

**Caribbean Judiciaries in an Era of Globalization: Meeting the  
Challenges of the Time**

**25-27 June 2009, Port of Spain, Trinidad and Tobago**

**Address of Judge Patrick Robinson, President of the International  
Criminal Tribunal for the former Yugoslavia (“ICTY”):**

**“Fairness and Efficiency in the Proceedings of the ICTY”<sup>1</sup>**

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<sup>1</sup> Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia. I must acknowledge that I have borrowed from my previous publications in this area. See P. Robinson, *The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia*, 16 ILSA J. Int’l & Comp. L. (forthcoming 2010); P. Robinson, “Fair but Expeditious Trials”, in H. Abtahi and G. Boas (eds.), *The Dynamics of International Criminal Justice*, pp. 269-192 (2006), Koninklijke Brill NV; Patrick L. Robinson, “Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY”, 3 Journal of International Criminal Justice 1037, at 1037-1058 (2005); P. Robinson, “Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia”, EJIL (2000), Vol. II, No. 3, 569-589. I must also acknowledge the assistance of Diane Brown, Associate Legal Officer, and Grant Dawson, Deputy Chef de Cabinet of the Tribunal, in the preparation of this Paper.

## I. INTRODUCTION

This paper discusses fairness and efficiency in proceedings before the United Nations International Criminal Tribunal for the former Yugoslavia (variously referred to as the “ICTY”, “The Hague Tribunal”, and the “Tribunal”). For the purposes of this paper, an issue of fairness and efficiency arises when the proper application of a measure designed to facilitate the progress of trial proceedings calls for a balancing of the advantages that measure brings to the trial with the interests of the accused, victims, witnesses, and sometimes the public.

In discussing these measures, I will address issues of their adaptability to Caribbean courts, either when considering the measure itself or separately, when appropriate.

Tension between fairness and efficiency has arisen in two areas of the work of the Tribunal.

From its first two cases, it was evident that the Tribunal would face criticism for the length of its trials. *Tadić*,<sup>2</sup> a case with one accused, 86 Prosecution witnesses, 60 Defence witnesses and a transcript of 7,015 pages, lasted six months. The second case, *Blaškić*,<sup>3</sup> with a single accused, 102 Prosecution witnesses, 47 Defence witnesses, nine Chamber witnesses, and a transcript of 25,398 pages, lasted two years and nine months. Compared to trials in domestic jurisdictions, which generally do not run for more than two weeks, the duration of the first two ICTY trials would have been viewed as long. And even in comparison with the Nuremberg trials, the first set of international criminal trials, they would have been viewed as being of a long

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<sup>2</sup> *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T.

duration. However, the Nuremberg trials, which were completed in 11 months, relied heavily on documentary evidence. Not surprisingly, the Tribunal came under pressure from the Security Council and the international community, and over the past ten years it has adopted a number of measures to expedite trial proceedings. It is in relation to these measures that the issue of fairness and efficiency is principally implicated.

However, tension between fairness and efficiency is also to be found in another area of the Tribunal's work. Ethnic conflicts resulting in mass violence and killings will always leave behind victims and witnesses who live in fear of retribution. The reality is that these persons will not come to court without being given certain protective measures. There can be little doubt that the protective measures for victims and witnesses of the Tribunal facilitate the conduct of trials; in fact, some would argue that without them many trials would not take place. It is therefore correct, in my view, to see the protection of witnesses as a measure to promote efficiency. But a question arises as to whether these measures compromise the rights of the accused and the interests of the public.

## **II. BACKGROUND**

### **A. Structure of the Tribunal**

The Tribunal where I work is a court with a mandate to try individuals for the most serious violations of international humanitarian law committed during the conflict that engulfed Yugoslavia in the 1990s. It is an international court established by the United Nations ("UN") Security Council in 1993.

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<sup>3</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14.

There are three organs of the Tribunal. The Registry provides logistical assistance to the Office of the Prosecutor and the Chambers. The Prosecutor, of course, conducts investigations and prosecutions at the trial and appellate level. And the Chambers consist of the Judges of the Tribunal.

There are 16 permanent Judges elected by the UN to serve on the Tribunal. In addition, to deal with the heavy caseload of the Tribunal, a system was established in 2000 whereby *ad litem* Judges are elected by the General Assembly and appointed by the UN Secretary-General at the request of the President of the Tribunal to sit on one or more specific trials.<sup>4</sup> Under the Statute of the Tribunal (“Statute”), the maximum number of *ad litem* Judges serving at any one time is 12. However, a temporary increase to a maximum of 16 was approved by the UN Security Council until 28 February 2009 to enable the Tribunal to conduct and complete additional trials as soon as possible. The Tribunal has three Trial Chambers, organised in benches of three Judges, and an Appeals Chamber of seven Judges.

With a staff of eleven hundred persons and a budget of 170 million dollars per year, the Tribunal is a big and expensive institution.

## **B. The Completion Strategy**

In many jurisdictions, there is a backlog of cases awaiting trial, prompting criticism of the judiciary in those countries. The reasons for that situation usually relate to a high rate of crime and shortages in personnel and support for judicial activity. This is certainly the case in many Caribbean countries.

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<sup>4</sup> See Resolution 1329 (2000) S/RES/1329 (2000), adopted by the Security Council at its 4240<sup>th</sup> Meeting, on 30 November 2000.

The case of the Tribunal is slightly different because it was never intended to be a permanent body. Unsurprisingly, after the first set of cases was disposed of by the Tribunal, and it was evident to the international community, the Security Council, and indeed the Tribunal itself that the trials were too long, it became clear that a strategy had to be devised to expedite proceedings. Consequently, in 2003, the Tribunal itself, in reaction to an estimation that, proceeding as it was at that time, trials would last until 2016, submitted a proposal to the Security Council, and thus came into being the Completion Strategy, requiring investigations to be completed by the end of 2004, trials by the end of 2008, and all work by the end of 2010.<sup>5</sup> The Security Council also called on the Tribunal to concentrate on the prosecution and trial of the most senior leaders suspected of bearing responsibility for crimes within the Tribunal's jurisdiction, and to transfer to competent national jurisdictions cases involving those who did not have that level of responsibility.<sup>6</sup>

To date, the Tribunal has concluded proceedings against 120 accused persons, convicted 60, and acquitted 10 others. Seven trials are currently being conducted daily. There are 37 accused persons in detention, three on provisional release, six accused at the pre-trial stage, two accused persons still at large – Ratko Mladić and Goran Hadžić – and 13 accused have been transferred to domestic jurisdictions. It does not appear that the Tribunal will complete all the trials on its docket before 2011.<sup>7</sup> The Security Council

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<sup>5</sup> Resolution 1503 (2003) S/RES/1503 (2003), adopted by the Security Council at the 4817<sup>th</sup> meeting on 28 August 2003.

<sup>6</sup> See Resolution 1503 (2003) S/RES/1503 (2003), adopted by the Security Council at the 4817<sup>th</sup> meeting on 28 August 2003.

<sup>7</sup> See Letter dated 21 November 2008 from the President of the International Criminal Tribunal for the former Yugoslavia addressed to the President of the Security Council, S/2008/729, 24 November 2008, para. 2 (“[h]owever, while all efforts are being made to complete all trials as quickly and efficiently as

has already implicitly modified the Completion Strategy by a resolution adopted in 2008, providing that the terms of office of permanent Judges of the Appeals Chamber be extended until 31 December 2010 and that the terms of office of permanent and *ad litem* Judges of the Trial Chambers be extended until 31 December 2009.<sup>8</sup>

Since the institution of the Completion Strategy, many questions have been asked about the propriety of a judicial institution working under that kind of time pressure; and, in fact, reference to the Completion Strategy has been made in proceedings by Defence counsel, suggesting that it has compromised the independence of judges.

On the contrary, however, it is my view that there can be no doubt that the Completion Strategy has motivated the Judges to reform their procedures in order to further promote expeditiousness in the Tribunal's proceedings.

### **C. The Adversarial System and the Inquisitorial System**

The Tribunal's trial procedures are basically common law adversarial, as can be seen by the following features: there is an independent prosecutor and an accused; in the middle is the Trial Chamber comprised of three Judges; and, importantly, the collection of evidence is in the hands of the parties. On that basis then, in principle, the system would appear to be party driven, unlike that which obtains in civil law inquisitorial jurisdictions, where the system is driven by the Judge. However, over the years, in order to address the slow pace of trials, many amendments have been made to the Tribunal's Rules of

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possible, it now appears overly optimistic to claim that all appeals can be concluded during 2011, and it is likely that a small number will spill over to 2012.”)

<sup>8</sup> See Resolution 1837 (2008) S/RES/1837 (2008), adopted by the Security Council at the 5986<sup>th</sup> meeting on 29 September 2008.

Procedure and Evidence (“Rules”), incorporating features drawn from the more efficient civil law, inquisitorial system. At the Tribunal there is no jury; the judges are triers of both fact and law.

