Defence counsel in international criminal law

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V

THE PRINCIPLE OF EQUALITY OF ARMS

5.1 INTRODUCTION

The former Chapter illustrated that the expediting of proceedings may increasingly require judicial intervention in international criminal trials. That may result in diminishing the freedom of the parties and distort the adversarial nature of such proceedings. If this produces a disparity between the prosecution and the defence, there could be a violation of the principle of equality of arms and necessitate a remedy. The principle of equality of arms is a fair trial requirement that is intended to uphold the adversarial nature of criminal proceedings. It implies that no party to criminal proceedings, be it the defence or prosecution, is put in a disadvantaged position vis-à-vis the other.[1] The main goal of this Chapter is to ascertain and discuss the scope of the application of the principle in international criminal proceedings.

Even though "equality of arms" is not incorporated as such in the Statutes of international criminal courts or in international human rights treaties,[2] it is widely acknowledged to be an element of the overall right to a fair trial.[3] The principle covers different fair trial aspects that are laid down in the ICTY and ICTR's legal instruments, especially Article 21 of the ICTY Statute and Article 20 of the ICTR Statute, as well as in Article 6 of the ECHR and Article 14 of the ICCPR. It requires that the accused is informed promptly of the charges against him, has adequate time and facilities to prepare his defence,[4] has access to and is able to comment on the evidence against him, and has the right to secure 'the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'[5] Paragraph 5.2 examines the interpretation of the principle of equality of arms and of its scope by the European Court of Human Rights and the Human Rights Committee. Furthermore, it explores

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[1] Cf., for instance, ICTY App. Ch., Decision on Prosecutor's Appeal on Admissibility of Evidence, *Aleksovski* (Case No. IT-95-14/1-AR73), 16 February 1999 (hereinafter: Decision on Prosecutor's Appeal), § 24.

[2] See Article 21 ICTY Statute; Article 20 ICTR Statute; Article 67 ICC Statute; Article 6 European Convention on Human Rights (ECHR); Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

[3] The European Court of Human Rights (ECHR), for instance, has argued that the right to a fair trial as provided by Article 6 ECHR, which is almost identical to the fair trial provisions of the Tribunals, includes the principle of equality of arms. According to the Human Rights Committee (HRC), the concept of a "fair trial" within the meaning of Article 14(1) ICCPR includes respect for the principle of equality of arms. Cf. HRC, *Fei v. Colombia*, CCPR/C/53/D/514/1992, 26 April 1995, § 8.4. Cf. also HRC, *Morael v. France* (Comm. No. 207/1986), U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989) (28 July 1989), § 9.3.

[4] See Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 67(1)(b) ICC Statute.

[5] Article 21(4)(e) ICTY Statute. See also Article 20(4)(e) ICTR Statute; Article 67(1)(e) ICC Statute.

the extent to which the interpretation of this principle depends on the procedural system it is applied in.

At the *ad hoc* Tribunals, defence counsel regularly complain that the prosecution is far better off than the defence.[6] It is argued that there is no "equality of arms" between the defence and the prosecution, because the defence lacks sufficient resources to conduct proper investigations, whereas the prosecution has extensive resources. In particular, the prosecution has a large team of investigators, trial attorneys and legal advisors.[7] Even though the prosecution will only assign a limited number of personnel to one case, it will generally outnumber the defence team, which will consist of just two defence counsel at most and a few support staff members.[8] However, any differences between the defence and the prosecution regarding personnel, financial and other resources do not necessarily affect the principle of equality of arms. The principle of equality of arms requires procedural equality. It requires for the prosecution and the defence to have the same procedural rights, and to be able to conduct their cases under conditions that will not mean that one of them is at a substantial disadvantage vis-à-vis the other. It falls to be determined whether or not substantial inequality in terms of resources, facilities or other material conditions, affects this principle. Paragraph 5.3 examines this issue.

In *Kanyabashi et al.*, the defence team was required to limit its witnesses to half the number that the prosecution presented during the prosecution case.[9] This case raised the question as to whether these circumstances gave the defence an equal opportunity to present its case. Paragraph 5.4 addresses this question and examines whether or not the principle of equality of arms entitles the defence and the prosecution to have the same amount of time to present their cases.

Whether the principle of equality of arms implies that both parties should have equal access to evidence, and what this entails, is another important issue. To access evidence, the cooperation of state authorities is generally indispensable in international criminal proceedings. If states are more likely to cooperate with the prosecution than with the defence, the defence is plainly at a disadvantage. Paragraph 5.5 will examine the scope of this problem and whether it conflicts with the principle of equality of arms.

