courts and tribunals, suggesting unease with the decision.

In light of this, it would be overly optimistic to describe a rule on journalist privilege to exist in international criminal procedure. As already observed in the assessment of practice using the lenses of IHRL, the Brđanin & Talić standard actually falls below the standard set out in the ECHR's landmark case of Goodwin (an order for source disclosure could be compatible with freedom of expression only if "justified by an overriding requirement in the public interest"). In other words, while one would have expected greater protections, it is actually easier to pierce the veil of journalistic privilege using Prosecutor v. Brđanin & Talić than it is under the dominant standard of Goodwin v. UK. Having said that, it must be emphasized that there are two separate issues here: forcing a journalist to be a witness, and forcing the journalist to reveal sources, and the context of the two cases is very different.

It is recommended that the RPE of international courts and tribunals should start to include provisions incorporating a general qualified privilege of journalists against compellability and revealing sources, which will cover the particular situation of war correspondents. It will also need to cover the exceptional situations where the privilege can be overridden. This would draw from Brđanin & Talić at the ICTY (war journalists), Taylor at the SCSL (protection of sources) and Goodwin v. UK at the ECHR (journalists generally), and engage the court in a complex but necessary balancing exercise. The relevant limbs of the Brđanin & Talić and Taylor tests should be adapted to match Goodwin v. UK. It is also proposed that the second test should expressly require the court to consider the dangers to the journalist or to the source, if the privilege is lifted. Nevertheless, this is undoubtedly a complex matter that needs further reflection and specialised discussion and debate. The following is simply proposed as a starting point.

a. Principles concerning the evidence of journalists

1. Journalists may not be compelled to testify in certain circumstances [as set out below].
2. Journalists may not be compelled to reveal their sources of information in certain circumstances [as set out below].

b. Rules on evidence of journalists

1. In deciding whether a journalist has a privilege against testifying, the court shall consider whether:

There is a public interest in the work that the journalist does;

There is such a public interest that compelling the journalist to testify before the Tribunal would adversely affect his or her ability to carry out his or her tasks; and

The journalist would be at risk of harm to life or limb if his or her identity were to be revealed.

If so, the court shall consider how to balance public interest of having all the relevant evidence before the Tribunal, and permitting the accused to challenge such evidence.

2. Notwithstanding that a journalist may be protected by a privilege against testifying, the journalist may be compelled to testify where:

There is an overriding public interest in the information; and

The evidence that is being sought must not be reasonably available from another source.

3. In deciding whether a journalist has a privilege against revealing his or her sources, the court shall consider whether:

There is a public interest in the information;

If there is such a public interest, compelling the source to testify before the Tribunal would adversely affect the journalist's ability to carry out his or her tasks in future;  
Whether the source would be at risk of harm to life or limb if his or her identity were to be revealed;  
and  
Whether the information was provided in confidence.  
If so, the court shall consider how to balance public interest of having all the relevant evidence before the Tribunal, and permitting the accused to challenge such evidence.  
4. Notwithstanding the above, a journalist may be compelled to reveal his or her sources where:  
There is an overriding public interest in the information; and  
The evidence that is being sought is not reasonably available from another source.

*iii. Qualified Privilege from Compellability for Humanitarian Agencies – Principles and Rules*  
Humanitarian agencies other than the ICRC do have similar concerns such as relating to neutrality and the safety of their staff, and operations. Simić et al. cannot be read to extend beyond the ICRC, as it is based on the sui generis nature of the organisation. The qualified privilege of war journalists determined in *Prosecutor v. Brđanin & Talić* seems relevant. The basic legal issue presented raised three subsidiary questions, these helped the Trial Chamber work through the issue of whether, in the case at hand, war journalists had a privilege from testifying:  
Is there a public interest in the work that they do;  
If there is such a public interest, would compelling them to testify before the Tribunal would adversely affect their ability to carry out their tasks; and  
If so, what is the appropriate test of balancing public interest of having all the relevant evidence before the Tribunal, and permitting the accused to challenge such evidence.  
It has been argued that there should be a rule allowing humanitarian agencies to benefit from qualified privilege of the kind already afforded to war correspondents. They should only be forced to testify against their will if the evidence they can give is key to the case and no other sources of this evidence can reasonably be found.<sup>10</sup>

There is jurisprudence that supports such a position, particularly from the *Blaškić* case. In the two relevant decisions, protective measure decisions have considered the impact of testifying on, inter alia, humanitarian action.<sup>11</sup> Also supportive is Judge Robertson's Separate Concurring Opinion in the AFRC case, arguing in favour of human rights monitors having a privilege against testifying.<sup>12</sup> This drew from the ECtHR Goodwin judgement and the ICTY's *Brđanin & Talić* decision. Using an analogy approach, Judge Robertson found that the reasoning behind the reporter's privilege applied equally to human rights monitors who collect information for public purposes, such as for publicly issued reports. While protection for sources is "treated as a 'privilege' available to the journalist witness, it is really a reflection of the public interest in protecting the source's right of free speech in

<sup>10</sup> See K. Mackintosh, 'Note for humanitarian organizations on cooperation with international tribunals', (March 2004) 853 *International Review of the Red Cross* 131-146.

<sup>11</sup> There may be more jurisprudence, but from *Blaškić*, we find two supporting documents: (1) See *Prosecutor v. Blaškić*, Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber, p. 4 (granting protective measures for General Morillon "considering ... that the explanations which the Witness will provide to the Trial Chamber might endanger the safety of civilian or military personnel on duty on the territory of the Former Yugoslavia and might create difficulties for the military and humanitarian action of the United Nations and France in that region", emphasis added); (2) Decision of Trial Chamber I on protective Measures for Mr. Jean-Pierre Thebault, Witness of the Trial Chamber, *Prosecutor v. Blaškić*, T. Ch. I, ICTY, Case No. IT-95-14, 12 May 1999, p. 4 (granting protective measures to an EMM monitor: "considering ... that the explanations which the Witness will provide to the Trial Chamber might endanger the safety of civilian or military personnel on duty on the territory of the former Yugoslavia and might create difficulties for the military and humanitarian action of the European Union, France or international or non-governmental organisations in that region", emphasis added).

<sup>12</sup> *Prosecutor v. Brima et al.*, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, Q.C.

circumstances when identification would result in reprisals for exercising it". Appearing to go against this is a decision refusing protective measures to the staff of a humanitarian organisation in Milošević; however, when examined closely, it is clearly limited to the circumstances of the case. The Trial Chamber did not reject the possibility that there could be a limited privilege for humanitarian organisations, it "acknowledges the work of the humanitarian organisation and protection of its current and future personnel are important interests which warrant consideration, and accepts that personnel of the humanitarian organisation have been the target of attacks and intimidation both in Bosnia and elsewhere", but ultimately ruled that "in respect of this witness, the interests sought to be protected are too remote and do not outweigh the accused's right to a fair and public hearing" [emphasis added].<sup>13</sup> Supporting Judge Robertson's approach is the failed attempt by Human Rights Watch to quash a subpoena to produce documents in the US case of Lazare Kobagaya. This affirms that an NGO can be covered by journalistic privilege, when it gathers information about human rights. However, that privilege was waived in this case when the Human Rights Watch staffer who made the notes sought by the Defence agreed to become a paid expert for the government; it was not revived when he withdrew as the government's expert. Of course, one could debate whether Human Rights Watch could fall within even a broad definition of 'humanitarian organisation', but the important point here is the recognition of journalistic privilege for a human rights organisation which suggests a broader approach to privilege in US precedent. The following principles and rules are proposed as a starting point for a broader debate.

a. Principles concerning humanitarian organisations and their staff

i. Staff of humanitarian organisations may be compelled to testify, subject to certain exceptions.

ii. "humanitarian organisations" means [ ].

b. Rules concerning material evidence acquired by humanitarian organisations and their staff

i. In recognition of the public interest in the work of humanitarian organisations, information, documents or other evidence gathered by such organisations and their staff in the course of their humanitarian work shall only be subject to disclosure, and be compellable in court, if the following criteria are met:

- There is an overriding public interest in the information;
- The source would not be at risk of harm to life or limb if his or her identity were to be revealed; and
- The evidence sought cannot reasonably be obtained elsewhere.

Where, in conformity with paragraph 1, information, documents or other evidence gathered by a humanitarian organisation and its staff in the course of their humanitarian work is disclosed or presented in court, such protective measures may be granted as are necessary to ensure that the presentation of such evidence does not put the staff the organisation in danger nor otherwise interfere with its humanitarian work in the field.

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<sup>13</sup> See Decision on Prosecution Motion for Protective Measures (Concerning a Humanitarian Organisation), *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. Ch., ICTY, 1 April 2003, pp. 3-4.

## E. Appeals, Reviews, and Reconsideration

G. Boas, B. Don Taylor III, J. Jackson and B. Roche

### Principles

#### 1. Appeals

##### 1.1. Right to appeal

- **The convicted person shall have a right to appeal against final judgment (or decision) on conviction or the sentence.**

[Article 25(1) ICTY Statute; Article 24(1) ICTR Statute; Article 20(1) SCSL Statute; Article 81 (1)(b) and (2)(a) ICC Statute. Cf. Article 26 IMT Charter; Article 17 IMTFE Charter]

The prosecution has a right to appeal against final judgement (or decision) of conviction or acquittal as well as against the sentence.

[Article 25(1) ICTY Statute; Article 24(1) ICTR Statute; Article 20(1) SCSL Statute; Article 81(1)(a) and (2)(a) ICC Statute. Cf. Article 26 IMT Charter; Article 17 IMTFE Charter]

##### 1.2. Appellate grounds

- **The Appeals Chamber may hear appeals on the following grounds:**
  - a. Errors of law;**
  - b. Errors of fact;**
  - c. Procedural error.**

[Article 25 (1) ICTY Statute; Article 24 (1) ICTR Statute; Article 20 (1) SCSL Statute; Article 81 (1) ICC Statute; ICTY and ICTR case law]

##### 1.3. Standard of appellate review

- **The Appeals Chamber shall review questions of law de novo while it shall determine questions of fact with great deference to the Trial Chamber. It is only where no reasonable trial chamber could have reached the impugned conclusion of fact or where the finding is totally erroneous that the Appeals Chamber will intervene to substitute its own judgement.**

[ICTY and ICTR case law, e.g. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009, paras 13-15; Prosecutor v. Hadžihasanović and Kubura, Case No.IT-01-47-A, Appeal Judgement, 22 April 2008, paras 8-10; Prosecutor v. Ntagerura et al., Case No.ICTR-99-46-A, Judgement, 7 July 2006, paras 11-12; Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-A, Judgement, 16 November 2009, paras 10 and 11; CDF Case, Case No. SCSL-04-14-A, Judgment, 28 May 2008, para. 33]

##### 1.4. Powers of the Appeals Chamber

- **The Appeals Chamber may affirm, overturn or amend a decision or sentence issued by the Trial Chamber or it may remand the case to the Trial Chamber for a re-determination of an issue.**

[Article 25(2) ICTY Statute; Article 24 (2) ICTR Statute; Article 20(2) SCSL Statute; Article 83 ICC Statute]

### 1.5. Time limits

- **Time limits on giving notice of appeal and on filing briefs may be extended only where a party can show good cause.**

[Rule 108 and 116 ICTY RPE; Rule 108 and 116 ICTR RPE; Rule 108 and 116 SCSL RPE; Regulation 35 ICC Regulations of the Court]

### 1.6. Variation to the grounds of appeal

- **On final appeal, variation to the grounds of appeal is only permitted for good cause and to avoid a miscarriage of justice.**

[Rule 108 ICTY RPE; Rule 108 ICTR RPE; Rule 108 SCSL RPE; Regulation 61 (5)-(7) ICC Regulations of the Court]

### 1.7. Additional evidence on appeal

- **The Appeals Chamber may consider additional evidence on appeal if it finds that such evidence was not available at trial, is relevant and credible and could have been a decisive factor in reaching the decision at trial, subject to the overriding need to admit additional evidence where otherwise a miscarriage of justice would result.**

[Rule 115 ICTY RPE; Rule 115 ICTR RPE; Rule 115 SCSL RPE; Decision on Request to Admit Additional Evidence, Prosecutor v. Jelisić, 15 November 2000; Decision on Applications for Admission of Additional Evidence on Appeal, Prosecutor v. Krstić, Case No. IT-98-33-A, 5 August 2003; Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006]