Admissibility of evidence at the Tribunal is based on the more relaxed civil law model, in which professional Judges are the arbiters of law and fact. Indeed, pursuant to Rule 89(C), evidence is admissible as long as it is relevant and has probative value. Thus, hearsay evidence is admissible. Generally, that is not the case in the common law adversarial system. There is less need for the hearsay rule in a system where there are professional Judges able to assess and weigh the evidence. In common law countries, where there are lay juries in criminal trials as triers of fact, there is a greater need for a rule limiting the use of hearsay evidence. At the Tribunal, as in the civil law system, we admit evidence if it is relevant and has probative value, and then determine, in light of the totality of the evidence at the end of trial, what weight to attach to this evidence. The approach to the admission of evidence is inclusionary, not exclusionary, as it tends to be in the common law system.

### III. CONCEPT OF FAIRNESS

Fairness is the overarching principle of any legal system based on the rule of law. It is the means by which justice is achieved. This is well illustrated in the dictum of Lord Bingham that “the paramount object must always be to do justice”.<sup>9</sup> That is the purpose which courts of justice exist to serve.”<sup>10</sup> To be fair is to be just, to be unbiased, to be equitable;<sup>11</sup> it is not to be infallible.

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<sup>9</sup> *R v. Davis*, [2008] UKHL 36 (HL) [26(2)], citing *Scott v. Scott* [1913] AC 417 (HL) [437].

<sup>10</sup> *R v. Davis*, [2008] UKHL 36 (HL) [26(2)].

<sup>11</sup> Concise Oxford Dictionary, 9<sup>th</sup> Ed.

One may make a mistake and yet still be fair. As Lord Diplock said in the *Maharaj* case: “The fundamental human right is not to a legal system that is infallible but to one that is fair.”<sup>12</sup> Fairness is central to the pursuit and achievement of justice. It is a principle that ennobles law and man. It is the goal of every legal system, and is the unstated rationale for every legal norm, whether judge-made or statutory.

In criminal proceedings, the concept of fairness is reflected principally in the duty of the court to protect the rights of the accused, and it is also encompassed in the doctrine of equality of arms between the Prosecution and the Defence. It is embodied in the right to a fair hearing and also embraces the other rights reflected in all major human rights treaties, including the International Covenant on Civil and Political Rights (“ICCPR”), which, by reason of its global, non-regional coverage and the vast number of ratifying states (151), ought to have the greatest influence on the work of the Tribunal.<sup>13</sup>

The principle of fairness has been confirmed time and again at the Tribunal. For instance, in the *Nyiramasuhuko et al.* case, Judge David Hunt issued a dissenting opinion, stating:

There may be difficulties placed in the way of an accused in the course of applying an “interests of justice” test in various situations, so that the trial is not a perfect one (such as the need to protect victims

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<sup>12</sup> *Maharaj v. Attorney-General of Trinidad and Tobago*, [1979] AZ 385 (Privy Council) [399]; (1978) 2 AER 670; (1978) WLR 902.

<sup>13</sup> The UN Secretary-General in the “Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)” (to which the Tribunal’s Statute is attached, and which is, therefore, an important element of the Statute’s legislative history) states at paragraph 106 that the Tribunal “must fully respect the internationally recognized standards regarding the rights of the accused at all stages of its proceedings.” The Report cites Article 14 of the ICCPR in its discussion of the fair trial requirement.



and witnesses) but the absence of perfection does not mean that the trial will not be a fair one. However, the interests of justice cannot be served where the accused is denied a fair trial.<sup>14</sup>

As a court ruling on individual criminal responsibility, the right of an accused person to a fair trial is the most important principle that the Tribunal must respect. Fair trial rights are provided for in Articles 20 and 21 of the Tribunal's Statute. I consider it beyond argument that the fair trial requirement in these Articles reflects a rule of customary international law. Moreover, in my view, the ICCPR's provision on the right of an accused to a fair hearing is, subject to the permissible derogations set out in Article 4 of the ICCPR, also a peremptory norm of general international law from which no derogation is permitted, that is, *jus cogens*. Thus, if in circumstances not covered by Article 4, a treaty that established an international tribunal provided that the fairness of its trials was irrelevant to the proceedings, it would, by virtue of Article 53 of the Vienna Convention on the Law of Treaties, be void *ab initio*.<sup>15</sup>

Article 20(1) of the Tribunal's Statute is significant for the positive obligation that is placed on Trial Chambers to ensure a fair and expeditious trial, a duty which has been treated as the very object and purpose of the

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<sup>14</sup> See *Prosecutor v. Pauline Nyiramasuhuko and Others*, Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings under Rule 15bis(D), 24 September 2003, Dissenting Opinion of Judge David Hunt, para. 16. See also Judge Shahabuddeen's Separate Opinion in the *Slobodan Milošević* case, stating that "the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him." *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 October 2003, para. 16.

<sup>15</sup> Article 53 of the Vienna Convention provides: "A Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

Statute and Rules.<sup>16</sup> This obligation extends beyond the specific right of an accused to be tried without undue delay under Article 21(4)(c) to embrace the trial process and the administration of justice as a whole, including the Prosecutor. An important feature of Article 20(1) of the Tribunal's Statute is the twinning of the requirement of a fair trial with the requirement of an expeditious trial. These requirements are cumulative: a trial may proceed expeditiously, but not fairly; on the other hand, a trial cannot be fair if it is not expeditious. Fairness, therefore, remains the overarching requirement, of which an expeditious trial is one element.

#### **IV. THE TRIBUNAL'S APPLICABLE LAW AND THE INTERPRETATIVE FUNCTION**

The fairness of trials before the ICTY cannot be assessed without an understanding of the applicable law, and thus the normative criterion, by which fairness is measured. The Statute has no express provision on applicable law comparable to Article 21 of the Statute of the International Criminal Court ("ICC"), which sets out the law applicable by that Court.

Article 21(C) of the ICC's Statute provides that where the other sources of applicable law (such as the Statute, Rules of Procedure and Evidence, and Elements of Crimes) do not apply, the Court shall apply "general principles of law derived by the Court from national laws of legal systems of the world..." The value of this provision is that it clarifies the extent to which

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<sup>16</sup> See *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint Separate Opinion of Judge McDonald and Judge Vohrah, p. 6: "Further, it would defeat the object and purpose of the Statute to ensure that the accused has a fair and expeditious trial." See also *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, para. 19: "The purpose of the Rules is to promote a fair and expeditious trial and Trial Chambers must have flexibility to achieve this goal."

national laws may be applied: there is no application of national laws *simpliciter*; rather, it is “general principles of law derived by the Court from national laws of legal systems of the world...” This calls for a comparative exercise to isolate general principles which are adaptable for use in international criminal law proceedings.<sup>17</sup>

Article 38 of the Statute of the International Court of Justice provides that the Court shall apply (1) international treaty law, (2) international customary law, (3) general principles of law, and (4) judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.

The Tribunal’s applicable law, on the other hand, may be gathered from its mandate in Article 1 of its Statute to try persons responsible for serious violations of international humanitarian law, which law, generally, consists of conventional and customary international law. In that regard, the Tribunal’s applicable law is not significantly different from that of the ICC: it applies its Statute, applicable treaties, customary international law, and the general principles of law which derive from the national laws of legal systems of the world. However, while the first three facets of applicable law are taken for granted, a clear statement on the extent to which national laws may be drawn upon would be helpful.

Notwithstanding the absence of any express provision in the Statute on applicable law, I should note that the report of the Secretary-General – which accompanied the Statute when it was submitted to the Security Council, and which is considered the “legislative history” of the Statute –

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<sup>17</sup> Alain Pellet, “Applicable Law” in A. Cassese, P. Gaeta, and J. Jones (eds.) *The Rome Statute of the*

does make it clear that the body of international humanitarian law, which the Tribunal has been charged with enforcing, consists in the form of both conventional and customary law. While there is customary international law that is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law. The importance of the Tribunal's enforcement of customary international law lies in the principle of *nullum crimen sine lege*. The Tribunal's adherence to customary international law prevents impunity in the situation where some but not all States have ratified specific conventions, while still allowing the Tribunal to respect this principle.<sup>18</sup>

Furthermore, the Tribunal's legal system is based upon the two main legal systems of the world, but is, ultimately, neither common law nor civil law, nor even an amalgam of both: it is *sui generis*. In *Delalić et al.*, the Trial Chamber put the matter as follows: "A Rule may have a common law or civil law origin, but the final product may be an amalgamation of both common law or civil law elements, so as to render it *sui generis*."<sup>19</sup> In this regard, even if a feature remains unchanged, it is inappropriate to describe it by its domestic origin as either inquisitorial or accusatorial, or even an amalgam of both. Once adopted, it is peculiar to the Tribunal.

The issue is therefore not whether a particular provision in the Statute or the Rules is inquisitorial or accusatorial, *simpliciter*. Properly analysed, the issue is one of interpretation of that provision in the Statute or the Rules.

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*International Criminal Court: A Commentary* (Vol. II, 2002), pp. 1051, 1073-1074.