Obviously, differences remain between the position of the prosecution and the defence. The examples given all concerned situations in which the defence required a level playing field with the prosecution. Nonetheless, the prosecution may face disadvantages that the defence will not experience. For one, the prosecution may

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[6] See, for instance ICTY App. Ch., Judgement, *Tadić* (Case No. IT-94-1-A), 15 July 1999, § 30; ICTY App. Ch., Decision on Interlocutory Appeal on Motion for Additional Funds, *Milutinović, Ojdanić and Šainović* (Case No. IT-99-37-AR73.2), 13 November 2003 (hereinafter: Decision on Interlocutory Appeal), particularly § 11; ICTR Tr. Ch., Judgement, *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), 21 May 1999, § 56. See *infra*, paragraph 5.3.

[7] In 2000, for instance, the ICTR Prosecution's Investigations Division had a staff of 120 persons. See ICTR Sixth Annual Report (UN Doc. A/56/351), 31 July 2001, par. 104. See *infra*, paragraph 5.3.

[8] See, *supra*, Chapter II, paragraph 2.3.3.

[9] Cf. ICTR Tr. Ch., Decision on Joseph Kanyabashi's Motions for Modification of His Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, *Kanyabashi et al* (Case No. ICTR-98-42-T), 21 March 2007, § 38.

generally not count on the cooperation of the accused. At the ICTY, the principle of equality of arms has been invoked by the prosecution. Paragraph 5.6 examines whether or not this should be a viable option.

When one defendant is tried with other defendants in a joint trial, he may not receive the same treatment as a defendant who is tried alone. Paragraph 5.7 studies the consequences of a joint trial for an accused's defence, and how this may affect the principle of equality of arms.

5.2 General Scope of the Principle of Equality of Arms

According to the ECHR, the principle of equality of arms is part of the wider concept of a fair trial.[10] It is closely connected to the right to adversarial proceedings,[11] which entails that the parties involved in a trial get the opportunity 'to have knowledge of and comment on all evidence adduced or observations filed'.[12] The principle has a broad scope and is applicable during all stages of criminal proceedings, even during preliminary police investigations.[13] The principle applies to civil law and common law proceedings and requires that each party gets 'a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.' [14] In addition, the principle requires 'the arguments of the defence to be heard as far as possible in addition to those of the prosecution',[15] but it does not necessarily require a "quantifiable unfairness flowing from a procedural inequality".[16] In other words, no unquestionable prejudice needs to

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[10] See ECHR, *Delcourt v. Belgium* (Appl. no. 2689/65), 17 January 1970, § 28. The court also held here that 'a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage.' See *ibid.,* § 34. Cf. also ECHR, *Borgers v. Belgium* (Appl. No. 12005/86), 30 October 1991, (procureur general), §§ 24 and 26.

[11] For a thorough overview of this principle in the European Human Rights Convention's context, see Wasek-Wiaderek, Malgorzata, *The principle of "equality of arms" in criminal procedure under Article 6 of the European Convention on Human Rights and its functions in criminal justice of selected European countries: a comparative view* (Leuven: Leuven University Press, 2000). For a more detailed view on the nuances of the relationship between the adversarial principle and the principle of equality of arms, see Ambos, Kai, 'Der Europäische Gerichtshof für Menschenrechte und die Verfahrensrechte. Waffengleichheit, partizipatorisches Vorverfahren und Art. 6 EMRK', 115 *ZStW* (2003), pp. 583-637, pp. 596, 597.

[12] ECHR, *Reinhardt and Slimane-Kaïd v. France* (Appl. Nos. 23043/93 and 22921/93), 31 March 1998, § 103.

[13] This was held by the ECHR for instance in *Reinhardt and Slimane-Kaïd*, §§ 101-107; *Murray v. UK* (Appl. No. 18731/91), 8 February 1996, § 62; and, *Öcalan v. Turkey* (Appl. No. 46221/99), 12 March 2003, § 140. Cf. also Wasek-Wiaderek (2000), *supra* note 11, p. 26.

[14] ECHR, *Dombo Beheer BV v. The Netherlands* (Appl. No. 14448/88), 27 October 1993, § 33. Although this was a civil case, the same definition was later used in the context of criminal proceedings. Cf., for instance, *Bulut v. Austria* (Appl. No. 17358/90), 22 February 1996, § 47.

[15] ECHR, *Lala /Pelladoah v. The Netherlands* (Appl. No. 16737/90), 22 September 1994, § 33.

