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Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia

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Abstract

The debate as to the nature of the legal system established by the International Criminal Tribunal for the former Yugoslavia's Statute and Rules of Procedure and Evidence is ultimately unproductive and unnecessary; it is neither common law accusatorial nor civil law inquisitorial, nor even an amalgam of both; it is sui generis. The key to the application of the Statute and the Rules is the use of the appropriate interpretative technique (which gives due weight to the four principles set out in Article 31(1) of the Vienna Convention on the Law of Treaties). Although a Rule may have a common law or civil law origin, it is peculiar to the Tribunal, and though recourse may be had to its domestic origin, at the level of the Tribunal it must be interpreted and applied having regard to the context in which the Tribunal is placed in the prosecution of persons responsible for serious violations of international humanitarian law, and in the light of the fundamental object and purpose of the Tribunal to ensure a fair and expeditious trial. The requirements for fair and expeditious trials are cumulative. A trial may proceed expeditiously, but not fairly. However, a trial cannot be fair if it is not expeditious. Fairness, therefore, remains the overarching requirement, of which an expeditious trial is but one element. After an examination of various techniques for expediting trials, the article highlights the generic and organic relationship between hearsay, cross-examination and expeditiousness which can be exploited in the search for time-saving procedures.

1 Introduction

There are two aspects of international criminal law in relation to which recent developments in the International Criminal Tribunal for the former Yugoslavia can

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shed important light. The first concerns the nature of the legal system established by the Tribunal's Statute ('the Statute') and the Rules of Procedure and Evidence ('the Rules'); and the second concerns the impact of delay on the Tribunal's work. A recent letter to *The Times* of London serves as a convenient introduction to the issues at hand. The author described the Tribunal as 'a rogue court with rigged rules' and provided a scathing critique of the Tribunal because: it does not grant the right to bail or a speedy trial; it does not observe common law rules against hearsay (referring to the prosecutor's proposal to not call witnesses to give evidence but only the Tribunal's own 'war crimes investigators', a breach of the right of confrontation and cross-examination); and it 'dips into a pot-pourri of different legal systems from around the world'.¹

2 Interpretation of the Statute and Rules

An understanding of the appropriate technique for interpreting the Statute and Rules will help resolve issues relating to the nature of the legal system followed by the Tribunal and the impact of the Statute and the Rules on the quality of justice delivered by the Tribunal.

The Tribunal has on several occasions had recourse to the general rule of treaty interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties ('the Vienna Convention') for the purpose of interpreting the Statute. Article 31(1) states that: '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 the light of its object and purpose.'

In the recent decision of *Kanyabashi*, the Appeals Chamber put the issue in the following way:

Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty. Adopted by the Security Council, an organ to which Member States of the United Nations have vested legal responsibility, the Statute shares with treaties fundamental similarities. Because the Vienna Convention codifies logical and practical norms that are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties. Thus *recourse by analogy is appropriate* to Article 31(1) of the Vienna Convention in interpreting the provisions of the Statute.²

¹ 'The Anomalies of the International Criminal Tribunal are Legion', *The Times*, 17 June 1999. The Tribunal's reply was submitted to *The Times*, but not published.

² Joint and Separate Opinion of Judge McDonald and Judge Vohrah in *Joseph Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, 3 June 1999 ('*Kanyabashi Separate Opinion*') para. 15. Other decisions include: Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses, *Prosecutor v. Tadic*, Case No. IT-94-1-T, 10 August 1995, 10; Joint Separate Opinion of Judge McDonald and Judge Vohrah to the Judgment, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, 7 October 1999, para. 3; and Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagasora and 28 Others, *Prosecutor v. Theoneste Bagasora and 28 Others*, Case No. ICTR-98-37-A, 8 June 1998. In its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, 2 October 1995, the Appeals Chamber discussed extensively various approaches to the interpretation of Articles 2, 3 and 5 of the Statute without specifically invoking Article 3 of the Vienna Convention. A literal interpretative approach not yielding a clear result (para. 71), the Chamber then used a teleological approach (paras 72–78) combined

However, while Article 31(1) incorporates a general principle of interpretation — the textual approach in context and in light of the object and purpose — applicable to the construction of most legal instruments, including domestic legislation, the Statute lacks the essential element of a treaty, that of an agreement.³ The Statute results from a Security Council resolution which, by virtue of Article 25 of the United Nations Charter, is binding on all members of the United Nations irrespective of their agreement.⁴ Thirlway comments:

It is unclear to what extent, if any, the rules as to interpretation of treaties may be applied, by extension, to the interpretation of the resolutions or decisions of international organizations. In one sense, a resolution represents, like a treaty, a meeting of wills, a coming-together of the (possible opposing) aspirations of the States whose representatives have negotiated its drafting. In another sense, it is a unilateral act, an assertion of the will of the organ adopting it, or a statement of its collective view of a situation.⁵

Judge Shahabuddeen in his Dissenting Opinion in *Kanyabashi*⁶ also justifies recourse to the Vienna Convention on the ground of the Statute's proximity to a treaty, but argues that the Statute could be interpreted on the basis of 'the body of principles generally accepted in domestic jurisdictions'⁷ — which in his view was what the Permanent Court of International Justice 'in effect' applied in the *Brazilian Loans Case*⁸ — and would yield the same results as the application of Article 31(1) of the Vienna Convention.

On most occasions when the Tribunal has cited Article 31(1) of the Vienna Convention, it has been either to emphasize the importance of giving effect to the text where the meaning is clear,⁹ or to stress a teleological approach. The latter approach is

with the contextual: '[I]n adopting Resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international' (para. 72). Having determined the purpose of the Statute, the Chamber then proceeded to a 'logical and systematic interpretation' of the scope of Articles 2, 3 and 5 of the Statute (paras 79–93).

³ Article 1(1) of the Vienna Convention defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

⁴ The Tribunal was established by Security Council Resolution 827, S/RES/827 (1993), which approved the Secretary-General's Report (S/25704) and adopted the Statute annexed to that Report.

⁵ Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Yearbook of the United Nations Law* (1998) 85 and 86 (citing Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989', 67 *BYIL* (1996) 29 *et seq.*). See also 'International Law: Interpretation and Construction United Nations Security Council Resolutions', 140 *New Jersey Law Journal* (1995) 24.