### 1.8. Interlocutory appeals

- **All decisions of subordinate chambers or judges may be subject to interlocutory appeal where such decisions raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial, and for which, in the opinion of the trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.**

[Rules 72 (B) and 73 (B) ICTY and ICTR RPE; ICTY and ICTR case law; Article 81 ICC Statute; Cf. Rules 72 (D) and 73 (B) SCSL RPE]

## 2. Reviews

### 2.1. Right to revision/review

- **The accused enjoys a right to revision/review on the basis of new facts.**

[Article 26 ICTY Statute; Article 25 ICTR Statute; Article 21 SCSL Statute; Article 84 ICC Statute]  
Reconsideration

### 2.2. Power to reconsider a previous decision

- **Trial Chambers may reconsider their own decisions at any time up until the trial chamber has given judgment where new material circumstances have arisen that did not exist at the time of the decision or where the decision was erroneous and has caused prejudice or injustice to a party.**

[Prosecutor v. Stanislav Galić, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, Prosecutor v. Nahimana, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeal Chamber Decision of 19 January 2005, 4 February 2005, Prosecutor v. Bizimungu et al, Decision on Defendant Bicomumpaka's Motion for Reconsideration of Oral Decision Regarding Violation of Prosecutor's Obligations Pursuant to Rule 66(B) of the Rules of Procedure and Evidence, Dated 11 October 2007, Prosecutor v. Prlić et al, Second Decision on the Admission of Documentary Evidence submitted to the Prosecution (Dretelj and Gabela), 12 December 2007, Prosecutor v. Delic, Decision on the Prosecution's Motion for Reconsideration of the Chamber's Decision on Admission of Documentary Evidence, 13 February 2008, Prosecutor v. Milan Lukic and Sredoje Lukic, Decision on Defence Motion for Reconsideration, or, Certification to Appeal Oral Ruling on Scheduling 65 Ter Submissions and Defence Case, 5 November 2008. Examples from the SCSL include Prosecutor v. Norman et al, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005, Prosecutor v. Brima et al, Appeal Judgment, 27 February 2008]

## Rules

### 1. Appeals

#### 1.1. Right to appeal

- **Appeals are generally only permitted by parties to the proceedings. Where rulings have a direct impact upon non-parties, such as victims or states, they may be allowed to appeal against such rulings. Legal representatives of victims (and a bona fide owner of property adversely affected by a reparation order) may appeal against reparation orders.**

[Article 82(1), (2) and (4) ICC Statute]

### 2. Reviews

#### 2.1. Right to review of administrative decisions

- **There is a right to judicial review of administrative decisions.**

[Prosecutor v. Kvočka et al, Case No. IT-98-30/1-A, Appeals Chamber Decision on Review of Registrar's Decision to Withdraw Legal Aid From Zoran Žigić, 7 February 2003, para. 13]

- **The Prosecutor may apply for revision of the final judgment on conviction and sentence on behalf of the convicted person.**

[Article 84(1) ICC Statute]

# Recommendations

## 1. Enhanced use of Pre-Appeal judges

Further efforts should be made to expedite the time it takes to process appeals through the use of Pre-Appeal judges.

## 2. Additional evidence on appeal

Where additional evidence has been admitted on appeal and has to be assessed by the Appeals Chamber, the Appeals Chamber should defer to the Trial Chamber's evaluation of the evidence in relation to matters unaffected by the additional evidence such as the credibility or reliability of witnesses who testified at the trial and consider only whether in the light of these findings and the additional evidence the conviction can be sustained.

## 3. Recommendation for additional or replacement layer of appellate court

Several aspects of the appellate process at the international criminal courts and appeals suggest that the current appellate structure in international criminal procedure might be less than satisfactory. These include:

1. Concerns related to the exercise by an appellate chamber of first instance authority that would leave an accused without an effective avenue of appeal. For example, where an Appeals Chamber reverses an acquittal by a Trial Chamber and imposes a finding of guilt, leaving no apparent avenue of substantive appeal open.
2. Concerns related to the qualification of judges serving on appellate Benches and the quality of decision-making that takes place.

Different models for addressing these concerns exist, as follows:

1. The first concern could be dealt with by requiring that when an appellate chamber decides to reverse an acquittal, it should remit the case to the judges of first instance for them to address the question whether the available evidence would show beyond a reasonable doubt that the accused is guilty of the offence charged. Alternatively, provision could be made for an Appeals Chamber to overturn an acquittal and enter a finding of guilt, or increase sentence, only when there is a unanimous decision of the Bench. These solutions would not, however, cater for the second concern mentioned above.
2. A 'super-appellate' court, being a newly constructed appeals court that hears appeals on law and fact from all international criminal courts and tribunals. Such a court would need to be created by the UN and States Party to the Rome Statute with agreement to modify all existing court and tribunal statutes to permit appeals to be referred to such an institution, which would also have to be created (with specific elements addressed).
3. The court of cassation body that is the final court of appeal from all international criminal courts and tribunals. Under this model, an additional layer of appellate review is placed on top of the existing two Chamber system. This is currently employed at a domestic level, particularly within civil law states, for example France and Italy.<sup>14</sup> Within an international criminal law context, a Court of Cassation could ensure that the law is applied in a uniform manner between the trial and appeal chambers. The Court would be able to give definitive guidance as to how particular provisions are to be interpreted, before remitting the matter to be heard again by the relevant

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<sup>14</sup> In France, the Court of Cassation is granted jurisdiction over all triable matters within the judicial system, but only has scope of review to determine a miscarriage of justice, or to certify a question of law based solely on issues of law. See: <http://www.courdecassation.fr/>. In Italy, the purpose of the Court of Cassation is to ensure that the application of law is uniform between higher and lower courts, and to determine jurisdictional issues. See <http://www.cortedicassazione.it/>.



Chamber, or alternatively could decide the issue on the merits. Importantly, such a Court would provide an effective avenue of appeal from an Appeals Chamber decision.

4. A supervisory body that can review a final ruling from any International Criminal Tribunal. Such a model would be similar to that employed in relation to the European Court of Human Rights. The ECHR can be used as a final court to review human rights rulings by State Courts.<sup>15</sup> A similar model exists for the American countries, called the Inter-American Commission on Human Rights.<sup>16</sup> One of the key advantages of this model is that it allows for a consistency of law across various different states and jurisdictions. Applying this within an International Criminal law context, the supervisory body would allow for a consistency of law from all International Criminal Tribunal jurisdictions. It would also provide an avenue for appeal from an Appeals Chamber Decision.

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<sup>15</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols No. 11 and 14, Rome, 4.XI.1950, Art. 35.

<sup>16</sup> *Charter of the Organization of American States*, signed 30/4/1948.

## F. Law of Evidence

D. Jacobs, F. Gaynor, M. Klamberg and V. Tochilovsky

### Principles

#### 1. Relevance and probative value

- **A Chamber may admit any relevant evidence, taking into account, inter alia, the probative value of the evidence**

[Articles 19 and 20 IMT Charter, Article 13(a) and (b) IMTFE Charter, Rule 89(C) ICTY RPE, Rule 89(C) ICTR RPE, section 34(1) TRCP, Article 69(4) Rome Statute, Article 21(2) STL Statute, Rule 149(C) STL RPE]

#### 2. Presumption of innocence

- **The defendant is presumed innocent until proven guilty.**

[Article 21(3) ICTY Statute, Article 20(3) ICTR Statute, Article 66(1) ICC Statute, Article 17(3) SCSL Statute, Article 16(3)(a) STL Statute, Rule 21(d) ECCC Internal Rules]

#### 3. Standards of proof for pre-trial proceedings

- **Charges are confirmed if a prima facie case is made.**

- **An arrest warrant is delivered if a prima facie case is made.**

[Article 18(4) ICTY Statute, Article 17(4) ICTR Statute, Rule 47(E) ICTY and ICTR RPE, Article 19(2) ICTY Statute, Article 18(2) ICTR Statute, Article 18(1) STL Statute]

#### 4. Standard of proof for judgment

- **Guilt must be established beyond reasonable doubt.**

[Rule 87(A) ICTY, ICTR and SCSL RPE, Article 66(3) ICC Statute, Article 16(3)(c) STL Statute, Rule 87(1) ECCC Internal Rules]

#### 5. Burden of proof

- **The burden of proof is on the prosecution to establish guilt.**

[Article 66(2) ICC Statute, Article 16(3)(b) STL Statute, Rule 87(1) ECCC Internal Rules]

#### 6. In dubio pro reo

- **The defendant benefits from the in dubio pro reo principle, namely that any doubt should benefit the defendant.**

[ICTY, Limaj et al. Appeals Judgment, 27 September 2007]

# Rules

## 1. General

### 1.1. Applicability of national rules of evidence

- **A Chamber is not bound by any national rules of evidence**

[Article 19 IMT Charter, Article 13(a) IMTFC Charter, Rule 89(A) ICTY RPE, Rule 89(A) ICTR RPE, SCSL RPE Rule 89(A), ICC RPE rule 63(5)]

### 1.2. Exclusion of illegally or improperly obtained evidence

- **A Chamber may exclude evidence obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings**

[Rule 95 ICTY RPE, Rule 95 ICTR RPE, section 34(2) TRCP, Article 69(7) Rome Statute, Rule 149(D) STL RPE]

### 1.3. Exclusion of evidence of the prior or subsequent sexual conduct of a victim or witness.

- **A Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.**

[Rule 96(iv) ICTY RPE, Rule 96(iv) ICTR RPE, section 34(1) TRCP, Rule 71 ICC RPE]

## 2. The defence's access to the prosecution material

### 2.1. Disclosure of supporting material which accompanied the indictment when confirmation was sought and prior statements obtained by the Prosecutor from the accused

- **The accused shall have access to copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused.**

[Rule 66(A)(i) of the ICTY and ICTR Rules, Rule 110(A)(i) of the STL Rules]

### 2.2. Disclosure of statements of witnesses whom the Prosecutor intends to call to testify at trial

- **The accused shall have access to copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.**

[Rule 66(A)(ii) of the ICTY, ICTR, and SCSL Rules; Rule 76 of the ICC Rules; Rule 110(A)(ii) of the STL Rules; Rule 24.4(b) of the SPSC Rules]

### 2.3. Disclosure of exculpatory material

- **The accused shall have access to exculpatory material**

[Rule 68 of the ad hoc Tribunals' Rules, Article 67.2 of the ICC Statute, Rule 113 of the STL Rules; Rule 24.4(c) of the SPSC Rules]

- **Disclosure of books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial**
- **The accused shall have access to books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial.**

[Rule 66 of the ICTY, ICTR, SCSL Rules, Rule 77 of the ICC Rules, Rule 110(B) of the STL Rules; Rule 24.5 of the SPSC Rules]

#### 2.4. Non-disclosure of the identity of a victim or witness who may be in danger or at risk

- **A Trial Chamber or a judge, on request of a party, may order the non-disclosure of the identity of a victim or witness who may be in danger or at risk.**

[Rule 69 of the ICTY, ICTR, and SCSL Rules, and Rule 81.4 of the ICC Rules, Rule 24.6 of the SPSC Rules]

#### 2.5. Non-disclosure of information related to the internal preparation of a case

- **It is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure.**

[Rule 70(A) of the ad hoc Tribunals Rules, Rule 81.1 of the ICC Rules, Rule 111 of the STL Rules]

#### 2.6. Non-disclosure of information which has been provided to the Prosecutor on a confidential basis

- **Information which has been provided to the Prosecutor on a confidential basis shall not be disclosed by the Prosecutor without the consent of the provider.**

[Rule 70(B) of the ad hoc Tribunals' Rules, Article 54.3 of the ICC Statute, Rule 118(A) of the STL Rules]

### 3. The Prosecutor's access to the Defence material

#### 3.1. Disclosure of list of witnesses

- **The Trial Chamber may/shall order the defence to file to a list of witnesses it intends to call to testify at the confirmation hearing and/or trial.**