<sup>18</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993 (S/25704), paras 33-35.

<sup>19</sup> *Delalić et al.*, Case No. IT-96-21-T, Decision on Motion on Presentation of Evidence by the Accused, 1 May 1997, para. 15.

Any such interpretation must give due weight to the principles set out in Article 31(1) of the Vienna Convention on the Law of Treaties:<sup>20</sup> good faith, textuality, contextuality, and teleology. Essentially, this calls for an interpretation of the Statute and the Rules of Procedure and Evidence, having regard to the context in which the Tribunal is placed in the prosecution of persons for serious violations of international humanitarian law, and in light of the fundamental object and purpose of the Tribunal to ensure that trials are fair and to promote peace and reconciliation in the former Yugoslavia.

## **V. EXPEDITING MEASURES**

Prior to discussing the specific procedural innovations that have been devised by the Tribunal to expedite its proceedings, while at the same time maintaining their fairness, it is necessary to contextualise this analysis through mention of the statutory authority of the Judges to create and amend the Rules, as well as a brief description of the pre-trial framework in which many of these rules operate.

### **A. Article 15 of the ICTY Statute**

Article 15 of the Statute mandates the Judges of the Tribunal to adopt rules of procedure and evidence for the conduct of pre-trial, trial, and appellate proceedings. Although, at first sight, this does not appear to be an expediting measure, in my view, it is one of the most efficacious measures available to the Tribunal in the conduct of its proceedings.

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<sup>20</sup> Article 31(3)(c) of the Vienna Convention provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

In Caribbean countries, the rulemaking power of Judges is very limited. At the Tribunal, however, Judges enjoy a very broad rulemaking power. In contrast to domestic proceedings, where an Act of Parliament will be required to implement significant changes in the law, the Tribunal's Judges are empowered to draft rules without having to depend on the political directorate, *i.e.*, the Security Council, for approval. Judges themselves may not appreciate how important this lawmaking power is. It is used very frequently to respond to procedural and evidential issues as they arise during the proceedings. An interesting issue, but one which has never been raised, is whether there is a conflict between this lawmaking function of the Judges and the judicial function, which they exercise in relation to the very same rules that they have made. This judicial function sometimes relates to a determination as to the legality of the rules themselves. The Rules have been amended 42 times since their adoption in 1994. Amendments are usually made on the basis of recommendations from the Rules Committee, whose membership includes not only the Judges, but also the Office of the Prosecutor, representatives of the Association of Defence Counsel, and the Registry (although these last three participate in a non-voting capacity). However, an important safeguard of the fair trial rights of the accused is Rule 6(D), which provides that an amendment to the Rules shall not operate to prejudice the rights of the accused in any pending case.

The question is whether all of these amendments fall within the competence of the Tribunal Judges in terms of the provisions of Article 15, *i.e.*, whether any of them is *ultra vires* Article 15. Is there a case to be made that, in some cases, the amendments are so radical that they should have been authorised by the Security Council? I will make mention later in this paper of the

debate as to whether the Rule empowering a Trial Chamber to reduce counts in an indictment – Rule 73bis(D) – should have been authorised by the Security Council for the reason that on its face it interferes with prosecutorial independence.

This perhaps unique lawmaking power of the Tribunal’s Judges stands in contrast to the corresponding situation at the ICC, where, although the Judges may recommend Rules, their ultimate adoption is dependent on the approval of the States Parties to the Rome Statute.<sup>21</sup>

### **B. General Pre-Trial Measures**

The Tribunal has a body of laws governing pre-trial procedures. Pre-trial proceedings are governed by Part V of the Rules, including Rules 47 to 73ter. Generally, their purpose is to facilitate preparations for the trial, thereby ensuring that the trial itself will run as smoothly and expeditiously as possible. Common law jurisdictions generally do not have pre-trial procedures in criminal law, and Commonwealth Caribbean countries may wish to consider incorporating some of the procedures at the Tribunal. There are so many pre-trial procedures that it would not be appropriate in a paper of this kind to mention all of them. I will only mention one, which at first I found strange as a lawyer coming from the common law jurisdiction.

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<sup>21</sup> See Article 51 of the Rome Statute, which provides, in relevant part, that: (1) the Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties; (2) Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two thirds majority of the members of the Assembly of States Parties; (3) After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties. *See also* Rule 3(1) of the ICC Rules of Procedure and Evidence, which provides that: Amendments to the rules that are proposed in accordance with article 51, paragraph 2, shall be forwarded to the President of the Bureau of the Assembly of States Parties.

I refer to the procedures which oblige the Prosecution and the Defence to engage in consultations so as to identify those matters on which agreement can be reached so that they need not be litigated at trial.<sup>22</sup> There are no formal procedures in common law jurisdictions for determining areas of agreement between the parties; however, as a matter of practice, lawyers for the Prosecution and Defence will quite often consult with each other and indicate that a particular point will not be contested.

Although pre-trial procedures are designed to shorten trial proceedings, it has to be acknowledged that pre-trial proceedings themselves can last for an unreasonable length of time – some as long as two, three, or four years. Of course, the length of pre-trial proceedings itself raises the issue of the lawfulness of the detention of an accused for that period. In my view, a maximum time limit should be placed on pre-trial proceedings of the Tribunal. As it is now, they provide too much of an opportunity for parties to file motions, many of which are unnecessary.

**C. Written Evidence in Lieu of Oral Testimony – Rules 89(F), 92bis, 92ter, and 92quater**

The main challenge the Tribunal has faced in its groundbreaking work is to devise mechanisms that expedite its proceedings without prejudicing the rights of the accused to a fair trial. Several procedures drawn from the civil law inquisitorial system have been introduced in trials at the Tribunal for the purpose of expediting proceedings.

Generally, evidence in the form of written statements is not used in the common law adversarial system, which has a distinct preference for the

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<sup>22</sup> See Rule 65ter(D)(iv), E(i), F(ii), and H.



orality of evidence in criminal cases, with the accused or the Prosecution having the right to cross-examine a witness of the other party. The influence of the common law preference for the orality of evidence, expressed in the Rules prior to 2001, has since been neutralised by subsequent amendments authorising the admission of written evidence and gradually broadening the scope of the relevant Rules.<sup>23</sup> The Tribunal has adopted this procedure to expedite trials, which can include numbers of witnesses ranging from 100 to 400. While the practice is not unknown in the common law system, it remains exceptional. Examples from the common law system will be given later.

The use of written statements in lieu of oral testimony is an area in which Caribbean courts may benefit from the practices of the Tribunal. Commonwealth Caribbean courts follow the party driven, common law adversarial system, which has always had a distinct preference for the orality of evidence. This is a longstanding tradition, and I anticipate that there would be objection, particularly from the private bar, to the kind of measures to be found in Rules *92bis* and *92quater*.

The use of written statements has significantly expedited proceedings at the Tribunal. In considering the question of the adaptability of these procedures to the Caribbean, it is important to bear in mind that they were required mainly because of the large number of witnesses who testify in Tribunal cases. It would be rare to find a case in which there is less than 100 Prosecution and Defence witnesses, and many cases have as many as 200, 300, 400, and 500 Prosecution and Defence witnesses. Although domestic trials will not usually have as many witnesses as testify in the Tribunal's

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<sup>23</sup> See, e.g., the 13 September 2006 amendment to Rule *92bis* and introduction of Rules *92ter* and *92quater*.

cases, there may still be a time-saving benefit in employing written statements in lieu of oral evidence. As far as I am aware, all Caribbean courts have a backlog of criminal cases on their dockets.

### 1. Rule 89(F)

As a general rule, pursuant to Rule 89(F), a Chamber may receive the evidence of a witness in written form if it is in the interests of justice to do so.<sup>24</sup>

### 2. Rule 92bis

But the most significant specific measure for the reception of written evidence is one that was introduced in 2000 in Rule 92bis. It is the procedure whereby evidence is given in written form in lieu of oral testimony – whether it be in the form of witness statements or transcripts of previous testimony – so long as the evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.<sup>25</sup> This requires an explanation. In most of the trials before the Tribunal, certainly those in which political or military leaders are charged, the alleged crimes have not been committed by the accused “personally physically”,<sup>26</sup> but by others (*e.g.*, soldiers, paramilitaries) under the accused’s control, or as part of a joint criminal enterprise. Much of the Prosecution case in ICTY

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<sup>24</sup> Rule 89(F) reads: “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form”. In 2003, the Appeals Chamber held that written statements could be admitted under Rule 89(F) if the witness: (i) is present in court; (ii) is available for cross-examination and any questioning by the Judges; and (iii) attests that the statement accurately reflects his or her declaration; see *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Admissibility of Evidence-in-Chief in the Form of Written Statements, 20 September 2003, para. 20.

<sup>25</sup> See Rule 92bis(A) as amended on 13 September 2006; see *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements (Majority Decision given 30 September 2003), 21 October 2003, para. 17.