⁶ Dissenting Opinion of Judge Shahabuddeen in *Joseph Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, 3 June 1999, para. 15.

⁷ *Ibid.*, at 21–22.

⁸ Judgment of 12 July 1929, PCIJ Series A, No. 21.

⁹ '[M]ost importantly, Trial Chambers of the Tribunal must look to the wording of the rule itself to construe its meaning — the literal rule of interpretation.' May and Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', 37 *Columbia Journal of Transnational Law* (1999) 727, at 736.

seen in *Kanyabashi*, when, in considering whether a judge in the Rwandan Tribunal¹⁰ who had been assigned to a particular Chamber could be reassigned to another Chamber, the Appeals Chamber said:

An interpretation of the Statute that would find a requirement that judges serve forever in the Chamber to which they are assigned, despite disqualification, illness, death or resignation of a Judge, would lead to an absurd result. Further, it would defeat the object and purpose of the Statute to ensure that the accused has a fair and expeditious trial.¹¹

While Trial Chambers have affirmed the achievement of a fair and expeditious trial¹² as a fundamental purpose of the Statute and the Rules, the fulfilment of this purpose cannot, however, be separated from the broader purpose and context in which the Tribunal operates, that is, the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia.¹³ As such, the transposition of domestic legal practices to the International Tribunal must be effected in a manner that takes due account of the specific context in which the Tribunal operates. In this way, a purposive approach links up with a contextual approach. A comprehensive description of the interpretative task would, therefore, be the good faith ascertainment of the ordinary meaning of the terms of the Statute and Rules in light of the purpose of achieving a fair and expeditious trial of those accused of serious violations of international humanitarian law, so as to contribute to the restoration and maintenance of peace and security in the former Yugoslavia.

Contextual interpretation is particularly important in the Tribunal's assessment of challenges made to the form and substance of indictments. Trial Chambers have on several occasions asserted that specificity requirements, such as those relating to the identification of victims and the time of the commission of crimes, which are found in domestic legal systems, have to be modified in the work of the Tribunal which is an international body prosecuting persons for the most serious violations of international humanitarian law.¹⁴ This use of contextual interpretation of this sort raises many questions. Does it result in a quality of fairness in a trial before the Tribunal that is lower than that in a domestic criminal court? Does it affect the principle that human

¹⁰ The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, was established by Security Council Resolution 955, S/RES/955 of 8 November 1994.

¹¹ *Kanyabashi* Separate Opinion, *supra* note 2, at para. 17. See also Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, 16 February 1999: 'The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have flexibility to achieve this goal.'

¹² Article 20 of the Statute obliges Trial Chambers to 'ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'

¹³ See Preamble to Security Council Resolution 827, *supra* note 4.

¹⁴ Decision on Defence Preliminary Motions on the Form of the Indictment, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-PT, 12 April 1999, paras 16 and 17.

rights are universal?¹⁵ Does it result in the application of a principle of relativity in the Tribunal's dispensation of justice that breaches the fair trial requirements of international human rights instruments? Does an accused who is given less information in a Tribunal's indictment than he would in domestic courts about the identity of victims and the time of the commission of crimes receive a standard of justice and fairness inferior to that which he would receive in domestic courts? Is there a breach in those circumstances of the right to a fair trial?

A negative answer to these questions may be supported by the view that the concept of universality and non-relativity of human rights is different from, and does not stand in the way of, the principle of contextual interpretation.¹⁶ At the same time, the contextual tool cannot, on the ground that the Tribunal operates in an international setting, be used to nullify rights which accrue to an accused person under customary international law.

The Statute and the Rules should be seen as establishing a legal system that is self-contained and comprehensive, and capable of providing answers to any question that arises in the work of the Tribunal. This does not mean that it is not appropriate to examine domestic criminal law jurisdictions for purposes of comparison. But that comparative exercise must be completed by testing the solution it provides against the Tribunal system itself. Where the Statute and the Rules do not provide an answer in explicit terms, the testing is done by measuring the solution yielded by comparative analysis against the context in which the Tribunal operates and its object and purpose. The test is whether the solution is consistent with a fair and expeditious trial of persons charged with the most serious violations of international humanitarian law.

3 The Legal System Established by the Tribunal's Statute and Rules, and Its Impact on Questions of Fairness and Expeditiousness

The significance of an international judicial institution's rules of procedure and evidence is heightened when the institution is one which, like the Tribunal, is charged with the responsibility of making decisions that affect the liberty of the individual in respect of serious violations of international humanitarian law. Such rules ultimately

¹⁵ Article 1(5) of the Vienna Declaration and Programme of Action provides: 'all human rights are universal, indivisible and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

¹⁶ One of the purposes of that concept is to clarify that certain practices cannot be regarded as acceptable on the ground that they are peculiar to specific regions and cultures. International human rights law, in particular the right not to be subjected to inhuman treatment, protects an individual against certain practices, such as genital mutilation, irrespective of where they take place.

determine the information or the database which the judges use in making their decisions, thereby affecting the type of justice delivered by the Tribunal.¹⁷

A Do the Statute and the Rules Establish the Common Law Accusatorial or the Civil Law Inquisitorial System for the Tribunal's Proceedings?

With respect to criminal proceedings, the main differences between the common law accusatorial system and the civil law inquisitorial system lie in the extent to which each allows for state intervention in the proceedings and in the role ascribed to judges.¹⁸ In general, the main differences are that:

- the accusatorial system ascribes a lesser role to judges who are seen more as impartial arbiters between two (adversarial) sides while judges in the inquisitorial system play a more active role, including the gathering of evidence and the examination of witnesses, and thus have greater control over proceedings;
- the accusatorial system adopts a stricter approach to the admissibility of evidence resulting in rules governing the admission of hearsay evidence, while, in general there are no equivalent rules in the inquisitorial system; and
- the accusatorial system reflects an atomistic approach to evidence in that the final determination is made by aggregating the probative value of distinct pieces of evidence while the inquisitorial system reflects a holistic approach to the evidence where ‘the probative force of any item of information arises from interaction among elements of the total information output’.¹⁹

It should be noted, however, that in practice neither system exists in a pure form. They are hybrids, each containing elements taken from the other,²⁰ and it would be more accurate to speak of a dominant model.²¹ Similarly, the Tribunal’s Statute and the Rules do not reflect either system in a definitive form. It is clear from a review of the Statute and the Rules that the Tribunal has borrowed from both common law and civil systems for its rules on procedure, the presentation of evidence and on the admissibility of evidence.