[16] The context of this quotation from *Lanz v. Austria* is that the prosecution had made submissions to the court without the knowledge of the defence. According to the ECHR this was unfair, as '[i]t is a matter for the defence to assess whether a submission deserves a reaction.' ECHR, *Lanz v. Austria* (Appl. No. 24430/94), 31 January 2002, § 58. Cf. *Bulut v. Austria*, *supra* note 14, § 49. The prosecution had made submissions to the court without the knowledge of the defence. According to the ECHR this was unfair, as '[i]t is a matter for the defence to assess whether a submission deserves a reaction.'

be proven. '[I]mportance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.'[17] Thus, the mere appearance of inequality or of non-conformity with the rights of the defence suffices to establish a violation of Article 6(1) of the ECHR.[18] Nonetheless, the fact that a procedural requirement is disregarded does not necessarily render the proceedings as a whole unfair.[19] The Human Rights Committee also considers equality of arms between the prosecution and the defence to imply procedural equality.[20]

The ICTY basically adopted the interpretation of the HCR and the ECHR. In *Tadić*, the Appeals Chamber considered: 'The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee.'[21] The interpretation of what constitutes a fair trial pursuant to Article 20(1) of the ICTY Statute does not need to deviate from the interpretation of equivalent human rights treaty provisions such as Article 6 ECHR and Article 14 ICCPR.[22] Thus, the ICTY considers this principle to require that both parties will have a reasonable opportunity to present their case under conditions that will not place one of them in an unfavourable position *vis-à-vis* the other.[23] What this means in practice, and to what degree the adversarial principle is duly taken into account at the *ad hoc* Tribunals, will be considered in the following paragraphs.

It could be argued that the duty of the Prosecutor of the ICC to search for and disclose exculpatory evidence under Article 54 of the ICC Statute renders the defence less vulnerable vis-à-vis the prosecution and may allow for a more relaxed application of the adversarial principle, similar to civil law systems. But, if the victims, who may actively participate in ICC proceedings,[24] will add to the prosecution case, this may tilt the balance so much in favour of the prosecution side that reinforcement of the position of the defence could be legitimate.

5.3 Equality of Arms and the Proportionality of Resources and Facilities

5.3.1 Introduction

It has been argued that full equality between the prosecution and defence 'is an idle aspiration from a practical perspective'.[25] The principle of equality of arms is generally regarded to refer to procedural equality. Even so, some proportionality in terms of

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[17] ECHR, *Lanz v. Austria*, § 57. Cf. *Bulut v. Austria*, *supra* note 14, § 47.
[18] Cf. for instance, *Borgers v. Belgium*, *supra* note 10, §§ 24 and 29.
[19] Cf. ECHR, *Öcalan v. Turkey*, *supra* note 13, § 146.
[20] Cf., HRC, *B.d.B. et al. v. The Netherlands*, CCPR/C/35/D/273/1988 (2 May 1989). In this civil case the HRC observed: 'article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results or absence of error on the part of the competent tribunal.' § 6.4.
[21] App. Ch. Judgement, *Tadić*, *supra* note 6, § 44.
[22] See *idem*.
[23] See, for instance, Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 24.
[24] See Articles 15(3), 19(3), 43(6), 68(3) and 75(3) ICC Statute.
[25] See Zahar, Alexander and Sluiter, Göran, *International Criminal Law: a Critical Introduction* (Oxford UK; New York: Oxford University Press, 2008), par. 8.5.1, p. 293.

resources and facilities between the prosecution and the defence may be required to achieve procedural equality in international criminal proceedings. According to the HRC in *Little v. Jamaica* the accused's right 'to have adequate time and facilities for the preparation of his defence is […] a corollary of the principle of equality of arms.'[26] The same view was adopted by the Appeals Chamber in *Kayishema and Ruzindana*.[27] This paragraph examines the material differences between the prosecution and the defence in terms of their institutional positions and the resources and facilities available to them. It discusses the extent to which any such differences might amount to inequality of arms. Since the majority of accused at international criminal courts are indigent, the resources and facilities that are provided to them under the legal aid system are of prime concern. Although these were discussed in Chapter II, for reasons of comprehensibility, this paragraph addresses them again, this time in the context of the principle of equality of arms.

5.3.2 Procedural Approaches to Adequate Resources and Facilities

Whether or not the resources and facilities provided to the defence are adequate depends on the role of the defence given the nature of the proceedings. Even though the principle of equality of arms applies both to common law and civil law systems, its interpretation may not be the same in each system. It has been argued that it is inherent in common law systems 'that both sides will be given equality in procedural opportunities to advocate their respective opposing positions.'[28] In such proceedings the prosecution and the defence present their cases separately to a passive decision-maker (judges and, usually, a jury) and are each responsible for assembling evidence. Therefore, they should each have an equal chance to put their respective cases. This renders the principle of equality of arms of vital importance in adversarial proceedings.[29]

If the defence lacks the opportunity to conduct proper investigations in an adversarial system, the defence may not have a case to counter that of the prosecution. If each party presents its own case separately, without adequate resources, and without conducting their own investigations, the accused will stand little chance of effectively challenging the prosecution's case alone. In Damaška's reactive state's conflict-solving model, the government seeks to interfere as little as possible in proceedings. Therefore, it suffices that the parties are equal on a formal level only.[30] An exception is that the

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[26] *Little v. Jamaica*, CCPR/C/43/D/283/1988 (19 November 1991), § 8.3. Cf. also, Office of the High Commissioner for Human Rights, CCPR General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), 13 April 1984, available from www.unhchr.ch, par. 9.