<sup>26</sup> This phrase was used by the Appeals Chamber in *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002.

trials is concerned with adducing this so-called “crime base” evidence: so long as the evidence is of that kind, it may be introduced in written form (statement or transcript of a previous testimony). Of course, in order to prove its case, the Prosecution will also have to lead other evidence linking the accused directly to the crimes; usually, this comes from “insiders”, that is, witnesses close to the accused and who may have knowledge of his role in the crimes charged.

A statement can be given by a witness to a party under established procedures, including an attestation to the statement’s accuracy, and then admitted into evidence without cross-examination. The bulk of crime base evidence can often be admitted as statements under Rule 92*bis*.

The admission of the transcript of previous testimony achieves expeditiousness in the following situation: In 1999, accused A is tried for war crimes; among the witnesses at the trial are B, C, and D. In 2001, accused E is tried for war crimes; among the witnesses at the trial are B, C, and D who have testified at A’s trial on the same set of events. Since the evidence to be given in E’s trial is the same as that adduced at A’s trial, the transcript of the evidence from that trial is admitted in E’s trial if it does not relate to the acts and conduct of accused E.

The admission of written evidence is one thing. But what if a party wishes to cross-examine the witness? The evidence of a witness in some cases may be admitted without ever being subjected to any cross-examination whatsoever. Here again, the Tribunal has been greatly influenced by the civil law system in which the Judge, who is required to discover the truth, is very active. In the common law system, a party will determine whether it

wishes to cross-examine, with the Judge retaining the right to control the cross-examination by various means, including disallowing improper questions. At the Tribunal, so far as the procedure under Rule 92bis is concerned, the determination as to whether there is to be cross-examination on written evidence is made by the Trial Chamber. A party – and it is also important to bear in mind that the Defence can also use this procedure in presenting its case – will apply to a Trial Chamber for the admission of a written statement or a transcript of previous testimony. The Chamber grants the application if it is of the view that the evidence is “crime base” evidence, that is, evidence in which the accused is not “physically personally” involved. The Trial Chamber will then consider whether cross-examination will be allowed.

In some instances, while a written statement does not go to the acts and conduct of the accused, it may touch upon a live and critical issue of the case which would warrant cross-examination. For example, in superior responsibility cases, where a written statement touches upon the acts of subordinates of the accused, the statement may generally be admitted under Rule 92bis as it does not pertain, strictly speaking, to the acts and conduct of the accused. However, because this issue is so proximate to the accused’s responsibility and is a live and critical issue of the case, the Trial Chamber will decide that cross-examination of the maker of the statement is necessary.<sup>27</sup>

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<sup>27</sup> *Prosecution v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-PT, Decision on Prosecution’s Request to have Written Statements Admitted under Rule 92bis, 21 March 2002; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92bis(D)—Foča Transcripts, 30 June 2003, paras 28 and 35; see also September 2006 amendment of Rule 92bis(C) (The Trial Chamber

Practitioners in the Commonwealth Caribbean will immediately see the difference with their system: it is the Judge, not the party, who determines whether cross-examination takes place. Note the interaction between the systems: although, the Tribunal's trial process is at base common law adversarial – with a Prosecution and a Defence – we use the civil law procedure of written statements, *and* it is the Judge who determines whether there is cross-examination.

### Adaptability to Caribbean Courts

In considering the adaptability of the *92bis* procedure, one must bear in mind the distinction that is made between evidence that goes to the acts and conduct of the accused and evidence which does not, the former attracting cross-examination, while the latter may not. The main reason for that distinction at the Tribunal is that, in a typical leadership case, the accused is not personally, physically involved in the killings and other crimes, which are usually carried out by persons under his command. The so-called crime base evidence relating to crimes committed by persons under the command of the leader does not attract cross-examination. This distinction would not apply to the kind of crimes tried in domestic jurisdictions. However, Commonwealth Caribbean countries may still wish to consider the use of written statements in lieu of oral evidence in some cases. For example, in lieu of examination-in-chief, written statements could be provided with the right to cross-examine retained. I expect that the objection to that will be that the judge and jury will be deprived of the opportunity to assess the demeanour of the witness during his examination-in-chief.

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shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it

Another aspect of the *92bis* procedure that lawyers in the common law system will not find attractive is that the right to cross-examine is in the hands of the court and not a party. Cross-examination is the cornerstone of the common law adversarial system. It is the procedure by which the truth of an allegation is tested. It has been said that such “adversarial testing ‘beats and bolts out the Truth much better’”.<sup>28</sup> Although common law lawyers are understandably wedded to cross-examination, it is noteworthy that the term itself is not used in the ICCPR.<sup>29</sup> What is referred to is the “examination” of witnesses. Of course, the term “examination” includes cross-examination. Lawyers in the common law will also find strange the procedure for the use of the transcript of a previous trial in an ongoing proceeding. By that procedure, the entire transcript will come into evidence without any right of cross-examination. This effectively means that the accused in the ongoing proceeding is bound to the cross-examination carried out in the previous proceeding. It must, however, be recalled that this only applies to evidence that does not go to the acts and conduct of the accused.

A criticism that may be made of the *92bis* procedure is that it tends to create an artificial distinction between crime base evidence, that is, evidence not going to the acts and conduct of the accused, which is not viewed as being vitally important, and evidence that goes to the acts and conduct of the accused, which is viewed as being vitally important. In reality, however,

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does so decide, the provisions of Rule *92ter* shall apply”). Once a decision is made to allow cross-examination under Rule *92bis*, the provisions of Rule *92ter* will apply. *See* Rule *92bis*(C).

<sup>28</sup> *Crawford v. Washington*, 541 U.S. 36 (March 8, 2004), p. 62.

<sup>29</sup> *See* Article 14(3)(d) of the ICCPR, which provides that: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”).

both are equally important. There can be no conviction of an accused without the presentation of so-called crime base evidence.

I have not said much about the application of Rule 92*bis* provisions to civil law countries in the Caribbean because they are quite accustomed to the use of written statements in a system in which most of the questioning is done by the judge.

### 3. Rule 92*ter*

In 2006, Rule 92*ter* was introduced in the Rules, codifying the jurisprudential interpretation given to the admission of written evidence pursuant to the general Rule 89(F).<sup>30</sup> Under Rule 92*ter*, evidence which goes to proof of the acts and conduct of the accused may be admitted in written form under the following conditions: (1) the witness is present in court; (2) the witness is available for cross-examination and any questioning by the Judges; and (3) the witness attests that the written evidence accurately reflects that witness's declaration and what the witness would say if examined.

#### Adaptability to Caribbean Courts

Commonwealth Caribbean courts will not have much difficulty with this provision, since, although a written statement may be admitted, the witness must be present for cross-examination. That is so because the evidence may go to the acts and conduct of the accused.

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<sup>30</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, para. 20.

#### 4. Rule 92*quater*

Another example of the extent to which the admission of written evidence has been expanded is the introduction of Rule 92*quater*, which allows for the admission of written evidence (statement or transcript of previous testimony) of a person who has subsequently died, or who can no longer with reasonable diligence be traced or who is physically or mentally unable to testify. While Rule 92*quater* states that the fact that the evidence goes to proof of acts and conduct of an accused *may* be a factor against the admission of such evidence, such admission is not specifically prohibited.<sup>31</sup>

Although common law jurisdictions have a distinct preference for live testimony, some do have procedures allowing written statements in circumstances similar to Rule 92*quater*. In 1988, the United Kingdom (“UK”) instituted such a procedure with its Criminal Justice Act,<sup>32</sup> and in 1995 Jamaica amended its Evidence Act to do very much the same, although I suspect that for Jamaica what was important was the provision allowing written statements where the maker is kept away from court proceedings by threats of bodily harm.<sup>33</sup> Note that these provisions contain three important safeguards: the court has discretion to exclude the statement if its admission will result in unfairness to the accused (Section 25(1) and 2(d) of the UK 1988 Criminal Justice Act; Sections 114(1), 2(i), and 126 of the 2003 Act (which amended the 1988 Act); and Section 31J(1)(b) of the Jamaican Act). In Section 124(2) of the 2003 UK Act and Section 31J(1)(b) of the Jamaican

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<sup>31</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Admitting the Prior Statements of Ljubiša Petković pursuant to Rule 92*quater*, 6 November 2008 (original in French with English translation of 12 January 2009).

<sup>32</sup> See Criminal Justice Act 1988 (c.33), Section 23; Criminal Justice Act 2003 (c. 44), Section 116; *Regina c. Imad Al-Khawaja*, 2005 EWCA Crim 2697 CA (Crim Div) [2006] 1 WLR 1078.

<sup>33</sup> See Section 31 of Jamaica’s Evidence Act.



Act, provision is made for the calling of evidence pertaining to the credibility of a witness which could have been put to him in cross-examination had the witness given evidence in person. Also, by Section 119(2) and 124(2)(c) of the UK 2003 Act and Section 31J(1)(c) of the Jamaican Act, any previous inconsistent statements of a witness may be introduced.