¹⁷ The importance of rules of evidence in domestic criminal proceedings is commented on by Dixon, 7 *Transnational Journal of Contemporary Problems* (1997) 82, at 83 as follows: ‘These rules determine whether cases are won or lost, whether claims are satisfied or rejected, and whether convictions or acquittals are granted.’

¹⁸ For a discussion of the two systems, see Damaska, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Contemporary Experiments’, 45 *American Journal of Comparative Law* (1997) 839; Damaska, ‘Atomistic and Holistic Evaluation of Evidence: A Comparative View’, in David S. Clark (ed.), *Comparative and Private International Law Essays in Honour of John Merryman* 91–104; Tulkens, ‘Main Comparable Features of the Different European Criminal Justice Systems’ in Mireille Delmas-Marty (ed.), *The Criminal Process and Human Rights: Towards a European Consciousness* (1995) 5–13; and Pizzi, ‘The American Adversary System’, 100 *West Virginia Law Review* (1998) 847.

¹⁹ Damaska, ‘Atomistic and Holistic Evaluation’, *supra* note 18, at 91.

²⁰ Doran, Jackson and Seigel, ‘Rethinking Adversariness in Nonjury Criminal Trials’, 23 *American Journal of Criminal Law* (1995) 1, at 7 n. 23.

²¹ Tulkens, *supra* note 18, at 8, citing an observation by Agatha Logeart. She goes on to say (*ibid.*, at 8–9): ‘[I]n any case, nowhere is the model any longer pure; it is, for better or worse, contorted, attenuated, modified . . . As a system adds, superimposes or eliminates certain features, one can now only say that it reflects a “dominant model”.’ For a discussion of the influence of the accusatorial and inquisitorial systems on the Tribunal, see May and Wierda, *supra* note 9, at 727.

1 Procedure and Presentation of Evidence

(a) The Statute

The salient features of the Statute on this issue are the following:

- Proceedings are by way of a bench trial by a chamber of three judges without a jury.²² Bench trials are a feature of the inquisitorial system but are also employed in the accusatorial system.
- The prosecutor is responsible for the investigation and prosecution and for the preparation of the indictment.²³ This reflects an accusatorial system where an independent prosecutor is a definitive feature, while in the inquisitorial system there is an investigating judge. These provisions in the Statute would seem to have anticipated an accusatorial system, or one that was predominantly so, in respect of the presentation of evidence — they would seem to have predisposed the Rules to the establishment of an accusatorial system.
- The indictment is reviewed by a judge and confirmed if there is a *prima facie* case,²⁴ a feature of the inquisitorial system, though a *prima facie* case is also a common law concept.
- An accused is presumed innocent until proven guilty,²⁵ a feature of both systems and is as well reflected in the major human rights instruments.²⁶
- An accused has the right to examine, or have examined, the witnesses against him,²⁷ a feature of both systems and also found in the major human rights instruments,²⁸ although the common law accusatorial system places greater emphasis on the right of the accused to confrontation and cross-examination.
- A reasoned written opinion is required,²⁹ a feature of both systems.

²² Article 1 (Power of the Tribunal to try persons for serious violations of international humanitarian law); Article 12 (Composition of the Chambers); Article 23 (Judgment of the Trial Chambers).

²³ Articles 16 and 18.

²⁴ Article 19.

²⁵ Article 21(3).

²⁶ Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.' Article 6(2) of the European Convention on Human Rights ('European Convention') provides: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' Article 8(2) of the American Convention on Human Rights ('American Convention') provides: 'Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law.' Article 7(1)(b) of the African Charter on Human and Peoples' Rights ('African Charter') provides an accused with 'the right to be presumed innocent until proved guilty by a competent court or tribunal'.

²⁷ Article 21(4)(e).

²⁸ Article 14(3)(e) of the ICCPR provides that, in the determination of any criminal charge against him, the accused has the right 'to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him'. Article 6(3)(d) of the European Convention provides that everyone charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Article 8(2)(f) of the American Convention provides for 'the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts'. The African Charter contains no analogous provision.

²⁹ Article 23.

(b) The Rules

Rule 85 allows for the prosecution and the defence to present evidence in a particular sequence³⁰ and is strictly enforced by the Trial Chamber. In *Delalic*, the Trial Chamber refused to allow the defence to cross-examine a prosecution witness for the second time following re-examination by the prosecution on the ground that the rule was common law in origin and did not allow for cross-examination for a second time.³¹

While the entitlement of both prosecution and defence to present evidence is an adversarial feature, there are inquisitorial elements within rule 85. It allows for the presentation of evidence, if any, ordered by the Trial Chamber pursuant to rule 98. In addition, a judge may question witnesses at any stage.

The Trial Chamber has the power to call upon the prosecution and the defence, respectively, 'to shorten the estimated length of the examination-in-chief for some witnesses',³² an inquisitorial feature.

The Trial Chamber can call upon the prosecutor and the defence to reduce the number of witnesses if it considers that an excessive number are being called to testify on the same facts,³³ a significant inquisitorial element. It is a powerful judicial tool in the management of a trial, but one which has, to my knowledge, never been used. This power is balanced by the right of the prosecutor and defence, after the commencement of the trial and the defence, to seek the reinstatement of their list of witnesses.³⁴

The accused is allowed to make a statement at the beginning of the trial, without

³⁰ Rule 85 provides:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and

(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

(C) If the accused so desires, the accused may appear as a witness in his or her own defence.

³¹ Decision on the Motion on Presentation of Evidence by the Accused, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, 1 May 1997. See also Decision on Prosecutor's Alternative Request to Re-open the Prosecution's Case, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, 19 August 1998, where Trial Chamber II *quater* refused a request by the prosecution to re-open its case and call four witnesses after the close of the defence case.