[27] ICTR App. Ch., Judgement (Reasons), *Kayishema and Ruzindana* (Case No. ICTR-95-1-A), 1 June 2001, § 55.

[28] Cherif Bassiouni, M., 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', 3 *Duke Journal of Comparative and International Law* (1993), Spring 1993, pp. 235-293, p. 278.

[29] Cf. Zappalà, Salvatore, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), p. 112.

[30] See Damaška, Mirjan R., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), p. 144.

accused is entitled to legal assistance. This reinforces the equality of arms. States that freely provide such assistance to indigent accused must set limits to the funding provided.[31] Nevertheless, in practice in the US, there have been clear examples of cases in which the state funded an extraordinary amount of resources for the accused's defence. In the US Federal case of *Moussaoui*, the accused – the alleged 20th hijacker of the 9-11 bombings of the NY World Trade Center – was initially assigned three, and later five defence counsel.[32] The defence was provided with extra time and resources so as to be more proportionate to the extensive resources available to the prosecution.[33] In *State v. Peart*, the resources for routine criminal cases were considered insufficient to provide indigent defendants with 'the reasonably effective assistance of counsel the constitution guarantees'.[34]

In the Dutch case of *Van Anraat*, concerning war crimes committed in Iraq, it was noted that the Dutch system differed from common law systems and from the adversarial system of the *ad hoc* Tribunals. It required a different interpretation of the principle of equality of arms.[35] In a civil law system, the prosecution is under an obligation to search for both exculpatory and inculpatory evidence. A defence team with fewer (financial) means and resources than the prosecution, is still considered to be in a reasonable position to conduct an effective defence. In civil law proceedings, and in Damaška's activist state's policy-implementing proceedings, the prosecution and the defence are generally further apart. The prosecution and defence cases are intertwined, the prosecution takes care of the core of the investigative work – building up a *dossier* – and often an investigative judge is actively involved in the pre-trial stage. Defence counsel have more limited possibilities to undertake separate investigations, as the state's prosecution's investigations are deemed sufficient. Defence counsel should not distort the investigative efforts of the state prosecution and thus the truth-finding that is so important in these proceedings.[36] Therefore, counsel usually gets the opportunity to participate only after most of the official investigations are completed. Additionally, during trial proceedings, having a state official 'who is actively involved

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[31] See *ibid*, p. 145.

[32] See, for instance, U.S. District Court for the Eastern District of Virginia, Transcript, *U.S. v. Moussaoui* (Criminal No. 01-455-A) , 18 July 2002 (available at http://cryptome.org/usa-v-zm-071802.htm, lastly visited 26 June 2007) and 2 January 2002 (http://cryptome.org/usa-v-zm-arr.htm) and 24 April 2002 (http://cryptome.org/usa-v-zm-ht1.htm).

[33] Supposedly, the defence was provided with such an amount of resources because Moussaoui was tried on a federal level, rather than on state level. Cf., for instance, Steve Chapman, Why Moussaoui Escaped Death, 7 May 2006, (www.realclearpolitics.com/articles/2006/05/hearing_both_sides.html).

[34] Louisiana Supreme Court, *State v. Peart*, 621 So. 2d 780 (1993). There were no investigative resources, no funds for expert witnesses and no adequate library facilities available for routine cases.

[35] See The Hague District Court, *Van Anraat* (Case No. 09/751003-04), 21 December 2005, English translation available from www.rechtspraak.nl (LJN No. AX6406), § 5.4. In its appeal judgement in this case, the The Hague Court of Appeals noted the following: 'It should be handed to the defence that the present criminal case has exceptional proportions, partly because of its international dimensions and the fact that the offences (serious international crimes) would have taken place decades ago and mainly in a non-European country. In hearing such a case, especially when the police and the Public Prosecution Service apparently have ample (extra) financial means available for the execution of their tasks, one should make sure that the defence does not end up in a relatively disadvantageous position.' The Hague Court of Appeals, *Van Anraat* (Case No. 2200050906-2), 9 May 2007, English translation available from www.rechtspraak.nl (LJN No. BA6734), § 6.1.