[Trial of the Major War Criminals before the International Military Tribunal, volumes 1-42, 1947 reprinted 1995, volume II, p. 18 and volume III, p. 335; ICTY RPE, Rule 65 ter (G); ICTR RPE Rule 73 ter (B), Section 26 TRCP, ICC RPE, rule 121(6); Decision on disclosure by the defence, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, T. Ch. I, ICC, 20 March 2008, para. 41(d)]

#### 3.2. Disclosure of the general nature of the accused's defence

- **The Trial Chamber may/shall order the defence to file a pre-trial brief setting out the general nature of the accused's defence.**

[ICTY RPE, Rule 65 ter (F); STL RPE rule 91(I)(i); Decision on disclosure by the defence, Prosecutor v. Lubanga, Case no. ICC-01/04-01/06, T. Ch. I, ICC, 20 March 2008, para. 41(b)]

### 3.3. Disclosure in relation to the defence of alibi

- **The defence shall notify the Prosecutor of its intent to enter the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.**

[ICTY RPE, Rule 67(B)(i)(a) ICTR RPE, Rule 67(A)(ii)(a), SCSL RPE Rule 67(A)(ii)(a), ICC RPE rule 79(1)(a), STL RPE rule 12(B)(i)(a)]

### 3.4. Disclosure in relation to special defences such as diminished or lack of mental responsibility

- **The defence shall notify the Prosecutor of its intent to enter any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.**

[ICTY RPE, Rule 67(B)(i)(b) ICTR RPE, Rule 67(A)(ii)(b), SCSL RPE Rule 67(A)(ii)(b), ICC RPE rule 79(1)(b) and 80, STL RPE rule 12(B)(i)(b)]

### 3.5. Categories of admissible documents

- **Categories of admissible non-testimonial documentary evidence includes letters, minutes, transcripts of parliamentary speeches, maps, decrees, situation reports, internal and external communications of international organizations and NGOs, films, videotapes, written and audio records of intercepted conversations, media reports, contemporaneous diaries, forensic, medical and autopsy records.**

[IMT, IMTFE, ICTY, ICTR, SCSL, SPSC and ECCC jurisprudence]

### 3.6. Admission of documents through a witness

- **The party tendering a piece of evidence should do so through a witness who is either the author of that piece of evidence, or who can speak to its origins and/or content. There is no blanket prohibition on the admission of evidence simply on the grounds that the purported author of that evidence has not been called to testify.**

[IMT, IMTFE, ICTY, ICTR, SCSL jurisprudence]

### 3.7. Bar table procedure

- **Documentary evidence can be admitted, without showing it to a witness, provided that the offering party can demonstrate with clarity and specificity, where and how each document fits into its case.**

[ICTY, ICTR, and ICC jurisprudence, including Milutinović et al., Decision on Prosecution Motion to Admit Documentary Evidence, Case No. IT-05-87-T, T. Ch., 10 October 2006, Strugar, Decision II on the Admissibility of Certain Documents, Case No. IT-01-42-T, T. Ch., 9 September 2004, Karadžić, Order on

Prosecution Request for Clarification and Proposal concerning Guidelines for the Conduct of Trial, 20 October 2009; Karadžić, Decision on the Prosecution's First Bar Table Motion, Case No. IT-95-5/18-T, T. Ch., 13 April 2010; Karemera et al, Case No. ICTR-98-44-T, Decision On Joseph Nzirorera's Motion To Admit Documents From The Bar Table: Public Statements And Minutes, 14 April 2009; Lubanga, ICC-01/04-01/06-1981, Decision on the Admission from the "bar table", 24 June 2009; Katanga, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07, 17 December 2010]

### 3.8. Admission of testimonial evidence in written form

- **The evidence of a witness in the form of a written statement or a transcript of evidence given by the witness in prior proceedings may be admitted, without cross-examination, in lieu of oral evidence. Evidence that goes to proof of the acts and conduct of the accused as charged in the indictment may not be admitted using this procedure.**

[ICTY Rule 92 bis A; ICTR Rule 92 bis A; STL Rule 155 (A); SCSL Rule 92 bis (A)]

- **Where the witness appears before the court and is available for cross-examination and questioning by the judges, the witness's evidence may be admitted in writing if the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined. Evidence that goes to proof of the acts and conduct of the accused as charged in the indictment may be admitted using this procedure.**

[ICTY Rule 92 ter; ICTR Rule 92 ter; SCSL Rule 92 ter; STL Rule 156]

- **Written evidence (in the form of a written statement or transcript) of a person who is for good reason unable to testify orally may be admitted, whether or not accompanied by a declaration by the witness witnessed by a court officer, if the Trial Chamber is satisfied of the person's unavailability, and finds from the circumstances in which the statement was made and recorded that it is reliable.**

[ICTY Rule 92 quater (A); ICTR 92 bis (C). SCSL Rule 92 quater (A). STL Rule 158]

### 3.9. Judicial notice of facts of common knowledge

- **A Chamber must take judicial notice of facts of common knowledge, thereby dispensing with the need for proof of them.**

[Article 21 IMT Charter; Article 13 (d) IMTFE Charter; Rule 94 (A) ICTY, ICTR, SCSL RPE; Article 69 (6) ICC Statute; Rule 160 (A) STL RPE]

### 3.10. Agreed Facts

- **A Chamber may consider alleged facts as proven where the parties agree that the alleged fact is not contested.**

[Rule 65 ter(H) ICTY RPE, Rule 73 bis (B)(ii) ICTR RPE, Rule 109(C) STL RPE; Rule 69 ICC RPE; Rule 87(6) ECCC IR; Rule 122 STL RPE]

## Recommendations

One standard on admissibility is shared by all international criminal courts, namely that they are not bound by any national rules of evidence. However, key terms such as relevance, probative value, reliability and credibility are not used in a coherent way. This becomes an even greater problem during the final evaluation of the evidence. It would arguably be difficult to clarify these terms through amendments of the statutes and/or the RPEs. Instead the judges should provide reasoned opinions explaining or indicating how these terms should be understood. At the ICC, a Chamber has the discretion to decide whether it should rule on the probative value of an item of evidence and any prejudice it may cause when it is submitted or defer its consideration of these criteria until the end of the proceedings. Considering that there is no jury in international criminal proceedings, it is arguably more appropriate to admit items of evidence provided that they are relevant and defer the evaluation of their probative value until the final deliberations. This would be consistent with the principle of “free evaluation of evidence”.

International courts should dispense with direct examination, and instead swear in the witness and confirm his or her identity, and admit in evidence his or her signed written statement. The witness could then, if necessary, be asked some simple introductory questions to put him or her at ease, and then immediately be cross-examined by counsel for each accused and subsequently questioned by the judges. To ensure that the voice of the victims is properly heard, it may be appropriate to allow a representative sample of crime base witnesses to express in their own voices the principal facts of the ordeals which they have undergone, with the rest of their evidence-in-chief to be admitted in writing. Oral direct examination should be employed where witness is an accused testifying in his own defence or as a witness for the defence of one of his co-accused; when the witness is an insider of low credibility, or other situations where the judges can gain a real insight into the witness’s evidence by visual observation of his or her mannerisms in court. Direct examination should be ordered for those parts of a witness’s evidence concerning those acts or conduct of the accused which give rise to criminal liability. There should be rigorous training in statement-writing for all investigators and lawyers, regardless of whether they work for the prosecution or the defence, to ensure that the statement admitted at trial is true to the witness’s own words, yet arranged logically and is easy to follow. All international tribunals should adopt a rule regulating the admission of documents by bar table, requiring the tendering party to provide a cogent explanation of the relevance of each document tendered. The ICC should adopt detailed rules of evidence regarding the admission of written testimonial evidence, based on the procedural regime in place at the ICTY/ICTR/SCSL and largely adopted by the STL.

The general rules and principles governing disclosure by the Prosecution are identical in all international jurisdictions which provide for this institution. These rules are consistent with the requirements of the international human rights law. This and the consistent practice of the international criminal courts suggest that there is no need for amendments of the relevant provisions existing in international jurisdictions.

Any recommendations that could be advanced in relation to defence disclosure depend on whether the investigations are conducted by the parties or by a neutral body such as an investigative judge. In the latter case defence disclosure becomes less relevant. The most detailed legal regime concerning defence disclosure has been adopted by ICTY which includes, inter alia, through the obligation for the defence to file a list of witnesses and exhibits the defence intends to call and offer. The defence has also an obligation to disclose the general nature of the accused’s defence after the receipt of the Prosecutor’s Rule 65 ter (E) filing. The purpose of these amendments has been to

expedite the proceedings. The judges at the ICC may impose some or maybe all of these obligations on an ad hoc basis. These obligations should arguably be codified through an amendment of the ICC RPE.

Turning to the issue of judicial notice, a rule should be adopted by the ICC and other international tribunals permitting a Chamber to take judicial notice of the fact that a person has been charged, is on trial, has been convicted by the court or has been sentenced by the court of which the Chamber is a part. The ICC should consider adopting a rule permitting judicial notice of adjudicated facts, framed to incorporate the principles which have been developed at the ICTY and ICTR. Judicial notice of facts of common knowledge should be discretionary rather than mandatory, in particular in respect of matters such as the existence of an armed conflict, of a campaign of genocide, or of a widespread or systematic attack on a civilian population.

Finally, burden of proof and standard of proof issues are considered. In relation to the pre-trial proceedings and how to define a prima facie case, it is difficult to make any general recommendations. The prima facie case should however be framed in such a way as to correspond to an objective of judicial economy, rather than pre-trying the accused. In this sense, we would recommend that the standard of proof at this stage of the proceedings be closer to its interpretation in the ICC than the ICTY and be a prima facie case that the trial seems justified, rather than a prima facie case of the guilt of the accused.

In relation to judgment, one has to keep in mind that the "beyond reasonable doubt" standard, beyond its affirmation, is fraught with uncertainty. One can wonder whether the nature of international criminal proceedings, that function without a jury, with professional judges, could not in fact justify that the "intime conviction du juge" principle be adopted, which corresponds more to the reality of international decisionmaking, with the central role of judges. In any case, however the standard is labelled, there are two recommendations that are suggested. The main recommendation is that it be more precisely defined, in line with some of the established case law. Indeed, The ad hoc tribunals have in several cases adopted a test for establishing proof beyond reasonable doubt whereby the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt. As a consequence, the standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused. It is recommended that the ICC adopts and develops the same test. A second, subsidiary but fundamental recommendation, given the inherent difficulty in circumscribing through a legal standard what is essentially a mental process, would be to lay more emphasis on the motivation and explanation of the reasoning, in order to better guarantee the rights of the defense.



## G. Deliberation, Dissent, Judgment

N. Jørgensen and A. Zahar

### Principles

#### 1. Privacy and secrecy of judicial deliberations

- **Deliberations of the judges shall be private and shall remain secret.**

[ICTY RPE Rules 29, 87(A); SCSL RPE Rules 29, 87(A); ICC Statute Article 74(4); ICC RPE Rule 142(1); UNTAET Reg 2000/11 Section 25(4), 39(1); ECCC IR Rule 77(12), 96(1); STL RPE Rules 43, 148(A)]

#### 2. Permissibility of majority or dissenting opinions

- **Simple majority decisions of the bench are valid in relation to all matters, although unanimity is preferable.**

[IMT Charter Article 4(c); IMTFE Charter Article 4(b); ICTY Statute Article 23(2); ICTY RPE Rules 87(A), 98ter(C); SCSL Statute Article 18; SCSL RPE Rules 87(A), 88(C); ICC Statute Articles 74(3); UNTAET Reg 2000/11 Section 15(2); ECCC IR Rule 98(4); STL Statute Article 23; STL RPE Rule 168(B)]

- **Separate or dissenting opinions may be appended to the final judgment and all decisions.**

[IMT Charter Article 4(c); IMTFE Charter Article 4(b); ICTY Statute Article 23(2); ICTY RPE Rule 98ter(C); SCSL Statute Article 18; SCSL RPE Rule, 88(C); ICC Statute Article 74(5); ECCC IR Rule 101(2); STL Statute Article 23; STL RPE Rule 168(B)]

#### 3. Character and appearance of final judgment

- **The final judgment and all significant interlocutory decisions shall be reasoned and in writing.**

[ICTY Statute Article 23(2); ICTY RPE Rules 98ter(C), 117(B); SCSL Statute Article 18; SCSL RPE Rules 88(C), 118(B); ICC Statute Article 74(5); UNTAET Reg 2000/30 Rule 39(3); ECCC IR Rule 101]

#### 4. Timing of final judgment

- **The final judgment and all decisions shall be pronounced within a reasonable time.**

[ICC RPE Rule 142(1); Prosecutor v. Krajišnik, IT-00-39-A, Judgement (Appeals Chamber), 17 March 2009, par. 134]

## Rules

### 1. Public nature of final judgment and interlocutory decisions

- **The final judgment and all significant interlocutory decisions shall be public, although special circumstances may justify redaction of parts of the judgment or decision.**

[IMTFE Charter Article 17; ICTY Statute Article 23(2); ICTY RPE Rule 98ter(A); SCSL Statute Article 18; SCSL RPE Rule 88(A); ICC Statute Article 74(5), 76(4), ICC RPE Rule 144(1); UNTAET Reg 2000/11 Section 25.2; ECCC IR Rule 79(6)(d); STL Statute Article 23; STL RPE Rule 168(A)]

### 2. Bench composition and single-judge decisions

- **All decisions are to issue from the full bench, except for decisions of a (merely) managerial or organizational nature.**

[ICC Statute Article 74(1); ICC RPE Rule 7]

## Recommendations

### 1. Privacy and secrecy of judicial deliberations

The question has arisen in this chapter whether it should be possible to waive adjudicative privilege for judges or staff associates. In view of the general preference for transparency and the need to expose any lack of integrity in the process in the interests of fair trial rights, one may wish to argue for the possibility of waiving the privilege. On the other hand, one must consider the possible deleterious impact of such a change on judicial independence. Any trend in the case law of the tribunals is currently too indistinct, and the pros and cons too closely balanced to support a recommendation.