³² Rules 73bis(C) and 73ter(C).

³³ Rules 73bis(D) and 73ter(D).

³⁴ Rules 73bis(E) and 73ter(E).

being compelled to make a solemn declaration and being cross-examined,³⁵ a recent amendment which reflects a strong civil influence.³⁶

Proof beyond a reasonable doubt is required for a finding of guilt,³⁷ a feature of the adversarial system, and which is in effect also reflected in the inquisitorial system through the 'free evaluation of evidence', whereby the court decides according to its own conviction.³⁸

The Trial Chamber has the power to control the mode and order of the interrogation of witnesses and presentation of evidence.³⁹ This appears to be more an inquisitorial than accusatorial influence, although common law judges are of course expected to control the trial proceedings.

The Chamber has the power to order the production of additional evidence and, *proprio motu*, to summon witnesses,⁴⁰ clearly inquisitorial.

2 *The Admissibility of Evidence*

(a) The Statute

There are no provisions in the Statute dealing with the admissibility of evidence.

(b) The Rules

There are 13 rules of evidence. Rule 89(B) deals with lacunae in these rules: 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.' In general terms this has more of a civilian than common law character.

Under rule 89(C), the Trial Chamber 'may admit any relevant evidence which it deems to have probative value'. This reflects the relaxed civilian approach to the admission of evidence and allows Chambers to admit hearsay evidence. The Tribunal has on several occasions had to deal with defence arguments as to the inadmissibility

³⁵ Rule 84*bis* provides: '(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84 after the opening statement of the prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement. (B) The Trial Chamber shall decide on the probative value, if any, of the statement.'

³⁶ In the French system, the presiding judge interrogates the defendant first and the parties are allowed to ask questions after. In Germany, the accused has the right to be heard at all stages of the proceedings. The right of the accused to make an unsworn statement, while abolished in the United Kingdom and Australia, remains in Commonwealth Caribbean states.

³⁷ Rule 87(a).

³⁸ See, e.g., section 261 of the German Code of Criminal Procedure, entitled 'Free Evaluation of Evidence', which provides: 'Concerning the result of the taking of evidence, the court decides according to its own conviction based upon the essence of the entire trial.' The analogous concept in the French system is that of *intime conviction*. See also Professor Damaska's explanation of the civil law holistic approach to evidence in Damaska, 'Atomistic and Holistic Evaluation', *supra* note 18.

³⁹ Rule 90(G) provides: 'The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.'

⁴⁰ Rule 98.

of hearsay evidence most notably in *Tadic*,⁴¹ *Blaskic*,⁴² *Aleksovski*,⁴³ and *Kordic* and *Cerkez*.⁴⁴ The Tribunal's approach is summarized in *Aleksovski*:

It is well settled in the practice of the Tribunal that hearsay evidence is admissible. Thus relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89(C). This was established in 1996 by the Decision of Trial Chamber II in *Prosecutor v. Tadic* and followed by Trial Chamber I in *Prosecutor v. Blaskic*. Neither Decision was the subject of appeal and it is not now submitted that they were wrongly decided ... Accordingly, Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose.⁴⁵

In *Kordic*, the prosecution attempted to use the dossier approach, a feature of the civil law system, for the first time in the Tribunal. The significance of the dossier approach for expeditiousness is obvious: the live testimony of a single person, the investigator, is used to admit evidence of other persons who are not called to testify in court. The prosecution sought to have admitted into evidence (i) a dossier of evidence relating to the attack on the town of Tulica containing five maps, a video containing footage, eight witness statements, four court transcripts, exhumation documents, photographs and 13 photographic stills; and (ii) a report prepared by an investigator from the Office of the Prosecutor, which summarized the information in the dossier. The investigator would give evidence in court and be cross-examined on the information in the dossier, including the witness statements, but the persons who made those statements would not be called. The prosecutor argued that the dossier was admissible as hearsay evidence under rule 89(C), while the defence objected on the ground that its admission would breach the right to cross-examination.

The Chamber refused to admit into evidence the witness statements on the ground that 'whilst it could admit the witness statements under rule 89(C), this was not an appropriate case for the exercise of the discretion under that provision, as it would amount to the wholesale admission of hearsay evidence untested by cross-examination, namely the attack on Tulica and would be of no probative value.'⁴⁶ It, however, drew the attention of the prosecutor to the possibility of using affidavit

⁴¹ Decision on the Defence Motion on Hearsay, *Prosecutor v. Tadic*, Case No. IT-94-1, 5 August 1996; Opinion and Judgment, *Prosecutor v. Tadic*, Case No. IT-94-1-T, 7 May 1997, para. 555.

⁴² Decision, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, 21 January 1998.

⁴³ Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, *supra* note 11.

⁴⁴ Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, 29 July 1999.

⁴⁵ Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, *supra* note 11, at para. 15. Many common law jurisdictions have relaxed their approach to the admissibility of hearsay evidence. For example, in Canada, hearsay evidence is admitted when it is shown to be reliable and necessary: *R. v. Khan* [1990] 2 SCR 531; *R. v. Smith* [1992] 2 SCR 915; *R. v. Rockey* [1996] 3 SCR 829; and *R. v. Hawkins* [1996] 3 SCR 1043.

⁴⁶ *Tulica* Decision, *supra* note 44, at para. 23.

evidence.⁴⁷ But the Chamber, following *Aleksovski*,⁴⁸ did admit into evidence three of the four court transcripts. It refused to admit one transcript on the basis that the witness to whom the transcript related had already given evidence in the case; admission would be unnecessarily repetitious as the transcript was already part of the record of the trial.⁴⁹ The Chamber admitted into evidence the other items in the dossier.