[36] Damaška, (1986), *supra* note 30, p. 177. Cf. *supra*, Chapter IV.

in the investigation'[37] as one's adversary, means that a defence counsel 'who fiercely challenges material damaging to his client can easily appear to be trying to obstruct the realization of state policies'.[38]

Notwithstanding its civil law tradition which involves fewer investigative responsibilities for the defence, in a Dutch case concerning war crimes and torture allegedly committed in Afghanistan, the defence was allowed the assistance of its own investigator at the *locus delicti*, in order to meet the principle of equality of arms.[39]

For fair adversarial proceedings, it is vital that the accused is given a genuine opportunity to present his defence case effectively. The adversarial principle may require more actual equality of the prosecution and the defence than the human rights principle of equality of arms stipulates for each legal system. It is important to determine the extent to which international criminal courts, especially if conducting adversarial proceedings, should achieve a proper balance between the resources and facilities of the prosecution and those of the defence.

5.3.3 Material Differences between the Prosecution and the Defence

The prosecution is a statutory organ of the court,[40] whereas the defence generally is not. Despite considerable efforts to institutionalize the defence to promote equality of arms, at the ICC and SCSL in particular, the institutional position of the prosecutor remains very distinguishable from the defence. The defence remains particularly dependent on the Registry. The future will tell whether this will be different at the STL, under which Statute the defence will be an organ.[41] It has been argued that the institutional position of the prosecution may lend it 'greater freedom and ability to identify and access relevant evidence than the accused'.[42] According to Judge Vohrah of the ICTY, '[t]he principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side.'[43] It is a notable disadvantage for the defence that it does not enjoy the same privileges and immunities under the Statute as the prosecution.[44] This could hinder the defence in gathering evidence, particularly if it needs to enter the territory of any country that is hostile towards it. The ICC's Agreement on the Privileges and Immunities of the International Criminal Court does

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[37] *Ibid.*, p. 178.

[38] See *ibid.*, p. 178.

[39] See The Hague District Court, 14 October 2005, Case no. 09/751004-04 (indictment I) and 09/750006-05 (indictment II), English translation available from www.rechtspraak.nl (LJN No. AV1163).

[40] Cf. Article 11 ICTY Statute; Article 10 ICTR Statute; Article 34 ICC Statute.

[41] See *supra*, Chapter III, paragraph 3.2.2.

[42] McIntyre, Gabrielle, 'Equality of Arms - Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', 16 *Leiden Journal of International Law* (2003), pp. 269-320, p. 275.

[43] ICTY Tr. Ch., Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, *Tadić* (Case No. IT-94-1), 27 November 1996 (hereinafter: Separate Opinion of Judge Vohrah).

[44] The Judges, the Registrar and the staff of the Registry also enjoy special privileges and immunities. See Article 29 ICTR Statute; Article 30 ICTY Statute; Article 48(4) ICC Statute.

entitle defence counsel as well as those assisting him to immunities that could enable the defence to conduct its own investigations without risking arrest for so doing.[45]

The prosecution also has the advantage of continuity. Staff members of the Office of the Prosecutor (OTP) are appointed for a lengthy period. Defence counsel are appointed to any particular case, only if the accused has chosen them. Having been appointed to one case, an appointment to a next case does not necessarily follow. Many defence counsel will be "first timers" in international criminal cases.[46] After their engagement in one case, OTP members generally move on to the next. Thus, OTP staff can learn from their experiences in various cases and build a career conducting international criminal cases. In addition, being based in the same office, prosecution counsel can more easily learn from each other and pass on their knowledge than defence counsel,[47] who have fewer such opportunities, their work being more solitary. A maximum of two defence counsel will work on one case. At the ICTY, offices of defence counsel are not located in one building; rather, defence counsel work in separate, privately rented offices throughout the city of The Hague. At the ICTR, counsel do have office spaces in the building of the Tribunal and on the same corridor so that they can easily meet to discuss issues. During the long breaks throughout proceedings, counsel are scattered all over the world in their home offices. By the time of the final verdict, or even long before that, [48] many counsel will return to their home jurisdiction without passing on their knowledge to their colleagues. This puts the defence at a disadvantage in comparison to the prosecution. Bar Associations should assist in transferring knowledge between defence counsel by providing a series of training sessions tailored to the different stages of proceedings. Mandatory membership should be required so that all counsel follow the required training.

There is also a numerical distinction. The OTP has always had more staff members than the defence.[49] A substantial number of staff members will be necessary properly to conduct investigations regarding crimes that were committed on a large scale. Between 1999 and 2000 for instance, the ICTR's OTP had an Investigations

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[45] See Article 18 of the Agreement on the Privileges and Immunities of the International Criminal Court (ICC-ASP/1/3), 9 September 2002.