### 2. Public nature of final judgment and interlocutory decisions

The tribunals issue numerous decisions under seal, only exceptionally accompanied by corresponding (partially redacted) public versions. While not every confidential decision can have a meaningful redacted public version, judges or registry staff are currently not required to produce public versions of decisions in every case where it is possible to do so.

Tribunals should, as a rule, produce public versions of all their decisions, whether by a process of redaction at the time of issue or through periodic review aimed at making public those decisions whose confidential status is no longer justified. Another possibility would be that, when preparing a confidential decision, judges are to make provision where possible for the later change of status of the decision to 'public' (e.g. after the occurrence of a particular event or the passage of a certain period of time) as a way of saving resources and limiting the need for later review as part of any comprehensive declassification process.

The introduction of a procedure or procedures with the above effect is particularly important as the ad hoc tribunals near the end of their mandates and must be a matter of ongoing concern for the ICC.

Confidential decisions shall be redacted as necessary with a view to creating parallel public versions; over the long term, they shall be periodically reviewed with a view to changing their status to public.

### **3. Permissibility of majority or dissenting opinions**

Noting the preference for unanimity, a written rule or internal judicial practice direction on the holding of joint deliberations would be a desirable measure to ensure or enhance adequate communication amongst all judges and guard against judicial errancy and aberrance. While it would not be appropriate to over-regulate the process of deliberation, and while unwritten practices are no doubt in place, the ICJ's resolution concerning its internal judicial practice suggests some minimum requirements that could serve as a useful model. For example, dissenting views should be put forward for discussion during deliberations and should not be saved up for individual expression. The effect of a proper discussion of dissenting views and reasoning may be to persuade the majority to take a different path. Formalizing these procedures or at least publishing guidelines (thereby also promoting transparency) might at this stage be most relevant to a permanent court such as the ICC.

The importance of consensus with regard to factual findings at the appeal level has been stressed in this chapter. However, various factors suggest that a recommendation for an explicit rule to the effect that factual findings forming the basis of a new conviction on appeal must be made on the basis of unanimity may be ill-advised or premature. A final appeal court should nevertheless make every effort to achieve unanimity in relation to factual findings that form the basis for a new conviction on appeal. Great emphasis should also be placed on the requirement of a reasoned opinion in this context.

### **4. Bench composition and single-judge decisions**

In large and complex cases a reserve trial judge should be present to guard against lengthy delays or re-trials necessitated by the inability of a member of the panel of judges to continue. The role of the reserve judge could be further clarified in the internal judicial practice direction recommended under the heading 'permissibility of majority or dissenting opinions'.

Reserve judges shall be designated in complex trials that are likely to be of a long duration to be present at each stage of the trial and to replace a member of the Trial Chamber who is unable to continue hearing the case.

### **5. Character and appearance of final judgment**

The role of judges' assistants in the judgment drafting process should be limited to research, drafting straightforward or peripheral judgment sections such as the case's procedural history, improving the language of the overall draft, acting as sounding boards and sources of legal advice, and ancillary tasks of this kind.

### **6. Timing of final judgment**

The imposition of precise time limits on judgment delivery is impractical as it risks placing speed before competing interests such as working towards unanimity and thoroughness of written reasoning. On the other hand, it would be an appropriate compromise for judges to stipulate (extendable) guide times for judgment delivery, somewhere between the 27 days taken in Krajišnik and the eight months or more that is projected for some ICTY and ICTR cases.

# H. Defence Issues

T. Gut, S. Kirsch, D. Mundis and M. Taylor

## Principles

### 1. Representation

#### 1.1. Self-representation

- **The accused has a right to self-representation.**

[Article 14(3)(d), ICCPR, Article 21(4)(d) ICTY Statute, Article 20(4)(d) ICTR Statute, Art. 17(4)(d) SCSL Statute; Article 67(1)(d) ICC Statute; Art. 16(4)(d) STL Statute; Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Prosecutor v. Slobodan Milošević, Case No. IT-02-54-R73.7, A. Ch., ICTY, 1 November 2004, para. 11]

- **The right of the accused to self-representation may be curtailed if the accused engages in obstructionist behavior, but any such curtailment must accord with the principles of necessity and proportionality.**

[Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-AR73.3, Case No. A. Ch., ICTY, 20 October 2006, and Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-AR73.4, A. Ch., ICTY, 8 December 2006]

- **Unless otherwise directed in the interests of justice, the accused may elect to self-represent or to be represented by counsel, but the election to be represented bars the accused from participating in the proceedings.**

[Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Prosecutor v. Milošević, Case No. IT-02-54-R73.7, A. Ch., ICTY, 1 November 2004, para. 7; Reasons for Oral Decision Denying Mr Krajišnik's Request to Proceed Unrepresented by Counsel, Prosecutor v. Krajišnik, Case No. IT-00-39-T, T. Ch. I, ICTY, 18 August 2005; Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses dated 26 June 2008, Prosecutor v. Prlić et al., Case No. IT-04-74AR73.11, ICTY, 11 September 2008, para. 19; Judgement, Nahimana v. Prosecutor, Case No. ICTR-99-52-A, ICTR, 28 November 2007, para. 267, footnote 651]

#### 1.2. Representation by counsel

- **There is a presumption of free choice of counsel. The defendant has the right to freely choose any counsel who is on the list of counsel, or who meets the requirements to be placed on the list.**

[Articles 18(3), 21(4)(d) ICTY Statute, Rules 45(A), 62(B) ICTY RPE; Articles 17(3), 20(4)(d) ICTR Statute, Rules 44bis(A), 45 ICTR RPE; Articles 55(2)(c), 67(1)(d) ICC Statute, Rule 21 ICC RPE, Regulation 75 ICC Regulations of the Court]

- **The right to legal assistance applies in all stages of the proceedings.**  
[Article 18(3) ICTY Statute, Rules 42(A)(i), 62 (A)(i) ICTY RPE; Article 17(3) ICTR Statute, Rules 42(A)(i), 62(A)(i) ICTR RPE; Article 55(2)(c) ICC Statute; Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, App. Ch., ICTY, 31 January 2007, paras 23, 29]
- **The right to freely choose counsel does not include a right to freely replace counsel, which may only be granted if the defendant demonstrates good cause. The defendant cannot, however, deliberately take steps calculated to bring about a breakdown in communication with his or her counsel in order to prove good cause.**  
[Article 20(A)(i) ICTY Practice Direction on the Assignment of Defence Counsel; Rule 45(H) ICTR RPE; Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to replace his Defence Team, Prosecutor v. Blagojević, Case No. IT-02-60-AR73.4, A. Ch., ICTY, 7 November 2003, paras 53-54; Decision On The Motions of the Accused for Replacement of Assigned Counsel, Prosecutor v. Ntakirutimana, Case No. ICTR-96-10 and ICTR-96-17-T. T. Ch., ICTR, 11 June 1997]

### 1.3. Ensuring Effective Representation - Mechanisms for vetting and ensuring the effective representation of the defendant

- **The defendant may request the withdrawal or replacement of counsel subject to a showing of good cause, such as misconduct or manifest negligence by counsel.**  
[Article 20(A)(i) ICTY Practice Direction on the Assignment of Defence Counsel; Rule 45(H) ICTR RPE]

## 2. The Defence

### 2.1. Defence Counsel Qualifications: Structural equality with the Prosecution

- **The defence do not have the same or equivalent structural powers within their respective court/tribunal as the prosecution.**  
[ICTY Trial Legal Aid Policy, 1 November 2009; Rules 44(D), 73(D) ICTY RPE; Rule 73(E) ICTR RPE; Decision on the Request for Review of the Registry's decision of 13 February 2007, Situation in Darfur, Case No. ICC-02/05-66, Pr-T. Ch. I, 15 March 2007, p. 6-7]

### 2.2. Defence Counsel Qualifications: Minimum Requirements for Assigned Counsel

- **Counsel must possess competence in international law or criminal law, either through admission to the bar, professorship of law, or relevant experience in criminal proceedings; and counsel must be in good standing.**  
[Rule 44(A)(i), (iii)-(vii) ICTY RPE; Rule 44(A) ICTR RPE; Rule 44 SCSL RPE; Rule 22(1) ICC RPE, Regulations 67, 69, 71 ICC Regulations of the Court; Rule 11(2) and (4) ECCC Internal Rules; Rule 58(i) STL RPE]
- **Counsel must be proficient in at least one of the working languages of the Court.**  
[Rule 44(A)(ii) ICTY RPE; Rule 45(A) ICTR RPE, Rule 22(1) ICC RPE; Rule 11(4)(v) ECCC Internal Rules; Rule 58(ii) STL RPE]

### 2.3. Legal Aid Scheme for Indigent Accused: What does Legal Aid Cover?

- **The payment of defence counsel shall be modeled on the equivalent salary of the Prosecution, although the overall resources allocated to the defence are not equivalent to the resources of the Prosecution.**

[Articles 23-31 ICTY Directive on the Assignment of Defence Counsel; Articles 16-30 ICTR Directive on the Assignment of Defence Counsel; Articles 17-21, 26 SCSL Directive on the Assignment of Counsel; Regulation 82 ICC Regulations of the Court; Guide to the ECCC Legal Assistance Scheme; Para 9.5 STL Legal Aid Policy for the Defence]

- **In giving effect to the right to adversarial proceedings, the defence shall be allocated their own budget for conducting investigations and preparing expert testimony.**

[Articles 23(A), 26, 27 ICTY Directive on the Assignment of Defence Counsel; Articles 17(B), 27 ICTR Directive on the Assignment of Defence Counsel; Article 26 SCSL Directive on the Assignment of Counsel; Regulation 83(1) ICC Regulations of the Court; Guide to the ECCC Legal Assistance Scheme, 21 January 2008, at H. 2.; Paras. 4.8, 5.4 and 7.18 STL Legal Aid Policy for the Defence]

- **The defence may seek a review of decisions on legal aid.**

[Article 31(A) ICTY Directive on the Assignment of Defence Counsel; Articles 17(A), (B), 30 ICTR Directive on the Assignment of Counsel; Articles 21, 22 SCSL Directive on the Assignment of Counsel; Regulation 83(1) ICC Regulations of the Court; Guide to the ECCC Legal Assistance Scheme, 21 January 2008, at F.3.; Article 43(C) of the STL Directive on the Assignment of Defence Counsel]

### 2.4. Legal Aid Scheme for Indigent Accused: Calculating Indigence & Obtaining Payment from Accused

- **The Registry may require non-indigent defendants to contribute to the costs of their defence team.**