The Chamber refused to admit into evidence the investigator's report on the ground that it was of little or no probative value since the investigator 'was not reporting as a contemporary witness of fact, he has only recently collated statements and other materials for the purpose of the Application. He would, in reality, only give evidence that material was or was not in the Dossier.'⁵⁰

The decision was not appealed. However, a decision of a Trial Chamber is not binding on another Chamber,⁵¹ and one can only speculate as to whether this decision will be followed by other Chambers. It remains to be seen how far rule 89(C) will be developed as a time-saving device. That development must, of course, respect the overarching requirement of fairness to the accused.⁵² It should be noted that the scope of rule 89(C) is qualified by rule 89(D), which allows the Chamber to exclude evidence if 'its probative value is substantially outweighed by the need to ensure a fair trial'. This provision reflects a common law proclivity to screen information for decision-making. In practice, the liberal, relaxed approach in rule 89(C) has been the dominant trend in trials.

Whether the Tribunal has an inquisitorial or accusatorial system is, in the end, an unproductive and unnecessary debate, since in interpreting a provision that reflects a feature of a particular system, it would be incorrect to import that feature wholesale into the Tribunal without first testing whether this would promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal. As a result, a feature taken from the common law system in the presentation of evidence does not, for the purposes of application in the Tribunal, necessarily retain all of its

⁴⁷ Rule 94ter entitled 'Affidavit Evidence' provides: 'To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits signed by other witnesses in accordance with the law and procedure of the state in which such affidavits are signed. These affidavits are admissible if the other party does not object within five working days after the witness' testimony. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.'

⁴⁸ Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, *supra* note 11.

⁴⁹ *Tulica* Decision, *supra* note 44, at paras 26–28.

⁵⁰ *Ibid.*, at para. 20.

⁵¹ Generally, however, Trial Chambers have tended to follow decisions of other Trial Chambers.

⁵² As reflected in Articles 20(1) and 21(2), and specifically in rule 89(D). On the question of the application of *stare decisis* or precedent in the Tribunal, see the *Aleksovski* case where the Appeals Chamber held that Trial Chambers are bound by the *ratio decidendi* of Appeals Chamber decisions and that the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. The Appeals Chamber further held that decisions of Trial Chambers, which are bodies of coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive. *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, paras 107–114.

constituent parts. In the passage from its domestic berth to the international level it may, in response to the contextual and teleological requirements of the Tribunal, have undergone some modifications. Following this transition, that feature from the common law system is no longer a common law feature. It has become a feature peculiar to the Tribunal system and is in fact *sui generis*. In *Delalic*,⁵³ the Trial Chamber put the matter as follows: ‘A Rule may have a common law or civilian origin but the final product may be an amalgamation of both common law or civilian elements, so as to render it *sui generis*.’ Judge Cassese in his Dissenting Opinion in the Appeals Chamber Judgment in *Erdemovic* said: ‘Legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.’⁵⁴ 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 belongs and is peculiar to the Tribunal.

The issue, therefore, is 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, utilizing as a single process all elements of Article 31(1) of the Vienna Convention — good faith, textuality, contextuality and teleology. One may conclude that, although the provisions of the Tribunal’s Statute and Rules have an origin in both the civil and common law systems, they are peculiar to the Tribunal, and though recourse may be had to their domestic origin, at the level of the International Tribunal they must be interpreted and applied 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 the light of the fundamental object and purpose of the Tribunal to ensure that trials are fair and expeditious.

B *The Significance of the Rules of Evidence for Speedy Trials*

The following provisions may be identified as the most effective mechanisms for expediting trial proceedings:

- Status Conferences:⁵⁵ within 120 days of the initial appearance of an accused, and not less than every 120 days thereafter, a Trial Chamber is obliged to convene a Status Conference ‘to organize exchanges between the parties so as to ensure expeditious preparation for trial’, providing an opportunity for the Trial Chamber and the parties to identify and resolve matters and issues that have given rise to delay, and generally to make arrangements that will expedite the trial.

⁵³ *Supra* note 31.

⁵⁴ Separate and Dissenting Opinion of Judge Cassese in *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, 7 October 1997, 2.

⁵⁵ Rule 65bis(i).

- Mandatory Pre-Trial Conferences:⁵⁶ the purpose of which are to identify issues between the parties and to make preparations for trial.⁵⁷
- The Trial Chamber can require the prosecutor to shorten the estimated length of the examination-in-chief.⁵⁸
- The Trial Chamber can reduce the number of witnesses in cases where witnesses are being called to testify on the same facts.⁵⁹ This discretion, which has so far not been used, can be exercised at a pre-trial conference and a pre-defence conference which must be held prior to the commencement of the trial and of the case for the defence, respectively. Although judges have witness statements and summaries which would put them in a position to be more active in the trial proceedings, in a system where investigations and evidence gathering are carried out by an independent prosecutor, a judge can never know the prosecutor's case as well as the prosecutor. This perhaps explains why the power to limit the number of witnesses has not been exercised.
- Procedures whereby a person's statement is introduced into evidence without that person's *viva voce* testimony in court and with no consequent cross-examination, invariably raising questions on hearsay evidence and the right to cross-examination. Included here are the following:
 - (a) Depositions: taken in exceptional circumstances for use at trial and where the other party has a right to attend the taking of the deposition and cross-examine the deponent.⁶⁰ A recent Appeals Chamber decision held that the rule had to be strictly construed as it was an exception to the general requirement for direct evidence.⁶¹
 - (b) An expert witness' statement is submitted to the other party and admitted into evidence without calling the expert to testify in person, if the other party does not insist on cross-examination.⁶²
 - (c) Affidavit evidence to corroborate testimony is admissible if the party does not object and the affiant will not be obliged to testify in court.⁶³
- Presentation of oral rather than written motions.⁶⁴
- Judicial notice: where the Trial Chamber will not require proof of facts of common

⁵⁶ Rules 73bis and 73ter.

⁵⁷ Rules 65ter, 73bis and 73ter were amended at the last plenary from 15–17 November 1999, to give the pre-trial judge specific powers and functions relating to the organization of the case which were formerly the functions of the Trial Chamber under rules 73bis and 73ter, the idea being that the strengthening of the powers of the pre-trial judge will facilitate expeditiousness.

⁵⁸ Rules 73bis(C) and 73ter(C).

⁵⁹ Rules 73bis(D) and 73ter(D).

⁶⁰ Rules 71 and 90(A).

⁶¹ Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-AR73.3, 15 July 1999, paras 19 and 22. However, the Appeals Chamber noted that, with the consent of the accused, rule 71 may be used 'in situations to which the provision does not directly apply'.