### Adaptability to Caribbean Courts

As mentioned above, the procedure for the use of written statements in certain cases of the unavailability of witnesses, that is, when a person has subsequently died, can no longer with reasonable diligence be traced, or is by reason of bodily or mental condition unable to testify in court, is already in the common law system through the United Kingdom's Criminal Justice Act of 2003 and the Jamaican Evidence Act, which include three significant safeguards. I suspect that other Caribbean countries now have similar provisions.

The Tribunal is now considering adopting the provision in the UK and Jamaican Acts for the use of written statements in cases where the witnesses are kept away from court by fear arising from intimidation or threats of violence.

Over the years, the Tribunal has experienced difficulty in securing the attendance of witnesses because of fear on their part, and most recently the trial of one accused was suspended to enable contempt proceedings to be instituted against individuals intimidating witnesses.

Caribbean countries which do not have these provisions allowing the use of written statements in lieu of oral testimony in certain cases should seriously consider adopting them. The main problem for Commonwealth Caribbean countries will again be the absence of the opportunity to cross-examine. However, the provisions deal with exceptional circumstances and are in my view warranted for the proper administration of justice. Moreover, it would not be unreasonable to consider that the absence of cross-examination is compensated for by the safeguards built into the provisions in the English and Jamaican Acts.

The measures under Rules 89(F), 92*bis*, 92*ter*, and 92*quater* are all examples of procedures that have largely been inspired by the civil law system and that have been introduced for the purpose of expediting proceedings.<sup>34</sup> Where there is no cross-examination (use of Rule 92*bis*), the time saved is the time that would have been used for examination-in-chief and cross-examination. Where there is cross-examination (use of Rule 92*ter*), the time saved is the time that would have been used for examination-in-chief. Global time saved is not always readily noticeable because, even when there is no examination-in-chief, the party calling the witness is allowed to ask certain basic questions and to introduce documents.

One final point that should be emphasised in relation to the admission of written evidence in lieu of oral testimony is an important procedural safeguard that ensures the fairness of the use of that evidence. Evidence admitted that is not subjected to cross-examination, such as under Rules

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<sup>34</sup> Other examples are Rule 94 (judicial notice of adjudicated facts and documentary evidence) and Rule 94*bis* (testimony of expert witnesses).

92bis and Rule 92quater, may only be relied upon in a Chamber’s final judgement if it is supported by other evidence adduced in the trial. Such evidence may include other witness testimony, documentary evidence, or audio and video evidence.<sup>35</sup> It is in this manner that the joint aims of efficiency and fairness are satisfied in trials before the Tribunal.

#### **D. Judicial Notice – Rule 94**

Apart from the civil-law inspired procedures we have discussed today, there exists a procedure stemming from the common-law system. That procedure is judicial notice. At the Tribunal, judicial notice is divided into (1) judicial notice of facts of common knowledge not subject to reasonable dispute and (2) judicial notice of adjudicated facts or documentary evidence from other proceedings at the Tribunal, as set out in Rule 94.

On a general level, judicial notice is a time-saving mechanism meant to avoid stating the obvious during trial. Originally, the Rule only contained what is currently included in Rule 94(A), namely “facts of common knowledge”. This is the aspect of judicial notice with which lawyers in the Commonwealth Caribbean would be familiar.

The more controversial procedure of judicial notice of adjudicated facts was added in 1998. The notion of “adjudicated facts” covers situations where a Trial Chamber makes a certain factual finding (for instance, “Bosnia and Herzegovina was the most multiethnic of all the Republics of the former Yugoslavia, with a pre-war population of 44 percent Muslims, 31 percent

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<sup>35</sup> See *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, p. 9, note 34; *Unterpertinger v. Austria*, Judgement of 24 November 1986, Series A no. 110, pp. 14-15, paras 31-33; *Saïdi v. France*, Judgement of 20 September 1993, Series A no., 261-C,

Serbs, and 17 percent Croats”)<sup>36</sup> which is either unchallenged on appeal or confirmed by the Appeals Chamber. That fact thus becomes “adjudicated”. A second Trial Chamber may then subsequently “admit” that fact in its ongoing proceedings provided certain conditions are met. These are:

1. the fact must have some relevance to an issue in the current proceedings;
2. the fact must be distinct, concrete, and identifiable;
3. the fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgment;
4. the fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion;
5. the fact must be identified with adequate precision by the moving party;
6. the fact must not contain characteristics of an essentially legal nature;
7. the fact must not be based on an agreement between the parties of the original proceedings;
8. the fact must not relate to the acts, conduct, or mental state of the accused; and

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pp. 56-57, paras 43-44; *A.M. v. Italy*, no. 37019/97, para. 25, ECHR 1999-IX; *Lucà v. Italy*, no. 33354/96, paras 39-45, ECHR 2001-II.

<sup>36</sup> See *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006, in which the Trial Chamber has judicially noticed the mentioned fact from the *Krstić* and *Blagojević* cases.

9. the fact must clearly not be subject to pending appeal or review.<sup>37</sup>

Since, by virtue of this procedure, facts adjudicated in a previous case may be admitted in an ongoing trial, the trial process is thereby expedited. The Prosecution does not have to lead evidence to establish that fact. Once the fact has been admitted, a rebuttable presumption is created, thereby shifting to the accused the burden of contesting the fact. This shift has given rise to much debate as to whether there is a breach of the principle that the burden of proof is on the Prosecution. The procedure is also open to the Defence, although in the vast majority of cases, it is only utilised by the Prosecution.

Since the 1998 amendments, Chambers have used the Rule 94(B) provision relating to “facts” in practically all cases before the Tribunal. Hundreds of “adjudicated facts” may be judicially noticed at once, therefore expediting the presentation of “crime base” evidence. However, Rule 94(A) has been used sparingly.<sup>38</sup>

The scope of the indictments at ICTY make the use of adjudicated facts a potentially powerful tool for promoting efficiency, but the fairness of the accused must always be preserved. The nine criteria outlined above are designed to ensure that an accused is not placed in the position where evidence critical to his case is presented in the form of adjudicated facts.

### Adaptability to Caribbean Courts

There is of course no difficulty for the Commonwealth Caribbean countries with the application of Rule 94(A), because this deals with the ordinary

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<sup>37</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006.

understanding of judicial notice in those countries – that is, notice of facts of common knowledge.

However, there might be a major difficulty with Rule 94(B), which allows for judicial notice of adjudicated facts from other proceedings. This is undoubtedly one of the most efficient measures of the Tribunal, promoting expeditiousness and shortening of proceedings. As I indicated earlier, it has given rise to immense debate as to whether the rebuttable presumption that arises, resulting in a shift of the burden of proof to the Defence, is not in breach of the fundamental rule that the burden remains on the Prosecution to prove its case. I have much sympathy for the views expressed in the dissenting opinion of Judge Hunt in the *Slobodan Milošević* case, who held that treating an adjudicated fact as a rebuttable presumption places a burden of proof on the accused, contrary to the presumption of innocence which is entrenched in the Statute, and that a fact is not indisputable merely because it has been litigated at trial and on appeal.<sup>39</sup> However, the situations that give rise to judicial notice of adjudicated facts in the cases at the Tribunal will rarely arise in the kind of cases at the municipal level. Because trials at the Tribunal often relate to a single set of historical events, there is quite often in different cases a repetition of the same evidence. It is this particular situation that is addressed by the procedure of judicial notice of facts that have been previously decided in another case. Many question whether there is any warrant for the presumption that a fact decided in a previous case against accused A is proven in a subsequent case against accused B, and the

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<sup>38</sup> See e.g. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, para. 152 (judicial notice of the adoption of United Nations General Assembly Resolution A/RES/46/242 of 25 August 1992).

<sup>39</sup> See *Prosecutor v. Slobodan Milošević*, Decision on the Prosecution Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No. IT-02-AR73.5, 28 October 2003, Dissenting Opinion of Judge David Hunt, paras 7 and 10.

resultant shift of the burden to accused B to disprove that fact. In the view of those, notwithstanding the time saved by this procedure, the Prosecution should be obliged to prove every single allegation it makes against accused B unless that accused has accepted the truth of those allegations.

#### **E. Reduction of Indictment – Rule 73bis(D)**

Under Rule 73bis, the Trial Chamber has the power to call on the Prosecution at the pre-trial conference to shorten the length of the examination-in-chief and to determine the number of witnesses the Prosecution may call and the time available to the Prosecution for presenting evidence. The powers of the Trial Chamber to introduce time-saving measures were substantially enhanced in 2003 and 2006 as a result of an amendment empowering a Trial Chamber to reduce the number of counts in the indictment and fix the number of crime sites or incidents in respect of which evidence may be called, while ensuring that the counts and the sites or incidents are reasonably representative of the crimes charged. The representative nature of the crimes is determined on the basis of all relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale, and the victims of the crimes. This provision has had a significant effect on the expeditiousness of the Tribunal's trial procedures because, although not specifically mentioned in the Rule itself, as a matter of practice, indictments have been reduced by one-third.