[Article 6(C) ICTY Directive on the Assignment of Defence Counsel; Regulation 84 ICC Regulations of the Court; STL Directive on the Assignment of Counsel; ECCC, Interim report on different legal aid mechanisms before international criminal jurisdictions, 19 August 2008, ASP/7/12, para 58]

### 2.5. Legal aid for self-representing defendants

- **None.**

### 2.6. Defence Counsel

#### *Professional Discipline and Organizational Framework*

- **To be assigned in accordance with the legal aid scheme, counsel must be on the court-maintained list of the international court, or meet the requirements to be included on the list.**

[Rules 44(A), 45(B) ICTY, Rules 44(A), 45(A) ICTR, Rule 45(C) SCSL RPE; Rule 21(2) ICC RPE, Rules 57(D), Rule 59(B) STL RPE]

- **Counsel before the international court are subject to the code of professional conduct of that court. This does not relieve counsel from honoring obligations imposed by other governing bodies.**

[Rules 46(C) ICTY RPE, Rule 44(B) ICTR RPE, Rules 44(B), 46(G) SCSL RPE; Rule 20(3) ICC RPE, Rule 59(B) STL RPE]

### 3. Specific Professional Obligations

- **Counsel owes duties to client, to court, and to other participants.**

[ICTY Code of Professional Conduct, ICTR Code of Professional Conduct; SCSL Code of Professional Conduct; ICC Code of Professional Conduct; SPSC Code of Conduct for Public Defenders]

*Contempt and other Sanctioning Mechanisms*

- **The international court may rely on mechanisms to sanction counsel other than professional discipline.**

[Rules 46, 77 ICTY RPE, Rules 44, 77 ICTR, Rules 46, 77 SCSL RPE; Art. 70 and 71 ICC Statute, Rules 60, 134 STL RPE]

## Rules

### 1. Representation

#### 1.1. Self-representation

- **Where the interests of justice so require, the court may decide on the use of standby counsel, amicus curiae and assigned counsel to ensure the right of the accused to legal representation.**

[Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.6, ICTY, 12 February 2010, para. 35]

#### 1.2. Representation by counsel

- **Although the defendant is responsible for selecting lead counsel and for determining the overall objective of his or her defence case, the lead counsel is responsible for selecting all other members of the defence team upon consultation with the defendant.**

[Article 16 ICTY Practice Direction on the Assignment of Defence Counsel; Article 15(E) ICTR Directive on the Assignment of Defence Counsel; Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to replace his Defence Team, Prosecutor v. Blagojević, Case No. IT-02-60-AR73.4, A. Ch., ICTY, 7 November 2003, paras 22-54]

- **The court shall ensure legal representation if the defendant has not retained permanent counsel, but the method of assignment and the role of counsel varies.**

[Rules 45(C), 62(B) ICTY RPE; Rule 44 bis ICTR RPE, Regulations 73(2), 75,76 ICC Regulations of the Court; Judgement, Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, A. Ch., ICTR, 23 May 2005, paras 234-246, 243-245; Appointment of Duty Counsel, Prosecutor v. Lubanga, Case No. 01/04-01/06, Pre-T. Ch., ICTY, 19 April 2007]

1.3. Ensuring Effective Representation - Mechanisms for vetting and ensuring the effective representation of the defendant

- **Administrative decisions on whether the counsel possesses the necessary qualifications must be based on to foreseeable and transparent criteria, and comply with the principles of procedural fairness.**

[Decision on Assignment of Defence Counsel, Prosecutor v. Šljivančanin, Case No. IT-95-13/1-PT, President, ICTY, 20 August 2003, paras 24-25]

- **A defendant will only be able to obtain a remedy for ineffective representation on appeal if he or she can establish gross misconduct amounting to ineffective representation.**

[Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Prosecutor v. Tadic, Case No. Case No. IT-94-1-A, A. Ch., ICTY, 15 October 1998, paras 46-50]

## 2. The Defence

2.1. Defence Counsel Qualifications: Structural equality with the Prosecution

- **The Registry shall be responsible for representing the defence interests as well as organizing and assisting the defence.**

[Rule 45 ICTY RPE; Rules 44 bis (C), 45(A) ICTR RPE; Rule 20 ICC RPE, Regulation 77 ICC Regulations of the Court, Regulation 119 ICC Regulations of the Registry]

- **The internal defence offices shall represent the general interests of the defence in connection with the internal decision making processes of the court and with operational issues.**

[Rules 2(A) and 45 SCSL RPE; Art. 13 STL Statute, Rules 48(A) and 57(E)(ii) STL RPE]

2.2. Defence Counsel Qualifications: Minimum Requirements for Assigned Counsel

- **The criteria for counsel, who are assigned to indigent accused, shall be more stringent than the criteria which apply to privately retained counsel.**

[Rules 44, 45 ICTY, Rules 44, 45 ICTR RPE, but see Rules 21, 22 ICC RPE, Regulations 67, 69 ICC Regulations of the Court]

- **Counsel assigned to indigent defendants must possess relevant experience in criminal proceedings.**

[Rule 45(B) ICTY RPE; Rule 44 (A) SCSL RPE; Rule 22 ICC RPE, rule 11(4)(iii) of the ECCC internal rules, Rule 58 of the STL RPE]

2.3. Legal Aid Scheme for Indigent Accused: What does Legal Aid Cover?

- **Administrative decisions on legal aid are subject to judicial review.**

[Article 31(A) ICTY Directive on the Assignment of Defence Counsel; Articles 17(A), (B), 30 ICTR Directive on the Assignment of Counsel; Articles 21, 22 SCSL Directive on the Assignment of Counsel; Regulation 85(3) ICC Regulations of the Court; Guide to the ECCC Legal Assistance Scheme, 21 January 2008 at F.3.; Article 43(C) of the STL Directive on the Assignment of Defence Counsel]



2.4. Legal Aid Scheme for Indigent Accused: Calculating Indigence & Obtaining Payment from Accused

- **The partially indigent accused must cover part of the expenses related to his or her legal representation. The defence team may obtain the payment directly from the defendant.**

[Article 6(C) ICTY Directive on the Assignment of Defence Counsel]

- **The court may freeze the assets of the defendant, and recover the payments to the defence team directly from these frozen assets.**

[Article 16 STL Directive on the Assignment of Counsel]

2.5. Legal aid for self-representing defendants

- **The Registry shall allocate funds to the legal associates of a self-represented accused, at a rate of payment which is the equivalent of a legal assistant.**

[ICTY Remuneration Scheme for persons assisting indigent self-represented accused, 28 September 2007, with Rev. 1 of 24 July 2009; Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, T. Ch., ICTY, 28 January 2009; Decision on The Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(D) of the Statute of the Special Court, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, SCSL, 8 June 2004, at 10-11]

2.6. Defence Counsel

*Professional Discipline and Organizational Framework*

- **Counsel is subject to professional discipline.**

[Article 37 to 50 ICTY Code of Professional Conduct, Article 27 to 35 SCSL Code of Professional Conduct; Art. 30 to 44 ICC Code of Professional Conduct]

- **The international court's code of professional conduct prevails over other professional rules.**

[Article 4 ICTY Code of Professional Conduct, Art. 3 SCSL Code of Professional Conduct, Article 4 ICC Code of Professional Conduct]

- **Counsel must be member of court-recognized professional association.**

[Rule 44(A)(iii) ICTY RPE]

- **The Registry and/or Defence Office must consult the defence on policies that are relevant to representation.**

[Article 32 of the ICTY Directive on Assignment of Defence Counsel, Article 29 of the ICTR Directive on Assignment of Defence Counsel, Rule 20(3) RPE ICC]

*Contempt and other Sanctioning Mechanisms*

- **Counsel may be held in contempt.**

[Rule 77 ICTY RPE, Rule 77 ICTR, Rule 77 SCSL RPE, Rule 134 STL RPE]

- **Counsel may be held liable for offences against the administration of justice.**

# Recommendations

## 1. Representation

### 1.1. Self-representation

Given the complexity of international criminal proceedings, there is a right to actively participate in the proceedings and a right to legal assistance. We recommend abolishing the dichotomy between the two.

The right to self-representation should more properly be thought of as the right to participate in the proceedings. Participation ranges from mere presence at trial to self-representation. International criminal trials are extremely complex and it is beyond the capacity of any single individual to mount an effective defence while in pre-trial confinement. Combining the right to participate with the right to legal assistance offers a practical way out of the dilemma that the system faces when confronted with an accused who seeks to use the trial process for political purposes or who otherwise seeks to obstruct the process.

Neither fairness nor efficiency are served by the current system that requires a choice between representation by defence counsel or self-representation. The accused is not the “object”<sup>17</sup> of the proceedings and should not be forced to self-represent simply because he or she wishes to exercise some degree of active participation.

Accused who wish to participate actively must be given the opportunity to select qualified support staff, at least one of whom is qualified to serve as defence counsel. Depending on the wishes of the defendant, the person who is qualified as counsel can act as consultant or co-counsel. This team can assist the accused in preparing for trial, conducting legal research and drafting pleadings, and advising the accused on trial strategy and advocacy.

In the event the accused refuses to select qualified support staff, a team will be assembled for him by the relevant defence unit at the international court or tribunal.

Whether this team is selected by, or imposed upon the accused, it will be in place prior to trial and will be well-positioned to take over conduct of the case in the event the accused is unable or unwilling to do so. The accused’s right to self-representation can only be limited in accordance with clear and foreseeable criteria, such as if the accused engages in conduct which constitutes a intentional violation of the Statute and Rules or which prejudices the fair and impartial conduct of the proceedings. It should also only be restricted in accordance with the principles of necessity (in the sense that the issue giving rise to loss of self-representation must be linked to the fact that the defendant is representing himself) and proportionality (temporary disruption of the proceedings may result in a temporary suspension of self-representation).

The fact that the accused is no longer permitted to self-represent is without prejudice to the possibility that it may be appropriate to permit the defendant to continue to actively participate in the proceedings. Unlike the situation in which standby counsel assumes responsibility for the conduct of the trial, therefore, the accused under this scenario will continue to be allowed to put questions to witnesses, to make unsworn statements (which can be used against him in the proceedings) and to make relevant submissions on the law and facts.

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<sup>17</sup> The German Federal Constitutional Court has emphasized the “idea of the human being as a creature whose nature it is to exercise self-determination in freedom (see BVerfGE 45, 187 (227)), and who therefore may not be made a mere object of state action”, Bundesverfassungsgericht, Case No. 1 BvR 357/05, 15 February 2006, BVerfGE 115, 118, para. 121. See also Case No. 2 BvR 135/75 and others, 11 March 1975, BVerfGE 39, 156, para. 34; Case No. 2 BvR 215/81, 26 May 1981, BVerfGE 57, 250, para. 64.

### **1.2. Representation by counsel**

The right to freely choose any counsel who is on the list of counsel should only be restricted in accordance with the principles of necessity and proportionality, and in accordance with clearly enunciated and foreseeable grounds for doing so.

The right to legal assistance should apply throughout the proceedings. It should commence as soon as the person's rights are affected by the proceedings before the international court or tribunal. If the suspect is interviewed by either the Prosecution or national authorities at the request of the Prosecution, then the suspect has a right to be represented by counsel who meets the qualifications necessary for him or her to be assigned by the international court/tribunal in question. The suspect also has a right to legal assistance in connection with the domestic proceedings concerning the execution of the arrest warrant issued by the international court/tribunal and transfer proceedings. During the proceedings before the international court and tribunal, there should be no gaps in the right to representation. The defendant has a right to representation when testifying as a witness in their own case or in other cases (even if it is after the closure of their case). The defendant should also have a right to limited funds to investigate whether review proceedings are warranted, as opposed to a legal aid scheme which requires the defendant to first obtain permission from the Chamber to initiate review proceedings before legal aid will be allocated.

The following measures relating to the assignment of counsel can also have the effect of curbing fee-splitting: ensuring that an accused can only replace a counsel for good cause, prohibiting the defence from being able to recruit a direct relative of the defendant, and ensuring that experienced and qualified counsel are assigned by the Court to the suspect at the earliest stage of the proceedings.

### **1.3. Ensuring Effective Representation - Mechanisms for vetting and ensuring the effective representation of the defendant**

The replacement of ineffective counsel should be without prejudice to the right of the new defence counsel to seek any necessary and reasonable adjournments and additional resources.