⁶² Rule 94bis.

⁶³ Rule 94ter. However, if the other party objects and the Trial Chamber so rules, the affiant will be called for cross-examination.

⁶⁴ Rule 73(A).

knowledge and may take ‘judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings’.⁶⁵

- Cross-examination is confined to the subject matter of the direct examination and matters affecting the credibility of the witness.⁶⁶ The Trial Chamber, however, may permit questions on additional matters.
- The accused is allowed to make a statement at the beginning of the trial⁶⁷ whereby the prosecutor could be alerted to the position of the accused and thereby avoid leading unnecessary evidence.
- Counsel is required to put to the witness he is cross-examining the nature of his case when it contradicts the evidence given by the witness.⁶⁸

4 The Impact of Delay on the Work of the Tribunal

There are three related provisions in the Statute dealing with delay and fairness. Article 20(1) provides:

Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 21(2) provides:

In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.

Article 21(4) provides:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . (c) to be tried without undue delay.

I will examine the meaning of the obligation to ensure that trials are fair and expeditious and length of trial issues in the Tribunal in light of these provisions.

A The Significance of the Trial Chamber’s Obligation to Ensure that Trials are Fair and Expeditious in Article 20(1)

The right of an accused to be tried without undue delay is reflected in the major international human rights instruments,⁶⁹ though in the European Convention, the American Convention and the African Charter, the terminology used is trial ‘within a

⁶⁵ Rule 94.

⁶⁶ Rule 90(H)(i).

⁶⁷ Rule 84*bis* (see *supra* note 35).

⁶⁸ Rule 90(H)(ii).

⁶⁹ Article 14(3)(c) of the ICCPR grants to the accused an entitlement ‘to be tried without undue delay’. Article 6(1) of the European Convention provides ‘everyone is entitled to a fair and public hearing within a reasonable time’. Article 8(1) of the American Convention provides the right to a hearing ‘within a reasonable time’. Article 7(1)(d) of the African Charter grants ‘the right to be tried within a reasonable time’.

reasonable time'.⁷⁰ Other constituent elements of the principle of a fair trial can be found in the bundle of rights set out in Articles 14 and 15 of the ICCPR (apart from Article 14(3)(c) and Article 21(4) of the Statute. As these Article 21(4) rights are only 'minimum guarantees', the principle of fairness extends beyond them.

Article 20(1) 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 Statute and Rules.⁷¹ This obligation extends beyond the specific right of the 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) is the twinning of the requirement of a fair trial with the requirement of an expeditious trial; the 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.

However, Article 20(1) does not establish a standard that is higher than, or in any way different from, the right to trial without undue delay under Article 21(4)(c); it does not require a pace that is quicker than is called for by trial without undue delay under Article 21(4)(c). Its purpose is to highlight the importance of the temporal element in the work of the Tribunal — an emphasis that is wholly warranted in the light of the peculiar feature of the cases that come before the Tribunal, involving crimes committed on a massive scale and large numbers of witnesses.

B Length of Trial Issues in the Tribunal

There were no trials in the first three years of the Tribunal's existence and, for the greater part of the first two years, there were no indictees in custody. This initial period was spent on drafting the Rules of Procedure and on other internal matters.

The Tribunal's first trial, *Tadic*,⁷² began in May 1996 and lasted six months. While that time period would compare well with a domestic trial, few domestic trials would have features similar to those of a trial before the Tribunal. In *Tadic* there was one accused (ordinarily, there are multiple defendants), 86 prosecution witnesses, 40 defence witnesses, 367 exhibits and a transcript of evidence of 7,015 pages. The prosecution's case lasted 100 days, the defence case 50 days, and the length of pre-trial detention was one year and five months.

Tadic was a relatively short trial as, typically, a Tribunal trial will not conclude in less than a year. For example, a recent case, *Blaskic*,⁷³ lasted about two years and two months. There were 104 prosecution witnesses, 46 defence witnesses (the Trial

⁷⁰ Constitutions of Commonwealth countries based on the Westminster model use the terminology, 'within a reasonable time', e.g. section 20(1) of the Jamaica Constitution Order in Council 1962. The fundamental human rights provisions in these constitutions were inspired by the European Convention.

⁷¹ See *Kanyabashi* Separate Opinion, *supra* note 2, at 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 Decision on Prosecutor's Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, at para. 19: 'The purpose of the Rules is to promote a fair and expeditious trial and Trial Chambers must have the flexibility to achieve this goal.'

⁷² *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T.

⁷³ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T.

Chamber called nine witnesses), 788 prosecution exhibits, 614 defence exhibits and the transcript was 25,331 pages in English. The prosecution's case lasted approximately 100 days, as did the defence case. The availability of only one courtroom for trials during the first 10 months of the trial contributed to its prolongation.⁷⁴

In the six years of its existence the Tribunal has completed nine cases, including one accused who pleaded guilty.⁷⁵ There are currently 31 persons in detention. On its face, this record would seem to be poor (even after taking into account the first three years, which were, of necessity, substantially devoted to internal and administrative matters) in comparison with the pace of trials in domestic courts and with the International Military Tribunals at Nuremberg (the 'Nuremberg Tribunal') and the Far East (the 'Tokyo Tribunal'). Such comparisons, however, must be made carefully⁷⁶ and with due regard to the differences between the various systems.

The major difference between domestic trials and those at the Tribunal lies in the scale of the proceedings. Few domestic trials will have as many as 50 witnesses for both parties.⁷⁷ In contrast, only one Tribunal trial so far has had less than 50 witnesses and some have had more than 100. As for the Nuremberg and Tokyo Tribunals, they, in general, relied more on documentary evidence than live witnesses.⁷⁸ The Nuremberg trials, which were completed in 10 months,⁷⁹ had 33 prosecution witnesses, and 61 defence witnesses in addition to 19 of the defendants who testified.