Reducing an indictment can also be a way to ensure that an accused receives a fair trial. Some ICTY indictments are of such a vast scale that an accused's right to adequate time to prepare his defence is placed into

jeopardy. In an ideal world, it of course would be preferable to try each and every crime that allegedly occurred during a conflict, but the ICTY is dealing with criminal trials, not historical archiving; and, there are human limits upon what can be achieved in a process whose essential purpose is to decide the guilt or innocence of an individual. In addition, our accused are often at the highest levels of their civilian or military structures and therefore of an advanced age and sometimes poor health. Trials lasting for many years are simply not a viable option, and so tough choices must be made.

It is not only the size of the cases at the Tribunal, but also their complexity, that can serve as a justification for reducing the counts or crimes sites in an indictment. And this complexity can also justify the other measures discussed in this paper. The complexity of a case can be attributed to a variety of factors, such as the number of crime sites and victims, the number of witness testifying on different issues, and the same conduct being charged as different statutory crimes or under multiple modes of liability.

All of this only serves to highlight the limitations of international criminal courts, and the need for other mechanisms to address post-conflict challenges, such as truth and reconciliation commissions, national trials, and individual complaint procedures to bodies such as the Human Rights Council and similar regional bodies.

#### Adaptability to Caribbean Courts

The provision in Rule 73*bis*(D) should be of great interest to Caribbean jurisdictions. For years, the Tribunal has struggled with the broad scope of prosecution indictments, and much effort was spent in devising procedures to reduce the scope and breadth of indictments. Rule 73*bis*(D) results from a



proposal I made on the 10<sup>th</sup> of April 2002. It is a radical measure empowering the Trial Chamber to reduce the scope of the Prosecution's indictment; and, as has been indicated, in practice this is regularly done by 33.5 percent.

The interesting legal issue to which it gave rise was whether the amendment giving the Trial Chambers this enormous power could be effected by use of the rulemaking power of Judges under Article 15 of the Statute or whether it could only be achieved by an amendment of the Statute itself by the Tribunal's policymaker, the Security Council. The important question was whether prosecutorial independence, secured by the Statute,<sup>40</sup> would not be interfered with by this amendment, and whether the Judges were empowered to effect the amendment. The argument against an affirmative answer to that question was that prosecutorial independence as it is provided for in the Statute does not extend to the day to day proceedings of the court, over which the Judges have total control. My consultations with some Caribbean countries indicated that their courts would not have the power to order the Prosecution to reduce its indictment in the circumstances set out in Rule 73bis(D). It is to be borne in mind that the essential basis for the reduction in indictments of the Tribunal is simply their breadth.<sup>41</sup>

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<sup>40</sup> See Article 16(2) of the Statute, which states that: “[t]he Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.”

<sup>41</sup> This issue is addressed in Archbold, which states that “[i]n complicated cases, where the indictment contains a large number of counts involving a number of defendants, the prosecution should seriously consider dividing the trial into such parts as will enable the jury to grasp and retain the evidence properly”. With regard to the “undesirability of unnecessarily long indictments and the desirability of the prosecution being put to their election if an unduly large number of counts is included in one indictment”, Archbold cites, *inter alia*, a law report article regarding the unreported case of *Regina v. Cohen and Others* from the English Court of Appeal Criminal Division, which states that “[p]rosecuting authorities should not overload indictments in a jury trial with inessential particulars, as to do so might result in an unmanageably lengthy and complex trial. The trial judge, who has the ultimate responsibility of ensuring that the indictment is one on which a manageable trial is possible, should at an early stage robustly use his power to sever an

## F. Joinder – Rules 48, 49, and 82(B)

Another mechanism for expediting trials is the joinder of the accused under Rule 48 and the joinder of crimes under Rule 49. By the former Rule, persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried. Under the latter Rule, two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused. Rule 82(B) empowers a Trial Chamber to order that persons accused jointly under Rule 48 be tried separately if the Chamber considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Following the institution of the Completion Strategy by the Security Council in 2003, a more determined effort was made by the Prosecution to effect joinders. Consequently, the cases of many accused persons were joined, after careful examination and decision as to whether separate trials were not warranted to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

I want to briefly mention here a joinder case in which I was involved. In a motion from one of the accused in the *Popović e al.* case, who was the subject of a motion by the Prosecution to join his case with six other accused, it was argued that the main reason for the joinder was the Completion Strategy. I issued a separate opinion, making the point that I

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indictment in order to secure a manageable and fair trial". See Section 1-112 in Archbold – *Criminal Pleading, Evidence and Practice* (2003) Eds. Richardson and Thomas (citing *R v. Cohen, The Independent*, July 29, 1992).

would have made the same decision on joinder in that case prior to the institution of the Completion Strategy.<sup>42</sup>

From almost its very beginning, the Tribunal joined accused into a single trial in order to enhance the efficiency of its proceedings. Recently, there has been another “wave” of multi-accused trials. The multi-accused case of *Prosecutor v. Milutinović et al.*, with 6 accused, was completed in February of this year, having taken two years and seven months. It is likely that had these accused been tried separately, the entire trial process would have lasted twice as long. There are two other multi-accused trials taking place – *Popović et al.*, with seven accused, and *Prlić et al.*, with six accused. I think these cases are examples where joinder has enhanced the work of the Tribunal.

However, an interesting commentary on the issue of joinder and severance is the experience in the *Slobodan Milošević* trial. That trial involved charges covering three separate geographic areas: Kosovo, Croatia, and Bosnia and Herzegovina. The Prosecution proposed to call over 1,000 witnesses. The Trial Chamber denied a motion by the Prosecution to join the three cases into a single trial. It then decided that the Kosovo trial should proceed first, with Croatia and Bosnia and Herzegovina taking place subsequently in a single trial. That decision was appealed successfully by the Prosecutor, with the result that the trial took place covering all three geographical entities at once. In the result, the trial lasted approximately four years: the Prosecution’s case lasted about two years, with about 300 witnesses called, and the trial was terminated on the death of the accused with barely a month

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<sup>42</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motion for Joinder, 21 September 2005, Separate Opinion of Judge Patrick Robinson.

left for the completion of the Defence case, which also took approximately two years. I was one of the trial Judges in that case, whose decision not to join the three cases into one was reversed.

Joinder is an area of ICTY's law and practice where the commingling of fairness and expeditiousness can be seen very acutely, for the joinder of the trial can result in accused being tried much more quickly than if they were tried *seriatim*. And this expeditiousness is a component of an accused's right to a fair trial. The Tribunal has followed the example of Nuremburg and utilised the procedural mechanism of joinder in order to enhance the efficiency of its proceedings.<sup>43</sup>

An accused in a joint trial may cross-examine a witness called by one of his co-accused and can also adduce positive evidence from such a witness to assist him in his case. So long as an accused has the opportunity to cross-examine witnesses called by his co-accused during their defence cases, the evidence of such a witness may be considered in relation to a co-accused.<sup>44</sup> And, in this situation, it is the cross-examination by an accused of a witness called by a co-accused that secures the right to a fair trial.<sup>45</sup>

### **G. Guilty Pleas – Rule 62bis**

Guilty pleas are an accepted strategy for reducing cases in a court's docket in some common law jurisdictions. However, in most common law

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<sup>43</sup> *United States v. Alfried Krupp von Bohlen und Halbach et al.*, Case 10, Official Record, volume 36, pp. 370–371 (in *Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, volume 15, Nuernberg, October 1946–April 1949, William S. Hein & Co., Inc., Buffalo, New York, 1997, pp. 238–240).

<sup>44</sup> *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Decision on the “Request to the Trial Chamber to Issue a Decision on Use of Rule 90H”, 11 January 2001, pp. 2–3.

<sup>45</sup> *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković Motion for Partial Severance, 27 September 2007.

jurisdictions, the system of guilty pleas is nowhere near as developed as it is in the United States, where it is given automatic applicability in apparently all criminal cases. The practice of guilty pleas does not appear to be widely utilised in civil law countries.

Fairness to the accused is addressed in the requirement in Rule 62*bis* that, before a finding of guilt is entered after a guilty plea, the Trial Chamber must be satisfied that the plea has been made voluntarily, that it is informed and not equivocal, and that there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or the lack of any material disagreement about the facts of the case.

Rule 62*ter* of the Tribunal's Rules sets out the procedure for plea agreements. Under this Rule, a Trial Chamber is not bound by any plea agreement between the Prosecutor and the accused.

Up until 2002, there had been six guilty pleas. However, in the year 2003 alone, there were 10 such pleas, prompting criticism that the Tribunal was using guilty pleas to clear the backlog of cases.<sup>46</sup> The suggestion was that the Tribunal was promoting guilty pleas as part of its Completion Strategy, handing down lighter sentences than were warranted by the cases. However, a Trial Chamber is not bound by a sentence proposed by the Prosecution and Defence in a plea agreement. In two of the eight guilty pleas in 2003, Trial

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<sup>46</sup> "Plea Deals Being Used to Clear Balkan War Crimes Tribunal's Docket", *New York Times*, 18 November 2003. However, a *New York Times* editorial of 28 November 2003 commended the Tribunal for its use of guilty pleas, arguing that it promoted the interests of justice.