In light of the gravity of the crimes, and the overarching duty of the Chamber to ensure the fairness of the proceedings, the Chamber should ensure that fundamental rights of the defendant are not prejudiced as a result of the actions of defence counsel if counsel fails to act with due diligence or professional competence.

The Registry/Defence office should conduct an initial interview process for vetting the qualifications for counsel, whilst a second level of review by the independent bar can ensure that there is an independent assessment of the qualifications of counsel, which protects the interests of the defendant. The interview process should focus on objective rather than subjective qualifications. In order to ensure transparency and to enable monitoring, institutions or sections vested with the responsibility for reviewing qualifications should issue public decisions (albeit with identifying features of the applicant redacted if the applicant requests to remain anonymous). This would promote standardization in the application of the criteria and ensure equal treatment between candidates.

The subjective qualifications of counsel could be addressed through compulsory training, which is a pre-requisite for persons wishing to be included on the list of counsel who are eligible to be assigned. Whilst it is essential that the defence team must be able to provide effective representation within the context of adversarial court proceedings, this objective could be met by either compulsory training in these areas, or Registry or defence office could define the practical and theoretical qualifications which a defence team should possess, and stipulate that the team, as a whole, should fulfil these requirements.

An internal defence office can play an important role in addressing situations in which neither the defendant nor the Chamber are suitably placed to either assess the efficacy of counsel or to intervene to remedy instances of ineffective representation of counsel. The provisions of the STL (Rule 57(G) of the STL Rules of Procedure and Evidence) should be used as the model. In order to avoid conflicts of interest arising within the defence office, there should be stringent Chinese walls between the sections/persons responsible for monitoring the performance of counsel, and those who are tasked with providing substantive assistance to counsel.

## **2. The Defence**

### **2.1. Defence Counsel Qualifications: Structural equality with the Prosecution**

There is an emerging trend towards aligning the position of the defence to that of the Prosecution. If this trend were to be fully realized, it is recommended to do so in the following manner. It needs to be emphasized that there has been controversy within the Working Group on this point, though. Once the defendant has selected his or her counsel, from the list of counsel who have indicated their willingness to be assigned to defendants, the counsel in question will be contracted, and remunerated at the same rate as the Prosecution counterpart.

For the initial period of the contract, the lead counsel can seek authorization from the Head of the Defence to receive outside remuneration, in order to give the counsel time to finalize his or her commitments to external clients. Alternatively, counsel could opt to work part time during non-key stages of the preliminary or appellate proceedings, in exchange for receiving authorization to be engaged in external cases. Any reduction in the percentage of counsel's fees due to the fact that he or she is working part-time, should be accredited to the defence team. The lead counsel will be responsible for selecting and composing his or her team. Support staff will also be hired and remunerated at the same level as their prosecution counterparts.

It only makes sense to apply staff rules *mutatis mutandis* to the extent that it is consistent with the independence of the defence, and counsel's obligations under the Code of Conduct (in particular, counsel's duty to represent the best interests of his or her client). In order to maintain flexibility and to respect the defendant's right to an expeditious trial, the lead counsel will not be obliged to follow standard recruitment processes (i.e. advertisement of the position, respect for geographical distribution *et cetera*), provided that the Head of the Defence has verified that the person requested by the Lead Counsel meets the requisite qualifications.

As contracted counsel, the members of the defence team will be entitled to staff benefits (pension, maternity leave, dependency allowance), and to the protections which a staff contract would afford (i.e. no termination without prior notice).

As will be discussed in the section below concerning indigence, non-indigent defendants should not be required to contribute to the costs of their defence. A non-indigent defendant may however opt to pay for his or her defence if he or she wishes to be represented by someone who is unwilling to be assigned under the legal aid scheme.

The defence should be an organ of the court, and should be vested with the same powers as the STL Defence Office (i.e. responsibility for preparing and controlling its own budget, ability to propose amendments to the Rules of Procedure and Evidence, ability to negotiate agreements on cooperation, participation in the coordination council of the court/tribunal in question, rights of audience on issues which affect the general interests of the defence).

The establishment of the defence as an organ of the Court is without prejudice to the establishment of an independent bar for counsel. In order to ensure that the independent bar represents the interests of all counsel, membership would have to be compulsory. The membership fees can however be scaled to take into account the different financial means of counsel on the list from different countries. The independent bar can mediate/arbitrate in case of fee-disputes between the Head of the Defence and a particular defence team.

The proposed model of full-time defence counsel is based on catering to the special needs of the emerging landscape of international criminal courts. To establish an effective body of international defence lawyers which is at par with their counterpart, such regime, similar to a public defender system, would be hoped to boost professionalism as well as be sustainable. However, it has been stressed within the Working Group that international criminal justice needs seasoned defence lawyers with rich experience beyond the international criminal law scene and with strong ties to national jurisdictions. The ideal system would allow for both types of lawyers to contribute to it. In essence, the courts and tribunals need to be more inclusive, and in particular it needs to adopt a legal aid policy that enables counsel from many different countries and with different backgrounds to participate (see also in more detail infra section (f)).

## **2.2. Defence Counsel Qualifications: Minimum Requirements for Assigned Counsel**

All counsel, irrespective of whether they are assigned under the legal aid scheme or privately remunerated, should be required to possess established competence in criminal proceedings, and speak one of the working languages of the Court. They should also be required to participate in compulsory training sessions as a pre-requisite for being appointed to a case. The obligation to ensure that non-indigent defendants receive effective representation would not necessarily extend to an automatic alignment of the requirements for counsel appointed to non-indigent defendants to those which apply to counsel assigned to indigent defendants, particularly if the requirements in question are not directly related to the competence of counsel (for example, quantitative requirements concerning years of experience which do not necessarily correspond to the qualitative requirement of 'established competence').

There should be no requirement that counsel must either speak both or all working languages, nor that they must speak one of the working languages in addition to the language of the defendant.

## **2.3. Legal Aid Scheme for Indigent Accused: What does Legal Aid Cover?**

It is recommended that defence team members be paid at an equivalent rate to their Prosecution counterparts. This system would be more transparent and simpler to administer and could also result in savings for the court in question as the present rates paid to counsel are inflated to take into account that unlike the Prosecution, the defence must pay tax to their national authorities. With respect to travel and daily subsistence allowance (DSA), a system that pays for DSA and multiple flights to and from the former place of residence of counsel who may be in trial for over a year appears to be unsustainable. This system was linked to the concept that defence counsel are external consultants who would only be working on 6 week trials. The payment of DSA does not increase the size of the defence team nor does it reimburse the defence for any defence preparation. The approach of the ECCC of reimbursing counsel for any relocation costs and repatriation costs (as is the case with staff members) is thus preferable from the view of court management.

It would therefore follow, but there is a marked split within the Working Group on this point, that the travel and DSA scheme for the defence could replicate the scheme which applies to the Prosecution. Defence team members will therefore be entitled to flights at the beginning and end of

their contracts, and the respective relocation and repatriation grants. Otherwise, they should not be entitled to DSA during periods in which they have the right to be reimbursed on a full time basis. Any defence team member who is conducting an approved investigative mission, should be reimbursed for their flights and receive DSA.

It is noted that this proposal must also be assessed in terms of inclusiveness (see supra section (d)). There may be a risk that such a system does not attract senior lawyers with sound experience which are rooted in a strong practice beyond the international courts, let alone the top tier lawyers from national jurisdictions. This may come as a detriment to the system at a whole. Nonetheless, based on the current experience of the ECCC, which has attracted extremely qualified counsel, and given the number of counsel on the list of the STL, there is no empirical evidence to conclude that such a risk will necessarily eventuate.

In the same way that the Prosecution has its own language assistants and translation unit, the defence organ should provide interpretation and translation services to defence teams (official translations should, however, be conducted by the Registry). Since the defence would be allocated office space and facilities, it would not be necessary to award the defence an additional office costs component for their remuneration.

The overall budget allocated to each defence team should enable the defence to obtain procedural equality with the Prosecution. Although this does not necessarily equate to material equality in all circumstances, if both the Defence and the Prosecution are required to perform the same tasks, then they should be allocated equivalent funds to perform these tasks. It is therefore recommended that the defence team budget be modeled on the prosecution team budget for the trial and appeal stages. The criteria for determining whether investigative missions are warranted should also be governed by the same criteria, which applies to the authorization of Prosecution investigative missions. For courts or tribunals that permit victim participation, their participation must be factored into the budget allocated to the defence team. Depending on the procedural rights which are vested in victims, this may require the defence budget to exceed the budget of the Prosecution at certain stages of the proceedings.

In a manner which is consistent with legal professional privilege, the expenditure of funds by Defence teams should be subject to the same internal audit scheme which applies to Prosecution staff. Even though the Presidency exercises administrative oversight over decisions of the Registry, the Chamber is best placed to review decisions on legal aid, as it is better placed to assess the time and resources required for that particular defence team, and can assess the impact of a lack of resources on the case as a whole, including the defendant's right to an expeditious trial.

Within the framework of the budget allocated to the defence team, the lead counsel should be entitled to request the assignment of a co-counsel from the early stages of the proceedings. For example, at the ICC, it would be preferable to assign a co-counsel prior to the confirmation hearing, as a well-prepared team can proceed more quickly to trial if the charges are confirmed. It would also ensure that lengthy delays are not occasioned due to the possible withdrawal or temporary sickness of lead counsel.

#### **2.4. Legal Aid Scheme for Indigent Accused: Calculating Indigence & Obtaining Payment from Accused**

The system of requiring non-indigent or partially indigent defendants to contribute to the costs of their defence is not consistent with the defendant's right to expeditious proceedings and effective

representation, creates conflicts of interest between counsel and client, and results in negligible if any savings, due to the cost of the ancillary litigation between the Registry and the Defence, and the resultant delays in the trial proceedings.

It is therefore recommended that the Court automatically fund all defence teams, irrespective of the financial status of the defendant. If a non-indigent defendant wishes to remunerate his or her defence teams at higher rates or if he or she wishes to have more staff, then the defendant can opt out of the court payment scheme, and privately remunerate his or her team, in which case, the defendant would be responsible for meeting all of the costs of his or her defence.

If a non-indigent/partially indigent defendant is convicted, then the Court may order that the defendant pay reparations to the victims. In this connection, the victims' right to reparations should trump the right of the Court to receive remuneration for the costs of legal aid.<sup>18</sup> If the defendant is acquitted, then the defendant should not be required to remunerate the costs.

Although the possibility of being investigated and being ordered to liquidate personal assets might be a disincentive for fee-splitting, the same disincentive could be achieved through reparations investigations and decisions.

## **2.5. Legal aid for self-representing defendants**

In terms of recommended principles, the provision of legal aid resources for a self-representing accused should be decided and implemented in a neutral and impartial manner, taking into consideration the necessary and reasonable needs of the defence, and should not be tied to any policy objectives concerning whether a defendant should or should not represent himself or herself. As recommended above in section (a), if a defendant elects to represent himself or herself, the defendant should be accorded the option of freely selecting qualified counsel and assistants to assist him or her. Although the defendant will be allowed to determine the composition of his or her team, at least one of the persons assisting him or her must meet the qualifications of counsel so that he or she can take over if the defendant has engaged in obstructionist/contemptuous behavior. Persons assisting a self-representing defendant should be remunerated in accordance with their qualifications.

## **2.6. Defence Counsel**

Defence counsel before international courts are governed by a distinct set of professional rules of the respective court. This is a commendable trend, inter alia because professional ethics can be a unifying factor promoting professionalism and clarity about the applicable standards of practice. In a similar vein, a disciplinary regime can be an asset because it is defence-specific and has the potential to be a relatively sophisticated and direct mechanism to tackle misconduct. International practice so far repeats, though, what is known from the national level: professional discipline is underused.

By and large, the Codes for Professional Conduct set forth the applicable professional standards to a satisfactory degree. It is noted, though, that they do not always fully resolve "double deontology dilemmas", i.e. conflicts of applicable professional ethics.