Another significant difference is the effect of post-Second World War developments in international human rights law. The proceedings of the Nuremberg and Tokyo Tribunals were far more summary than would be consistent with modern international human rights law.⁸⁰ The present corpus of human rights law, with its emphasis on the rights of an accused, results in a more time-consuming, but fairer, process than existed during the Nuremberg and Tokyo trials. In the course of a trial, the Tribunal is frequently called upon to adjudicate on submissions that require examination of the ICCPR and the three regional human rights instruments — the European Convention, the American Convention and the African Charter.

⁷⁴ In *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, the trial of which commenced in April 1999, the prosecutor initially proposed over 350 witnesses. So far the Trial Chamber has heard less than 45 witnesses.

⁷⁵ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T.

⁷⁶ For comparison between Tribunal trials and those of the Nuremberg and Tokyo Tribunals, see May and Wierda, *supra* note 9.

⁷⁷ Some domestic trials, such as product liability cases in the US, attract a large number of witnesses.

⁷⁸ See May and Wierda, *supra* note 9, at 748.

⁷⁹ Like the Tribunal, the Nuremberg Tribunal used liberal rules for the admission of evidence, admitting hearsay evidence where it was relevant and probative; issues of admissibility did not take up much time.

⁸⁰ See the comment of Dixon, *supra* note 17, at 84 about 'the relatively little emphasis placed on the accused's right to full answer and defence' in the Nuremberg and Tokyo trials (citing Fenrick, 'In the Field with UNCOE: Investigating Atrocities in the Territory of the Former Yugoslavia', 34 *Mil. L. & L. War Rev.* (1995) 33, at 36).

C Pre-Trial Detention

In terms of the guarantee of trial without undue delay under Article 21(4)(d) of the Statute, time begins to run from the arrest of the accused.⁸¹ No period of pre-trial detention at the Tribunal has exceeded two and a half years.

The ICCPR, the European Convention and the American Convention divide the right to be tried without undue delay into two stages, with one provision that grants arrested persons the right to be brought to trial within a reasonable period or to release pending trial and another that grants the right during the trial to a fair hearing without undue delay or within a reasonable time.⁸² However, neither the Statute nor the Rules reflects the above-mentioned dual approach. That does not, of course, prevent an accused person from arguing that his pre-trial detention has been for a period that is unreasonably long, since the right under Article 21(4)(c) of the Statute to be tried without undue delay includes the period of pre-trial detention.

With respect to the Tribunal, several factors explain prolonged pre-trial detention, among which is the adjudication of preliminary motions brought by the accused pursuant to rule 72(A), which must be disposed of before the opening statements.⁸³ Also, there may be detainees whose trials have not commenced simply because the Trial Chambers already have a full docket of cases. In that regard it is noted that the UN Human Rights Committee has held that 'the lack of adequate budgetary appropriations for the administration of criminal justice does not justify a period of four years until adjudication at first instance'.⁸⁴

The criteria used for determining what constitutes a reasonable time in pre-trial detention necessarily differ from those for determining a reasonable time for the trial; delays may violate the former without violating the latter. Although, of the major human rights treaties, only the ICCPR explicitly states that detention is not to be the general rule for persons awaiting trial, it is clear that all of the instruments establish

⁸¹ For a discussion of issues relating to pre-trial detentions, see Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993) paras 41 and 42. See also P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., 1998) 373–380.

⁸² Article 9(3) of the ICCPR provides: 'Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.' Article 14(3)(c) of the ICCPR grants the right to trial without undue delay. Article 5(3) of the European Convention provides: 'Everyone arrested or detained . . . shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.' Article 6(1) of the European Convention grants the right to a fair hearing 'within a reasonable time'. Article 7(5) of the American Convention entitles any person detained to 'trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.' Article 8(1) of the American Convention grants a right to a hearing 'within a reasonable time.' There is no provision in the African Charter granting a detained person the right to trial within a reasonable period or to provisional release. Article 7(1)(d) of the African Charter grants 'the right to be tried within a reasonable time.' Principles 38 and 39 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also guarantee a person detained the right to trial within a reasonable time or to release pending trial.

⁸³ Rule 84.

⁸⁴ *Fillastre and Bizourn v. Bolivia*, Commission No. 336/1988, UN Doc. CCPR/C/43/D/336/1998 (1991) para. 6.5.

the principle that pre-trial detention is 'limited to essential reasons such as danger of suppression of evidence, repetition of the offence and absconding and should be as short as possible'.⁸⁵ However, what constitutes a reasonable time depends on the circumstances of each case. Indeed, pre-trial detention of six years has been held to be consistent with the European Convention.⁸⁶

Rule 65 does provide for provisional release but does not reflect the ICCPR approach:

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

The Trial Chambers have taken a strict approach to provisional release and have only granted it on four occasions, all on health-related grounds in respect of the accused or his immediate family, clearly a reflection of the burden imposed on an accused person to show 'exceptional circumstances'. In *Blaskic*, the Trial Chamber held:

Considering that the Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes for which they are being prosecuted by the International Tribunal, and, for this reason, subordinate any measure for provisional release to the existence of 'exceptional circumstances';

Considering that, for this reason, the Trial Chamber considers that it may order provisional release only in very rare cases in which the condition of the accused, notably the accused's state of health, is not compatible with any form of detention . . .⁸⁷

In response to a second motion for provisional release, the Trial Chamber held that the letter and the spirit of the Statute of the Tribunal required the legal principle to be one of detention of the accused with release being the exception.⁸⁸ The Chamber found it inappropriate to make a comparison with the various national systems given the very particular context in which the Tribunal found itself. It determined that the reasonable nature of the length of the preventive detention must 'be evaluated in the light of the circumstances of each case'⁸⁹ using the following criteria: (i) the effective length of the detention; (ii) the length of the detention in relation to the nature of the crime; (iii) the physical and psychological consequences of the detention on the detainee; (iv) the complexity of the case and the investigations; and (v) the conduct of the entire procedure.⁹⁰ The Trial Chamber found that the period of less than nine

⁸⁵ Nowak, *supra* note 81, at para. 41.

⁸⁶ *Ibid.*, at p. 177, n. 107.

⁸⁷ Decision Rejecting a Request for Provisional Release, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, 25 April 1996, para. 4.

⁸⁸ Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, 20 December 1996, 4; see also Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, 25 September 1996, para. 19.