Chambers sentenced the accused for longer periods than were proposed in the plea agreements.<sup>47</sup>

While there is no evidence to suggest that Trial Chambers have acted on the basis of improper motives in accepting guilty pleas, the Tribunal should nonetheless be sensitive to the concerns expressed. For sentences that do not reflect the gravity of the crimes committed by an accused who has pleaded guilty, although favourable to the accused, produce another kind of unfairness, and do not serve the wider purposes of the administration of justice, in particular the interests of victims.

#### Adaptability to Caribbean Courts

I am well aware that Caribbean countries are being urged to move away from the more limited practice of guilty pleas in the Commonwealth to the more automatic and comprehensive approach of the United States. When this proposal came on my desk at the Attorney General's Department in Jamaica, perhaps 12 years ago, I advised against it, and despite the claims made for it as a docket-reducing measure, my position has not changed. One aspect of plea bargaining that concerns me is the possibility of perjured, self-serving evidence being given by an accused to implicate others in a crime so as to have his sentence reduced following a guilty plea. I am of course aware that the guilty plea is a factor that a court would take into account in assessing the credibility of such testimony.

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<sup>47</sup> *Prosecutor v. Momir Nikolić*, Sentencing Judgement, Case No. IT-02-60/1-S, 2 December 2003 (sentence jointly proposed: 15-20 years; sentenced to 27 years); *Prosecutor v. Dragan Nikolić*, Sentencing Judgement, Case No. IT-94-2-S, 18 December 2003 (sentence jointly proposed: 15 years; sentenced to 23 years).

So, as you can see, guilty pleas are no doubt a way by which proceedings can be shortened, due to the elimination of the need to hold a trial at all. However, it is fraught with the potential difficulties that I have outlined above. Not only must the rights of the accused be kept in mind when dealing in the realm of guilty pleas, but also the interests of the victims in having the alleged wrongs committed against them adjudicated in a satisfactory manner.

#### **H. Disclosure of Nature of Defence Case – Rule 65ter(F)**

Following the Prosecution’s submission pursuant to Rule 65ter(E) of the final version of its pre-trial brief and list of witnesses and exhibits, Rule 65ter(F) requires the Pre-Trial Judge to order the Defence to file a pre-trial brief addressing the factual and legal issues, with a written statement setting out:

1. in general terms, the nature of the accused’s defence;
2. the matters with which the accused takes issue in the Prosecutor’s pre-trial brief; and,
3. in the case of each such matter, the reason why the accused takes issue with it.

While the purpose of this provision, which is based on a United Kingdom statute,<sup>48</sup> is commendable in that it seeks to clarify and narrow the issues

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<sup>48</sup> The Criminal Procedure and Investigations Act of 1996 empowers a Judge of the Crown Court to order a preparatory hearing in complex or lengthy cases when it appears to the Judge that substantial benefits are likely to accrue from such a hearing. See Section 31(6) and (7) in Archbold – *Criminal Pleading, Evidence and Practice* (2001) Ed. Richardson (stating, respectively, “Where a judge has ordered the prosecutor to give a case statement and the prosecutor has complied with the order, the judge may order the accused or, if there is more than one, each of them – (a) to give the court and the prosecutor a written statement setting

between the parties so that the trial may proceed more efficiently, it is questionable whether it does not infringe two fundamental rules: that the accused is presumed to be innocent and that the burden of proof is on the Prosecution.<sup>49</sup> Furthermore, there is the consequential right of the accused to remain silent, linked to the right of the accused not to be compelled to testify against himself.<sup>50</sup> Against that approach, it may be said that an obligation to state one's defence in general rather than specific terms does not infringe the accused's right to silence. That may be so, but there must be a strong case for saying that that right is breached, and a burden of proof is put on the accused, by the requirement that he must give reasons for taking issue with the matters raised in the Prosecution's pre-trial brief.

Therefore, although requiring the accused to disclose the nature of his defence case before the trial even starts can possibly streamline the proceedings, it is not unreasonable to question the fairness of this provision in the ICTY Rules.

### **I. Disclosure of Defence Witness Statements – Rule 67(A)**

As with Rule 65ter(F), there may also be concerns about Rule 67(A).

This provision has an interesting legislative history. For years an attempt was made to introduce a provision obliging the Defence to disclose any

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out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution; (b) to give the court and the prosecutor written notice of any objections that he has to the case statement; (c) to give the court and the prosecutor written notice of any point of law (including any point as to the admissibility of evidence) which he wishes to take, and any authority on which he intends to rely for that purpose" and "Where a judge has ordered the prosecutor to give notice under subsection (4)(c) and the prosecutor has complied with the order, the judge may order the accused or, if there is more than one, each of them to give the court and the prosecutor a written notice stating – (a) the extent to which he agrees with the prosecutor as to documents and other matters to which the notice under subsection (4)(c) relates, and (b) the reason for any disagreement").

<sup>49</sup> See Article 21(3) of the Statute.

<sup>50</sup> See Article 21(4)(G) of the Statute.



statements in its possession of witnesses they intended to call at trial. This was objected to on the ground that it breached the right of the accused to remain silent. Prior to the adoption of the present Rule in 2008, a system of reciprocal disclosure existed, whereby a request by the Defence of the Prosecutor to be allowed to inspect documents triggered the right of the Prosecutor to make a similar request of the Defence. However, in 2008, this limited obligation on the Defence was integrated in a new Rule, which obliged the Defence to: (1) permit the Prosecutor to inspect its documents; and (2) provide the Prosecutor with copies of any statements in its possession, as well as all written statements taken under Rules *92bis*, *92ter*, and *92quater*.

#### Adaptability to Caribbean Courts

As far as I am aware, the law in the Caribbean is still that the Defence is not obliged to disclose its witness statements. Of course, in the civil law system, the issue does not arise, because there the trial is in the hands of the judge, who has his dossier with the evidence that has been collected from both parties. Disclosure obligations on the Defence are said to be warranted in the interests of fairness to the Prosecutor as well as judicial economy. They are said to enable the Prosecutor to be more fully prepared for his cross-examination, and in that sense, should be seen as a time-saving measure.

I very much doubt that the Commonwealth Caribbean countries would want to adopt a provision similar to Rule 67(A) because for them the relationship between the Prosecutor and the Defence is not symmetrical; it is asymmetrical. There is no equality of rights and duties: the Prosecution

brings an accused to court, and the burden is on the Prosecution to prove his guilt; there is no burden on the accused to do anything.

## **VI. PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES**

Article 20(1) of the Statute requires that proceedings be conducted “with full respect for the rights of the accused and due regard for the protection of the victims and witnesses”. This Article appears to establish a hierarchical relationship between the protection of victims and witnesses, on the one hand, and safeguarding the rights of the accused to a fair and public hearing, on the other. It is not for nothing that Article 20(1) speaks of *full respect* for the rights of the accused as against *due regard* for the protection of victims and witnesses, thereby suggesting that the former takes precedence over the latter.

This relationship has been the subject of comment in the Tribunal’s case law. As noted by the Trial Chamber in *Prosecutor v. Karadžić*, “under Art 20(1) of the Statute, ‘the balance dictates clearly in favour of an accused’s right to the identity of witnesses which the Prosecution intends to rely upon’. While ‘due regard’ must also be given to protection of victims and witnesses, this is a secondary consideration”.<sup>51</sup> Nonetheless, the Statute makes it clear that the protection of victims and witnesses is of critical importance in the Tribunal’s proceedings. The reality is that many witnesses in the aftermath of mass violence and killings resulting from ethnic conflicts will not be prepared to come to court without adequate protective measures.

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<sup>51</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, 30 October 2008, para. 20.

For that reason, under Article 21(2),<sup>52</sup> the accused's right to a fair and public hearing is made subject to Article 22,<sup>53</sup> which requires the Tribunal to provide for the protection of victims and witnesses in its Rules.

Accordingly, Rules 69, 75, and 79 are each concerned with weighing the accused's right to a fair trial with the protection of victims and witnesses subject to the requirements of Articles 20(1), 21(2), and 22 of the Statute. A substantial body of case law has developed around these Rules regarding how to balance the accused's right to a fair and public trial with the protection of victims and witnesses and the public's interest in accessing information. If, at the end of the balancing exercise, the conclusion is that a protective measure is fair, then it is legitimate. This is Lord Bingham's point: the overriding objective is to do justice, and "[i]f, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised."<sup>54</sup>

Rule 75 concerns, *inter alia*, disclosure of information to the public<sup>55</sup> and permits a Trial Chamber to "order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused".<sup>56</sup> In August 1995, the *Tadić* Trial Chamber established a strict set of criteria that must be met before granting anonymity for witnesses under Rule 75, including the following:

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<sup>52</sup> Article 21(2) of the Statute provides that: "[i]n the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute".

<sup>53</sup> Article 22 of the Statute provides that: "[t]he International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity".