A recurring problem has been affording counsel due process when sanctioning alleged misconduct. It seems that a number of factors have had a role in this. The ICTY and ICTR relied on the concept

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<sup>18</sup> This is consistent with rule 221(2) of the ICC RPE, which provides that "In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims".

of inherent powers, e.g. for contempt or fee-denial, which are ultimately very broad. This was not always accompanied by the requisite procedural safeguards. The ICC's regulatory framework seems to offer more clarity. Whilst the stated objective of introducing the rule concerning fee denials – to expedite the proceedings – would appear to be consistent with the right of the accused to a speedy trial, the implementation of the rule in practice can however create a potential conflict of interest between the interest of the client to have all potential defence arguments brought before the Chamber, and the financial interest of the counsel not to undertake work for which he or she might not be remunerated. It is thus arguable that the rule potentially puts counsel in conflict with the obligation, which is found in the respective codes of professional conduct to defend the interests of their client diligently.<sup>19</sup> In disciplinary proceedings, when deciding whether to temporarily suspend a counsel who is appearing in a specific case pending the outcome of the disciplinary proceeding, the disciplinary body should consult with the Chamber in order to take into consideration the impact of such a decision on the defendant's right to a fair and expeditious trial (since the Chamber is the guardian of this right). Expediency and pragmatism argue against the mandatory establishment of a structured bar, in particular for smaller courts. It becomes a part of structural equality in permanent courts, though. Beyond formal recognition, it appears more effective to value the defence bar's input by way of ad hoc arrangements such as amicus briefs or by involvement in the disciplinary regime.

Finally, consideration should be given whether fairness and equality of arms dictate that relevant provisions of Code of Conduct should apply to the Prosecution.<sup>20</sup> This is particularly warranted for those Courts, at which the disciplinary sanctions under the Code of Conduct are far heavier than those, which could potentially apply to the Prosecution under the Statute, Rules and Staff Rules for equivalent behaviour. Alternatively, the disciplinary sanctions in the Code of Conduct could be harmonized with the Staff Rules (which could be appropriate if the defence are eventually contracted on a full-time basis).

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<sup>19</sup> See for example, article 3(iii) of the *ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal*, IT/125 Rev. 3; Introduction and article 6, *ICTR Code of Professional Conduct for Defence Counsel*; article 5 of the *ICC Code of Professional Conduct for Counsel*, ICC-ASP/4/Res.1.

<sup>20</sup> Some provisions, such as those governing legal professional privilege, are specific to the role of the defence.



# I. Victim Issues: Participation, Protection, Reparation, and Assistance

A.-M. de Brouwer and M. Heikkilä

## Principles

1. Participation
  - None.
2. Reparation and general assistance to victims
  - None.

## Rules

1. Participation
  - 1.1. Victim Participation
    - **Victims may participate in the proceedings not only as witnesses, but also in their own capacity. Victim participation shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**  
[Article 68(3) ICC Statute, Section 12 UNTAET Regulation No. 2000/30 (SPSC), Rule 23 ECCC IR, Article 17 STL Statute. See also Principle 6(b) 1985 UN Victim Declaration]
  - 1.2. Modes and Stages of Participation
    - **The victims' right to participate may be limited to particular stages of the proceedings or to particular procedural steps. In limiting victim participation, the court shall consider whether the procedural stage or procedural step involves questions affecting the personal interests of the victims and is appropriate for participation.**  
[Article 68(3) ICC Statute, Rules 23, 74 and 105 ECCC IR, Article 17 STL Statute, and Rule 87 STL RPE. See also Principle 6(b) 1985 UN Victim Declaration]
    - **Reparations and protective measures are generally considered to affect the personal interests of victims.**  
[ICC case law, Rules 23, 74 and 105 ECCC IR]
    - **The mode and manner of participation of victims or their legal representatives may include tendering evidence with the leave of the Chamber, questioning witnesses and delivering closing arguments/statements.**

[Article 68(3) ICC Statute, Rules 89 and 91 ICC RPE, ICC case law, Rules 23ter, 91 and 94 ECCC IR, Rules 87, 146, 147 and 165 STL RPE]

### 1.3. Legal Representation

- **The views and concerns of victims may be presented by (a) (common) legal representative(s).**

[Article 68(3) ICC Statute, Rule 91 ICC RPE, Section 12 UNTAET Regulation No. 2000/30 (SPSC), Rules 12ter and 23ter ECCC IR, Article 17 STL Statute, and Rule 86 STL RPE]

- **When selecting (a) (common) legal representative(s), reasonable steps should be taken to ensure that the distinct interests of the victims (particularly victims of sexual or gender violence and child victims) are represented and that any conflict of interest is avoided.**

[Rule 90 ICC RPE, Rule 23ter ECCC IR]

### 1.4. Protective Measures

- **Protective measures should, when needed, be adopted to protect the security, privacy and dignity of victim participants. The protective measures must be consistent with the rights of the accused.**

[Article 68 ICC Statute, Rule 87 ICC RPE, Rule 29 ECCC IR, and Rule 133 STL RPE. See also e.g., Principle 6(d) 1985 UN Victim Declaration, Principle 10 2005 Van Boven-Bassiouni Principles (UN Doc. A/RES/60/147), and Article 8 EU Council Framework Decision on the Standing of Victims in the Criminal Proceedings.]

### 1.5. Notifications

- **Where victims have participatory rights, victims and/or their legal representatives should be informed about the progress of proceedings and decisions that affect their personal interests.**

[Rules 16 and 92 ICC RPE, Section 12 UNTAET Regulation No. 2000/30 (SPSC), Rules 12bis and 46 ECCC IR, Rule 51 STL RPE. See also e.g., Principle 6(a) 1985 UN Victim Declaration]

## 2. Reparation and general assistance to victims

### 2.1. Reparations

- **Victims of gross violations of international human rights law and serious violations of international humanitarian law have a right to reparations.**

[Article 24(3) ICTY Statute, Rules 98ter(B) and 105-106 ICTY RPE, Paragraphs 21-22 UN Doc. S/2000/1063 (ICTY), Article 23(3) ICTR Statute, Rules 88 and 105-106 ICTR RPE, UN Doc. S/2000/1198 (ICTR), Article 19(3) SCSL Statute, Rules 88(B), 104 and 105 SCSL RPE, Articles 75 and 79 ICC Statute, Section 49 UNTAET Regulation No. 2000/30 (SPSC), Rules 23 and 23quinquies ECCC IR, Judgement, Kaing Guek Eav, Case File No. 001/18-07-2007/ECCC/TC, T. Ch., ECCC, 26 July 2010, para. 662, Article 25 STL Statute, Rule 86(G) STL RPE. See also e.g., Principles 8, 12 and 14 1985 UN Victim Declaration, and Principles 15 and 18 2005 Van Boven-Bassiouni Principles (UN Doc. A/RES/60/147)].

- **Reparations (or particular forms or reparations) may be ordered in connection to international criminal proceedings.**

[Article 24(3) ICTY Statute, Rules 98ter(B) and 105 ICTY RPE, Article 23(3) ICTR Statute, Rules 88 and 105 ICTR RPE, Article 19(3) SCSL Statute, Rules 88(B) and 104 SCSL RPE, Article 75 ICC Statute, Rules 94-99 ICC RPE, Section 49 UNTAET Regulation No. 2000/30 (SPSC), and Rules 23 and 23quinqies ECCC IR. See also Principle 9 1985 UN Victim Declaration].

## 2.2. Assistance and Support

- **Courts shall take appropriate measures to support the well-being of victims when they come before the courts to give evidence.**

[Rules 34 and 75 ICTY RPE, Rules 34 and 75 ICTR RPE, Rules 34 and 75 SCSL RPE, Articles 43(6) and 68 ICC Statute, Rules 16-18 and 88 ICC RPE, Rules 12bis and 29 ECCC IR, Article 12(4) STL Statute, Rules 50 and 133 STL RPE. See also e.g., Principles 14-15 and 17 1985 UN Victim]

# Recommendations

## 1. Victim participation and protection

A right to victim participation: The comparative inquiry into victim participatory rights in international criminal procedure does not allow the identification of a general principle that provides individual victims with a right to participation. It may, however, be argued that such a principle is developing or has developed in international law in general. It is therefore suggested that the following principle should become a general principle of the law of international criminal procedure: Where the personal interests of victims are affected, a court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

This principle is openly formulated, and its implementation can range from restrictive to extensive approach and include everything in between.<sup>21</sup> The principle, however, demands that meaningful legal recognition is given to the views and concerns of victims. In addition, for the same reason, some of the general rules on victim participation identified above should gradually mature into principles and rules of general application in international criminal law as well (for example, victims should be recognized to have an individual right to legal representation, information, and protection).

More established approaches to victim participation in international criminal procedural law: The victim participation regimes of all international criminal tribunals that allow for such participation differ from one other (even though some points of common practices can be identified). Also in domestic legal systems, the role of victims in the criminal proceedings varies. More problematic is that the scope of the victims' participatory rights within individual courts sometimes has been characterized by uncertainties, ever-changing case law and norms, and in casu application.<sup>22</sup> This

<sup>21</sup> See e.g., *Handbook on Justice for Victims - On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: United Nations Office for Drug Control and Crime Prevention, 1999) 37.

<sup>22</sup> In the case law, it has, for example, at times been suggested that the appropriate modalities of victim participation are not identical from case-to-case, but depend on factors, such as the type of charges and the number of victims taking part

variation in norms and practices is problematic both from the point of view of the victims (who can be re-victimized due to disappointments towards the system) and from the point of view of other trial participants (accused person, Prosecutor) whose work and legal position is affected by the participation of victims. A more regulated approach to the victim participation in international criminal procedural law should be strived for.

Clarification of the rationale of victim participation in international criminal procedural law: The reasons for and the goals of victim participation in international criminal procedure should be elaborated upon. If victim participation is limited to certain stages of the proceedings and to certain modalities, it may be necessary to identify the core interests and the core needs of victims. Furthermore, all views of victims are not necessarily such that they can be given legal significance. The ICC has in its case law suggested that the underlying reasons for victim participation are the victims' right to truth, the victims' wish to have those who have victimized them identified, and the victims' right to reparations.<sup>23</sup> Revenge, on the other hand, for example, at the sentencing stage, is an example of something that is not accepted as a legitimate ground for participation. The identified rationale of victim participation should to a higher degree affect the stages and modalities of victim participation. At present, the situation is sometimes such that certain interests are found to belong to the core interests of victims at the same time as the chosen procedural solutions do not really allow for their recognition (for example, the possibilities for the victims to receive reparations in international criminal procedures are often meager and they are rarely allowed to challenge decisions not to investigate or prosecute).

Streamlining the participation: The question to what extent victims personally may participate in international criminal procedures is not always clearly settled. As international crimes often are characterized by mass victimization, the modalities of victim participation must accommodate the possibility of large-scale participation. The practice, as developed before the ICC and ECCC, that common legal representatives represent victims should therefore be embraced and be made obligatory. Legal representatives are generally better positioned to address certain procedural issues than victims themselves, such as the questioning of witnesses. Furthermore, the rights of the accused and a fair and impartial trial also point in that direction, as does the idea that victims should not be re-victimized by prolonged trials. In case of irreconcilable differences amongst victims within a particular group of victims – for example, on the work done by the common legal representative – a procedure should be put in place to deal with such victims' complaints.

Ensuring victim-friendly court infrastructures: More consideration should be given to ensuring that the victim participation regimes are construed in a manner that ensures that victims de facto can participate. The victim status application procedure should, for example, not be made too cumbersome and victims should not be forced to prove that their personal interests are affected anew and anew. Victims should have easy access to competent legal representation and to information about their rights as well as notification, which includes that they are properly informed about the important developments in their case by their legal representative. Effective victim participation also demands that the tribunals' personnel are well-informed of the needs of victims and supportive of their participation. The legal frameworks of the international criminal tribunals already to varying extent recognize that meaningful victim participation only can be achieved if the tribunals' organizational infrastructure is supportive of victim participation. There is, however, still

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in the proceedings. Decision on the Modalities of Victim Participation at Trial, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Situation in Democratic Republic of the Congo, ICC-01/04-01/07-1788, T. Ch. II, 22 January 2010, para. 54.