⁸⁹ *Sanchez-Reisse v. Switzerland*, 21 October 1986, ECHR (1986) Series A, No. 107, para. 55.

⁹⁰ Order Denying a Motion for Provisional Release, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, 20 December 1996, 6.

months of detention of the defendant (who had surrendered voluntarily) compared favourably with periods of 19 months to five years which were considered consistent with the European Convention by the European Commission and Court.⁹¹

Is the principle of detention being the rule and release the exception, inconsistent with the norms of international human rights law, as reflected in the major conventions, in particular with Article 9(3) of the ICCPR which expressly stipulates that detention must not be the general rule?⁹² Significant in this respect is paragraph 106 of the Report of the Secretary-General⁹³ (to which the Tribunal's Statute is attached) which states that the Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings, particularly those contained in Article 14 of the ICCPR.

One could assume that the omission from Article 21, and from the Statute in general, of provisions equivalent to Article 9(3) of the ICCPR, was deliberate. It may be that the Security Council was sensitive to the unique position in which the Tribunal would find itself and the difficulties that it would, in the absence of its own police force, encounter in ensuring that guarantees for bail were met. Is the regime of Article 9(3) of the ICCPR, however, not sufficiently flexible to accommodate the exceptional circumstances of the Tribunal? For, if an application were made to the Tribunal for provisional release on behalf of each and every detainee and was denied on the grounds of the extreme gravity of the crimes, the possibility of the accused absconding and the danger to the victims and witnesses, such a denial would, provided there was evidence to substantiate those grounds, be entirely consistent with the scheme developed in the major international human rights instruments for release on bail pending trial. That is so because that scheme, in positing that detention is not the general rule, does not, of course, rule out detention in some circumstances, which would obviously embrace the grounds described above.⁹⁴

D Length of Trials

In respect of the right to be tried without undue delay under Article 14(3)(c) of the ICCPR and Article 21(4)(c) of the Statute, or the right to trial within a reasonable time under Article 6(1) of the European Convention, Article 8(1) of the American Convention and Article 7(1)(d) of the African Charter, time begins to run when the accused is informed that 'the authorities are taking specific steps to prosecute him. It ends on the date of the definitive decision, i.e., final and conclusive judgment or

⁹¹ *Ibid.*, at 6 and 7 (citing the ECHR case of *W. v. Switzerland*, 26 January 1993, ECHR (1993) Series A, No. 254; and the Commission cases of *Ventura v. Italy*, App. No. 7436/76, Report of 15 December 1980, and *X. v. Germany*, App. No. 6946/75 of 6 July 1996).

⁹² See also Article 5(3) of the European Convention and Article 7(5) of the American Convention.

⁹³ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704.

⁹⁴ At the most recent plenary (15–17 November 1999), rule 65(B) was amended by deleting the reference to 'exceptional circumstances'. However, in the three applications for provisional release that have been dealt with since the amendment to rule 65(B), the Trial Chambers have stressed that the effect of the amendment was not to make release the general rule, and that the remaining requirements had to be strictly complied with.

dismissal of the proceedings.⁹⁵ This period will of course include appellate proceedings.’

What constitutes a reasonable time or an undue delay depends on the circumstances of each case. That this is so is evident when one observes that periods lasting longer than 10 years have been held to be compatible with the European Convention, while periods of less than one year have been held to be in violation.⁹⁶ Taking into account that some accused persons will be in detention for periods of two years or more before commencement of their trials, and that the Tribunal’s average trial has a total of 100 witnesses and lasts for a period of one year or more, it is likely that the total period of trial (including pre-trial detention and appellate proceedings) for some accused persons will be three or more years. As well, one consequence of the slow pace of the Tribunal’s work is that it will take longer than anticipated to complete the cases on its docket.

Arguably, a trial period of three or more years would not violate the requirement in the ICCPR and the three regional Conventions for trial without undue delay or trial within a reasonable time, and this is particularly so when due account is taken of the special circumstances of Tribunal trials, which include the complexity of the cases and the large number of witnesses. Even so, the legitimate expectations of the international community may not be met by trials whose average length is one to one and a half years, and some of which last longer than two years. In this regard, the judges are working towards re-examining the present system and procedures. Measures that may be considered for expediting trials include three in particular:

1. Since trials proceed on the basis of evidence that for the most part comes through live witnesses, the most effective ways of securing expeditiousness in a trial are either: (i) to reduce the number of witnesses; or (ii) to admit as evidence the statements of persons who are not present in court for cross-examination — the latter is hearsay. Elimination of cross-examination saves time. There is, therefore, a generic and organic relationship between hearsay, cross-examination and expeditiousness which can be exploited in the search for time-saving procedures.
2. Trials by a single judge instead of three. This would require an amendment of the Statute by the Security Council, since the system of bench trials by a Chamber of three judges is set out in Article 12 of the Statute. Such amendment might be difficult to secure, since that system, perhaps, reflects a compromise between the common law trials by a judge and jury on the one hand, and the civil law trials by a judge. In any event, it might be considered unacceptable to have crimes such as genocide and crimes against humanity tried by a single judge.
3. The better use of pre-trial and status conferences.

5 Conclusion

The legal system established by the Statute and the Rules is neither common law accusatorial, nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*.

⁹⁵ Nowak, *supra* note 81, p. 257, para. 45.

⁹⁶ *Ibid.*

The key to the application of the Statute and the Rules is the use of the appropriate interpretative technique which gives due weight to the four principles set out in Article 31(1) of the Vienna Convention and the law of treaties; good faith, textuality, contextuality and teleology. The challenge facing the Tribunal is to ensure that it does not overreact to concerns of the international community about the slow pace of trials, by devising procedures which facilitate expeditiousness, but which infringe the rights of the accused. The Tribunal must ensure that, notwithstanding the acknowledged peculiarities of its proceedings, an accused before it does not, in terms of his rights, become a 'poor cousin' to his counterpart in domestic proceedings. The best response that the Tribunal can give to criticisms such as those made in the letter to *The Times* of London is to ensure that it conducts trials that are fair within the meaning of its Statute and Rules, which necessarily embrace the rules of customary international law as they have evolved over the past 50 years in the development of international human rights law and international humanitarian law.