<sup>54</sup> *R v. Davis*, [2008] UKHL 36 (HL) [26(2)].

<sup>55</sup> The distinction of the application of Rule 75 concerning disclosure to the public and Rule 69 concerning disclosure to the accused is made in *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, 30 October 2008, para. 18,

<sup>56</sup> See Rule 75(A) (as amended 28 February 2008).

(1) there must be real fear for the safety of the witness or his or her family; (2) the testimony of the witness must be important to the Prosecutor's case; (3) the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; (4) consideration of the ineffectiveness or non-existence of a witness protection program; and (5) any measures taken should be strictly necessary, such that if a less restrictive measure can secure the required protection, that measure should be applied.<sup>57</sup> The Trial Chamber must also be satisfied that the fear has an objective foundation.<sup>58</sup> Furthermore, the identity of the witness must be released when there are no longer any reasons to fear for the witness's security, which illustrates the Tribunal's efforts to ensure that the proceedings are conducted in a fair and transparent manner.<sup>59</sup>

Later Tribunal jurisprudence added the principle that "the more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted".<sup>60</sup> As the Chamber explained, this is because "the determination of protective measures requires the Chamber to consider competing interests, namely on the one hand, the right of the Accused to a fair and public trial and, on the other hand, the rights of victims to protection and privacy".<sup>61</sup>

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<sup>57</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras 62-66.

<sup>58</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Tarčulovski's Defence Motion for Protective Measures with Annexes A and B, 15 February 2008, para. 3.

<sup>59</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 71.

<sup>60</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Tarčulovski's Defence Motion for Protective Measures with Annexes A and B, 15 February 2008, para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Motion for Trial Related Protective Measures (Bosnia), 30 July 2002, para. 6.

<sup>61</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Tarčulovski's Defence Motion for Protective Measures with Annexes A and B, 15 February 2008, para. 4.

Rule 69 allows the Prosecutor to apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness to the accused. Similar to the requirements under Rule 75, to protect the rights of the accused, the Prosecution must establish that there are “exceptional circumstances” requiring non-disclosure that consist of something more than the prevailing circumstances in the former Yugoslavia.<sup>62</sup> In order to determine whether there are exceptional circumstances, a Trial Chamber may consider the following indicators: (1) the objective likelihood of interference resulting from disclosure to the accused; (2) whether there is a specific as opposed to a general basis for the request; and (3) the length of time before the trial at which disclosure to the accused will take place.<sup>63</sup> In addition, the identity of the witness must be released when there are no longer any reasons to fear for the security of the witness.<sup>64</sup>

Rule 79(A) provides that “[t]he Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: (1) public order or morality; (2) safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (3) the protection of the interests of justice”.<sup>65</sup> In accordance with the accused’s right to a public hearing under Article 21(4) of the ICTY Statute, the Trial Chamber in the case of *Prosecutor v. Boškoski and Tarčulovski* stated that, in order to justify closed session testimony, it must be established (1) that there is a real risk to the witness or his or her family from the prospect of the witness’s

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<sup>62</sup> *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 11.

<sup>63</sup> *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paras 26-33; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 32.

<sup>64</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 71.

public testimony, and such risk is sufficiently founded; and (2) that less restrictive measures cannot adequately deal with the witness's legitimate concerns or there exists some other exceptional circumstance.<sup>66</sup>

In practice, protective measures generally take the following forms: (1) closed session; (2) private session; (3) pseudonym; (4) face distortion; (5) voice distortion; and (6) delaying the public transmittal of testimony outside the courtroom and public gallery by half an hour.

Closed session is the most extensive measure, and it requires screening the entire testimony of a witness from the public. This measure is commonly used when the Trial Chamber hears the testimony of rape victims. When only part of a witness's testimony is screened from the public, the term "private session" is used. The use of a pseudonym is a measure designed to disguise the name of a witness by use of a fictitious designation, such as "Witness A". Face distortion is a measure designed to disguise the face of a witness by concealing the witness's facial image. This is done from the public gallery by use of a screen between the witness and the people in the public gallery, and it is done on the video broadcast by scrambling the visual image of the witness's face. Voice distortion is a measure designed to disguise the voice of a witness by electronically altering the tone of the witness's voice. This is done so that both the people in the public gallery and the people listening to the courtroom live feed hear the distorted voice.

The half hour delay is not strictly speaking a protective measure but rather a technical means of implementing other protective measures. If a mistake is

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<sup>65</sup> Rule 79(A) of the Rules of Procedure and Evidence (as amended 28 February 2008).

<sup>66</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Decision on Tarčulovski's Defence Motion for Protective Measures with Annexes A and B, 15 February 2008, para. 4.

made in court and something is revealed that should not have been, since the live courtroom feed is delayed by half an hour, the information that has been revealed can be redacted. This measure, however, does not prevent people in the public gallery from having heard or seen the inadvertently revealed confidential information. Accordingly, they must be ordered by the judge during the hearing not to reveal it once they leave the public gallery.

### Adaptability to Caribbean Courts

I believe that this is the area in which the Caribbean can benefit most from the Tribunal's experience. The Caribbean as a whole has a challenging crime rate. My own country, Jamaica, on a per capita basis, has one of the highest crime rates in the world. Indeed, it has been said that a crime rate such as that in Jamaica is more common in countries that have deep-rooted civilian and sectarian conflicts – something close to insurgencies. Be that as it may, the reality in Jamaica and other Caribbean countries is the same as it is in The Hague Tribunal: witnesses whose testimony is needed for the proper administration of justice will not attend court through fear and intimidation.

Many years ago, I was involved in negotiations for the establishment of a Caribbean-wide witness protection program. I am not sure how far that has reached, but I am sure that the Caribbean could benefit from some of our measures such as the closed session, pseudonym, and voice and facial distortion. Please note, however, that the program at the Tribunal is very costly. Witnesses are brought from the former Yugoslavia to The Hague and stay in hotels for the duration of their testimony. This expense is met by the United Nations. There is also a Victims and Witnesses Section of the

Tribunal, with the task of attending to the interests and needs of the witnesses. This Section of the Tribunal is very well developed, has a staff of approximately 40 persons, and is headed by an officer who is at the highest United Nations professional level. Again, a program such as the one that we have at The Hague Tribunal is something which Caribbean countries might wish to follow, that is, the creation of a unit within the court system to protect the interests of victims and witnesses.

## **VII. CONCLUSION**

When assessing the fairness of measures adopted to increase the efficiency of the Tribunal's proceedings, it is important to bear in mind the accused's right to be tried without undue delay, which is an integral aspect of the accused's right to a fair trial. I have explained the particular circumstances of the Tribunal's proceedings which have rendered our trials susceptible to being lengthy and which led the Security Council to endorse the Completion Strategy and the Judges of the Tribunal to adopt these measures for speeding up our trials. These measures were necessary in order for the Tribunal to cope with the size and complexity of the cases that were brought before it, while at the same time ensuring that the scale of the cases did not impinge upon the right of the accused to a fair trial.

In my view, the measures we have adopted to increase the fairness and efficiency of our proceedings meet, to borrow the words of Lord Bingham, the "paramount object" of our proceedings, which is to achieve justice in the aftermath of the war that engulfed the former Yugoslavia in the 1990s. Each measure was adopted after balancing carefully the need to facilitate the progress of our trial proceedings; the need to protect the rights of the



accused and the interests of victims and witnesses, without whom our pursuit of justice would come to a halt; and the need to take into account the interests of the public. And I believe that, as a result, we have succeeded in ensuring that the overall fairness of our proceedings has not been compromised.

Given the *sui generis* nature of the Tribunal's proceedings, which combine features of both the common law and civil law systems in an international jurisdiction, and which contain a relatively large number of witnesses with charges covering comparatively large geographical areas and time periods, not all of the measures adopted that have benefited the Tribunal will be adaptable to domestic or even some international jurisdictions. Nevertheless, I hope that I have left you with an impression of how these measures operate at the Tribunal, how the problems they were intended to address were dealt with, and how some of these measures, and in particular our protective measures, may be usefully adapted to benefit jurisdictions in the Commonwealth Caribbean.

An on-going concern at the Tribunal is the alignment of procedures from the two legal systems – the adversarial and the inquisitorial models – in order to ensure that the final product is faithful to the guiding precept of the work of the Tribunal, namely fairness. Therefore, in my view, the system at the Tribunal is ultimately neither adversarial nor inquisitorial. It is neither judge driven, nor party driven. It is fairness driven.

In conclusion, I would like to quote something I wrote several years ago on this very topic:

The factor that should facilitate the reconciliation of the two legal systems in proceedings at the Tribunal ... is that both aim for, and are required by customary international law to ensure, the fairness of a trial. Where there is a conflict between the two systems, and there is no clearly governing provision in the Statute or the Rules, resolution must take place using the principle of fairness as the plane to smooth the edges in the alignment of the legal systems.<sup>67</sup>

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<sup>67</sup> Patrick L. Robinson, "Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY", 3 *Journal of International Criminal Justice* 1037, at 1058 (2005).