<sup>23</sup> Decision on Victims' Participation, *Prosecutor v. Lubanga*, Situation in the DRC, ICC-01/04-01/06-1119, T. Ch. I, ICC, 18 January 2008, para. 96.

room for improvement. For example, a Victims Advisor, possibly supported by some staff, could be appointed at each tribunal overseeing the tribunal's strategy and implementation of victims' rights. Such an advisor would also be responsible for mainstreaming the enforcement of victims' rights within all sections of the tribunal, including by means of trainings on victims' rights. In order for such a Victims Advisor to have any influence on the proceedings, it is clearly necessary for such a person to be in a senior level position.

More coherent approaches to testifying victims: The status of victims who give evidence today varies considerably between the various international criminal tribunals. When victims are heard as victim participants or as civil parties, and not as normal witnesses, it is underlined that victim participants are actors who have a personal interest in the outcomes of the proceedings (conviction/sentence/reparations). Of the international tribunals, only the ECCC applies such special rules. The fact that victim participants have a personal interest in the outcome of the case should, however, not automatically entail that the evidence given by them should be regarded as less credible. Victims are also often the individuals who have first-hand information of the facts. The credibility of victim evidence should therefore be evaluated on a case-by-case basis. Before the ICC and the STL testifying victims are normal witnesses, but the courts differ in that victims before the ICC can have a dual status, whereas the legal framework of the STL assumes that victims either participate as victim participants or as witnesses. Although the STL may hear victim participants as witnesses if the interests of justice so require, the presumption appears to be that victims who testify should not participate as victim participants. From the perspective of victims, the STL system hence appears to demand a choice between acting as a witness or participating as a victim participant.<sup>24</sup> The ICC system of dual status participants is in this regard more satisfactory. The ICC system is, however, still plagued by uncertainties in relation to the scope of the participatory rights of dual status victim participants. To ensure the fairness of the proceedings and to protect the credibility of the victim evidence, it is necessary to delimit the participatory rights of victims before giving evidence, for example, by restricting the opportunity for victims to be present during other persons' evidence. By distinguishing the different types of victim participants (dual/not-dual), the ICC has been able to adjust the scope of the protective measures to the de facto procedural role of the victims (so that victim participants not providing evidence, for example, can be granted more far-reaching protective measures).

The scope of protective measures for victim participants: The relevance of victim anonymity for the scope of participatory rights should be elaborated upon. Since missing information on the identity of the victim participant does generally not impair the accused person's ability to prepare his/her defence, in the same way as missing information on the identity of a victim who testifies in the proceedings, more far-reaching protective measures could be accepted for victim participants, including victim anonymity.

## **2. Reparation and general assistance to victims**

Ensuring the existence of mechanisms to apply for reparations: Many international criminal tribunals can today only provide victims with very limited forms of reparations (for example, restitution of property or collective and moral reparations) even though the tribunals generally recognize that victims of gross violations of international human rights law and serious violations of international humanitarian law have a right to reparations. The concept of reparations is usually found to include restitution, compensation, and rehabilitation. Victims should be able to request such reparations from the international criminal

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<sup>24</sup> Also before the ECCC, victims have to make a choice between being normal witnesses or civil parties. As civil parties they can be heard by the Trial Chamber but under different conditions than witnesses. See further B. McGonigle, 'Apples and Oranges? Victim Participation Approaches at the ICC and ECCC', in C. Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (Antwerp: Intersentia, 2009) 113-114.

tribunals and/or from institutions closely connected to the tribunals. The outsourcing of the enforcement of the right to reparations to de facto completely malfunctioning external mechanisms should not be acceptable. Allowing victims to put forward reparation claims in the context of criminal proceedings underlines that crimes are not only violations against public order, but that they cause individual and collective harm. In other words, based on the fact that, with the exception of the post-World War II tribunals, all international tribunals recognize the right of victims to reparation, even though the forms of reparation may differ amongst the tribunals, it can be held that a general principle has developed in international law which recognizes the right of victims to reparation. The same applies to the other two general rules identified above. Reparations (or particular forms of reparations) may be ordered in connection to international criminal proceedings, and courts shall take appropriate measures to support the well-being of victims when they come before the courts to give evidence.

**Selectivity of prosecutions and the need for general assistance:** Where reparation procedures are provided for, the different categories of victims may not be treated discriminatorily (for example, when collective reparations are ordered). Furthermore, reparation mechanisms need to be complemented with general assistance schemes to ensure that not only victims of crimes chosen for prosecution can receive recognition of their victimization and help.

**Ensuring that the mechanisms that provide reparations and general assistance are adequately funded:** Tribunals and states need to make sure that the tribunals and the associated victim institutions/funds are adequately funded, so that victims can obtain meaningful reparations and assistance. Tribunals should, for example, have effective and timely possibilities to freeze the assets of the accused in order to use them for purposes of victim reparation. Victims should furthermore be clearly informed of what kind of reparations and general assistance they can expect to receive in order to avoid disappointments. It is especially important to consider the views of victims as regards what are meaningful reparations or important forms of general assistance when the resources are scant.

**Legal certainty and practicalities and institutional support:** When victims are allowed to request reparations through criminal proceedings, the procedures should be clear, accessible, and fair. Reparation procedures that are plagued by uncertainties are prone to cause victim dissatisfaction. The provisions on reparation procedures should, for example, clearly settle who can apply for reparations, in what stage of the proceedings, and in what form. In relation to international crimes, a great number of reparation claims can generally be expected. Courts should operationalize the best method to deal with the numerous claims.

**Assistance and support measures to victims:** The legal frameworks of all international criminal tribunals allow for support measures to victims in the trial proceedings. The application of the legal framework can, however, still be fine-tuned to ensure the greatest possible well-being of victims. Court personnel with expertise in victims' rights should be hired on decision-making level. As international criminal tribunals are not part of a state machinery, international tribunals must take greater responsibility for post-trial support than ordinary domestic criminal courts do.<sup>25</sup> This is today largely done through cooperation with states and other possible support providers, such as NGOs working in the field. The post-trial support of victims should, however, be strengthened, at least in situations where victims have been re-victimized by the trial proceedings. In these situations, the international criminal tribunals should clearly take responsibility for the post-trial support.

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<sup>25</sup> In this regard, it is significant that the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA), is 'not confined to attending to the victim's interests under criminal proceedings proper', but also addresses the pre- and post-trial phases.

# J. Negotiated Justice

J. Iontcheva Turner and T. Weigend

## Principles

### 1. Validity of admission of guilt

- **The accused may admit his guilt in court. The court may accept the admission of guilt if the admission is voluntary, informed, unequivocal, and sufficiently based on facts.**

[Article 20ICTY Statute; Article 19ICTR Statute; Articles 64(8)&65(1)ICC Statute; Rules 62 &62bisICTY RPE; Rule 62ICTR RPE; Rules 61 &62SCSL RPE; Prosecutor v. Erdemović, Case. No. IT-96-22, A. Ch., ICTY, 7 October 1997]

### 2. Subject-matter and effect of plea agreements

- **The parties may enter into an agreement about the conditions of an admission of guilt. An agreement can pertain to the charges, cooperation by the accused, and the penalty to be imposed. Any such agreement binds the court only when the court has ratified it.**

[ICTY RPE 62ter; ICTR RPE 62bis; Article 65(5) ICC Statute]

## Rules

### 1. Validity of admission of guilt

- **To ensure that an admission of guilt is voluntary and informed, the court shall verify that the defendant is mentally competent and understands the charges against him and the consequences of his admission.**

[Rule 62bis ICTY RPE; Rule 62(B) ICTR RPE; Rule 62(A)(i) SCSL RPE; Article 65(1) ICC Statute; Prosecutor v. Erdemović, Case. No. IT-96-22, A. Ch., ICTY, 7 October 1997; Prosecutor v. Kambanda, Case No. ICTR 97-23-A, A. Ch. ICTR, 19 October 2000]

- **To ensure that an admission of guilt is informed, the court shall verify that the defendant, before making the admission of guilt, has had access to counsel and has been provided with any exculpatory information available to the prosecution.**

[Articles 65(1)(b)& 67(2) ICC Statute; Rule 68 ICTY RPE (exculpatory evidence); Rule 68 ICTR RPE (exculpatory evidence); Rule 68(B) SCSL RPE (exculpatory evidence)]

- **The court shall verify that an admission of guilt is unequivocal.**

[Rule 62bis ICTY RPE; Rule 62(B) ICTR RPE; Rule 62(A)(iii) SCSL RPE]

- **The court shall ensure that an admission of guilt is supported by the facts of the case. In order to establish a sufficient factual basis for the admission of guilt, the**

**court shall consider: (i) The charges brought by the Prosecutor and admitted by the accused; (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) Any other available evidence.**

[Article 65(1)(c) ICC Statute; Rule 62bis ICTY RPE; Rule 62(B) ICTR RPE; Rule 62(A)(iv) SCSL RPE]

- **The court shall reject any admission of guilt that has been influenced by threats, illicit promises or undue pressure.**

[Rule 62bis ICTY RPE; Rule 62(B) ICTR RPE; Rule 62(A)(i) SCSL RPE; Article 65(1)(b) ICC Statute; Prosecutor v. Erdemović, Case. No. IT-96-22, A .Ch., ICTY, 7 October 1997; Prosecutor v. Kambanda, Case No. ICTR 97-23-A, A. Ch. ICTR, 19 October 2000]

## 2. Subject-matter and effect of plea agreements

- **The court shall accept an agreement between the parties only if it is consistent with the interests of justice, including the interests of victims. The court may solicit the views of victims for this purpose.**

[Articles 65(4)& 68(3)ICC Statute; Rule 93 ICC RPE].

- **If the court decides to reject an admission of guilt or an agreement offered by the parties, it shall give its reasons in writing. In that case, it shall refer the case to trial and may remit the case to another trial chamber.**

[Articles 65(3) & 65(4)(b) ICC Statute; Rule 139 ICC RPE]

- **Any statements the defendant has made in the course of negotiations or of the hearing on the admission of guilt shall not be used as evidence against him.**

[Articles 65(3) & 65(4)(b) ICC Statute; ICC RPE 139; Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose Its Notes from Plea Discussions with the Accused Nikolic & Request for an Expedited Open Session Hearing, Prosecutor v. Blagojević, Case No. IT-02-60-T, 13 June 2003, n.25]

## Recommendations

Although we have been able to identify a number of principles and general rules that apply to negotiated justice at international criminal tribunals, a few important points have not yet been clarified in this relatively new field of criminal procedure. Based on our evaluation of the situation with respect to admissions of guilt under international human rights law and in state practice, as well as in light of the main objectives of international criminal justice, we put forward the following recommendations.

(1) A voluntary admission of guilt containing a factual statement and recognition of personal responsibility can be a valuable tool for establishing the truth and should therefore be encouraged.

(2) A mere plea of guilty or an unsubstantiated acknowledgement of the charges contribute little to the goals of international criminal justice except for saving judicial resources. Since one of the goals of international criminal justice is the determination of the truth about certain crimes of great dimension, such "bare" guilty pleas should be used sparingly. They are acceptable when special considerations apply—for example, when a trial would endanger the health or safety of



victims or witnesses, or in order to obtain a suspect's crucial information for avoiding impunity of other, more serious offenders.

(3) Voluntariness of admissions of guilt should not be jeopardized by permitting excessive sentence differentials between trial and guilty plea. International courts should consider setting up specific rules as to the amount of permissible charge and sentence reductions.

(4) Defendants should be given access to any material evidence in the case against them before they decide whether to admit guilt pursuant to an agreement with the prosecution.

(5) Because international criminal justice cannot be achieved unless victims' interests have been taken into account, victims or their representatives should be informed and given an opportunity to voice their opinion whenever acceptance of an admission of guilt can affect the verdict or the sentence. Consultation should be early enough for the victim's opinion to be taken into consideration by the prosecutor or court before the charges or the sentence are determined.

(6) In order to establish the factual accuracy of an admission of guilt, the court should consider pertinent documents and hear relevant witnesses unless the defendant's admission of guilt provides, by itself, sufficient information on which the verdict and sentence can reliably be based.

(7) When the court decides not to follow the recommendations agreed upon by the parties with respect to the disposition of the case, the defendant should be permitted to withdraw any admission of guilt he may have made.

(8) If one of the parties has breached the plea agreement, the court should have the authority to impose appropriate remedies. In particular, the court may resentence the defendant, taking the parties' conduct into account.

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