[46] This may gradually change. International criminal courts are still being established; the ICC will be permanent.

[47] Cf. Groulx, Elise, The Role of Defence Lawyers and the Interface between the Prosecution and the Defence before International Criminal Courts, 2000, available at www.iap.nl.com/speeches/groulx.html, retrieved 12 January 2005. Evidently, OTP staff members will not necessarily agree on each procedural or substantial issue and not every OTP act results from a common or coordinated strategy. Cf. Minna Schrag, Lessons Learned from ICTY Experience, 2 *Journal of International Criminal Justice (JICJ)* (2004), pp. 427-434, pp. 431-433.

[48] Counsel quit before their case has finished on a regular basis. This could be because of an irreparable breakdown in communication with their client, or because of health reasons or other professional obligations. See, for instance, ICTY Dep. Reg., Decision, *Bala* (Case No. IT-03-66-PT), 7 July 2004; ICTR Tr. Ch. II, Decision on Defence Oral Motion for Adjournement [sic] of the Proceedings. *Ndindiliyimana et al.* (Case No. ICTR-2000-56-T), 8 October 2004.

[49] Even so, initially, the ICTR Prosecution lacked resources and was in want of more personnel. Cf. ICTR Second Annual Report (UN Doc. A/52/582), 6 June 1997, pars. 48 and 49. Then followed a period in which the budget could cover 137 posts and only 80 of these were filled. See ICTR Third Annual Report (UN Doc. A/53/429), 23 September 1998, par. 50.

Division of 120 persons which cooperated with Interpol.[50] In addition, it had a Legal Advisory Section of eight to ten legal advisors based in Kigali,[51] seven senior trial attorneys, ten trial attorneys, and five assistant trial attorneys.[52] It also had an "Information and Evidence Section" to manage, preserve and present the evidence gathered by investigators.[53] In addition, every OTP trial team includes a 'case manager'.[54] It is difficult to establish how many OTP members work on one particular case. At the ICTR in *Kayishema and Ruzindana*, the prosecution refused to disclose to the defence the number of OTP staff members that had worked on the case since the beginning.[55] In the pre-trial proceedings of the ICC in *Thomas Lubanga Dyilo*, according to a transcript,[56] the Prosecution was represented in court by nine persons: the Prosecutor, the Deputy Prosecutor, a Senior Trial Lawyer, a Legal Advisor, an Associate Legal Lawyer and two Associate Trial Lawyers, an Associate Legal Adviser and a Case Manager. The defence team consisted of six persons: one defence counsel, assisted by three lawyers, one professor who was also a lawyer, and one judicial assistant.[57]

At the *ad hoc* Tribunals, a maximum of two defence counsel can be assigned to an accused under the legal aid system: one lead counsel and one co-counsel.[58] In addition, a maximum of three support staff members (such as investigators or legal assistants) may be assigned at the ICTR and a maximum of five under the lump sum system of the ICTY.[59] In *Taylor*, the SCSL proposed to assign three defence counsel, one lead counsel and two co-counsel, and a senior investigator.[60] The ICC allows a defence team the assistance of an investigator and a law professor.[61]

The number of defence counsel retained by an accused who privately funds his defence is considerably higher.[62] The accused Haradinaj funded four defence counsel during the pre-trial stage, whereas his co-accused each had the assistance of

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[50] ICTR Sixth Annual Report (UN Doc. A/56/351), 31 July 2001, pars. 104 and 118.
[51] *Ibid.*, par. 122; ICTR Fifth Annual Report (UN Doc. A/55/435), 2 October 2000, par. 128.
[52] ICTR Fifth Annual Report (2000), par. 127.
[53] See *ibid.*, par. 131. Cf. also ICTR Tr. Ch. I, Judgement, *Akayesu* (Case No. ICTR-96-4-T), 2 September 1998, § 5. 'The Prosecutor of the Tribunal for Rwanda is assisted by a team of investigators, trial attorneys and senior trial attorneys, who are based in Kigali, Rwanda. These officials travel to Arusha whenever they are expected to plead a case before the Tribunal.'
[54] See ICTR Sixth Annual Report (2001), par. 125.
[55] See App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, §§ 56 and 57.
[56] This is a random sample from the transcripts of the ICC.
[57] See Transcript, Confirmation of charges Hearing, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-T-30), 9 November 2006, p. 3.
[58] Cf. *supra,* Chapter II, paragraph 2.3.3.
[59] See *supra*, Chapter II, paragraph 2.3.6.
[60] See SCSL Tr. Ch. II, Transcript, *Taylor* (Case No. SCSL-2003-01-T), 3 July 2007, p. 2. This was being done after the Registry had failed to solve certain representational issues as to his former defence team. See p. 4. The accused had been involuntarily absent while this proposal was made, as he was late due to route adjustments on his way to court for his security. See p. 8.
[61] See Rules 20(1)(b) and 22(1) ICC RPE.
[62] As noted in Chapter II, paragraph 2.3, only a handful of accused before the ICTY and the ICTR privately fund their defence.

one duty counsel.[63] As his proceedings progressed, he retained three counsel while his co-accused were assigned two counsel each.[64] This could suggest that the defence needs more manpower than currently provided under the legal aid system to present its case as effectively as the prosecution. If this were to be true, measures should be implemented. Assigning more personnel to the defence may be impossible for financial reasons. A balance in personnel could also be achieved through limiting the number of Prosecution staff members per case or the number of man years. The defence in *Kayishema and Ruzindana* suggested equalizing the number of prosecution and defence team members during the trial phase.[65] The ICTR Appeals Chamber and Trial Chamber each deemed this unnecessary, as equality of arms does not require 'the material equality of possessing the same financial and/or personal resources'.[66]

Where resources are concerned, the defence is generally worse off than the prosecution in all legal systems.[67] The ICTY's legal aid system is based on the principle that "[t]he accused and the Prosecutor must have equality of procedural arms, supported by an appropriate level of resources."[68] Pursuant to an SCSL Annual Report, "equality of arms" equals 'a reasonable equivalence in ability and resources of Prosecution and Defence.'[69]

Defence teams have objected to the resources available to them under the legal aid system of international criminal courts. At the ICTR, having to hand in meticulous accounts of their professional activities to the Registry, the defence could be deprived of remuneration for activities that were deemed necessary.[70] The 'lump sum' system in use at the ICTY has not been without controversy. Defence counsel have objected to the Registrar's findings as to the appropriate 'categorization' of their case as well as to the resources accompanying such a classification.[71] The case of *Hadžihasanović and Kubura* had been ranked at the highest possible level. Even so, the defence complained that the resources were 'simply not sufficient to properly prepare

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[63] This can be inferred from the names enlisted as counsel for the defence. Cf. ICTY Tr. Ch. II, Decision on Prosecution's Urgent Application for Authorisation to Exceed Page Limit for Responses, *Haradinaj et al.* (Case No. IT-04-84-PT), 5 May 2005.

[64] See, for instance, ICTY Tr. Ch. II, Further Decision on Lahi Brahimaj's Motion for Provisional Release, *Haradinaj et al.* (Case No. IT-04-84-PT), 3 May 2006.

[65] See App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 56.

[66] *Ibid.*; Tr. Ch. Judgement, *Kayishema and Ruzindana*, *supra* note 6, § 69. It seemed to found this reasoning on an ECHR case that does not seem to give any support for this specific assumption. See footnote 84 of the Judgement (Reasons), which refers to *Hentrich v. France* (Appl. No. 13616/88), 22 September 1994, § 56.

[67] Cf. for instance, Goldstein, Abraham S., 'The State and the Accused: Balance of Advantage in Criminal Procedure,' *69 YALE Law Journal 1149* (1960), pp. 1149-1199. Even in the highly adversarial system of the USA in the 1960-ies, the balance of advantages between the prosecution and the defence tilted toward the prosecution. A notable exception was the von Bulow case in the USA. It was estimated that the defence spent twice the amount that the prosecution spent. See Jonathan Friendly, Von Bulow jury issues acquittal on all charges, *NY Times*, 11 June 1985.

[68] Comprehensive Report on Legal Aid System ICTY, *supra* Chapter II note 148, par. 4(e).

[69] See SCSL First Annual Report, p. 16.

[70] See supra, Chapter II, paragraph 2.3.6.

[71] Cf., for instance, ICTY Tr. Ch., Decision of Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits, *Strugar* (Case No. IT-01-42-PT), 19 August 2003.

this case for trial'.[72] In the case of *Thomas Lubanga Dyilo* at the ICC, defence counsel informed the Registry that she would not accept her appointment to the accused, unless additional resources would be provided.[73]

The ICTR Directive on Assigned Counsel stipulates that the Tribunal will meet costs relating to investigative steps.[74] A degree of inequality in resources for conducting investigations between the prosecution and the defence will be justified because of their differing roles. Having no police force, the Prosecution starts its investigation from scratch, has to make a case and bears the burden of proof. Apart from the presumption of innocence, an important asset for defence counsel is that the accused may provide them with vital information. An important disadvantage however, is that in the context of international criminal proceedings, the defence generally receives the opportunity to conduct its investigations years after the prosecution has started theirs.[75] This is generally unavoidable, as the prosecution will not issue an arrest warrant until it has collected sufficient evidence to indict a person. Only when arrested or interrogated by the prosecution or police authorities, a person has a right to a defence counsel. An international criminal court will not assign a defence team before a person is arrested and it is certain that he will be tried by this court. After a period of several years, on site investigations will inevitably produce less reliable information than investigations made earlier in the history of the case. This diminishes the chances for the defence to obtain reliable results. Moreover, in some instances, the defence is unable to visit the crime scene at all. In *Kayishema*, defence counsel could not visit a crime scene, whereas the prosecution had been able to investigate it. The defence was therefore unable to verify the data that were submitted by the prosecution. The Trial Chamber deemed it sufficient that the defence was provided with professional investigators at the costs of the Tribunal. Thus, 'all the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case.'[76] How the defence employs its resources 'is not a matter for the Trial Chamber.'[77] The ICTR Appeals Chamber considered that 'the mere fact of not being able to travel to Rwanda is not sufficient to establish

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[72] As the Registrar is primarily responsible for the implementation of the legal aid payment system the Trial Chamber could only review his decision if it were shown 'that no reasonable Registrar could have acted in the way as was done in the present case'. Since the defence challenged the whole legal aid system, its motion was inadmissible. It is not up to the Chamber to take decisions in the context of a particular case that may alter the legal aid payment system of all cases. See ICTY Tr. Ch. II, Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences thereof for the Rights of the Accused to a Fair Trial, *Hadžihasanović and Kubura* (Case No. IT-01-47), 17 June 2003.

[73] As the Registrar refused to grant her request, as she could not demand additional resources since she was not appointed yet. See ICC President, Decision of the Presidency upon the document entitled Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-874), 2 May 2007.

[74] See ICTR Directive (24 April 2004), Article 17(B).

[75] Cf. McIntyre (2003), *supra* note 42, p. 280.

[76] Tr. Ch. Judgement, *Kayishema and Ruzindana*, *supra* note 6, § 61.

[77] See Tr. Ch. Judgement, *Kayishema and Ruzindana*, *supra* note 6, § 61. The Appeals Chamber concurred with this view. Cf. App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 72.

inequality of arms between the Prosecution and the Defence'. [78] The defence had failed to demonstrate that this deprived the accused 'of a reasonable opportunity to plead his case'.[79]

A report evaluating the legal aid system of the ICTY stated that the prosecutor's continuous disclosure of exculpatory and other materials increased the workload of the defence. [80] While a case lasts, the prosecution continues to assemble evidence, in parallel with investigating other cases. It compels the defence to continue to conduct its own investigations which may even include revisiting particular witnesses.[81] This could require additional funding. In *Milutinović et al.*, the Registrar refused to provide such additional funding. The Appeals Chamber did not consider the alleged inadequacy of funds to establish inequality of arms. Judge Hunt argued the contrary. The Registrar's assertion that the ICTY's legal aid system 'ensures that the defence is given quality representation to secure equality of arms with the Tribunal's Prosecutors'[82] was hollow, according to Judge Hunt.[83] Under the ICTY Directive, the Registrar may readjust his assessment of a case level where 'a stage of the procedure is substantially longer or shorter than estimated' in advance.[84] Once the "continuous discovery process" created unforeseen problems for the defence, Judge Hunt believed that the Registrar should have provided them with additional funding. The Registry should not unnecessarily hinder the defence in obtaining adequate resources.[85]

Prosecutors can count on a fixed UN salary.[86] It is difficult to establish whether or not defence counsel at the ICTR receive an income that is proportionate to a prosecutor's salary. Defence counsel are compensated on the basis of "hour statements" they hand in to the Registry.[87] On top of these fees, a maximum of four team members are entitled to a fixed amount of daily allowance while at the seat of the Tribunal. At the ICTY, only counsel, not legal assistants may receive daily allowance. During breaks, naturally, daily allowances are not provided.[88] The rule that legal assistants at the ICTR are remunerated for a maximum of one hundred hours per month should be abandoned. It is unlikely that legal officers carrying out similar tasks for the prosecution have to tolerate similar limits that reduce their working hours and their salary. The lump sum system at the ICTY provides a more consistent income to the defence, including legal assistants. As it requires lead counsel to be paid on UN P5 level and co-counsel on UN P4 level,[89] it is compatible with OTP salaries. The

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[78] See App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 72.
[79] See App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 72.
[80] Cf. Comprehensive Report on Legal Aid System ICTY, *supra* Chapter II note 148, par. 48.
[81] See Decision on Interlocutory Appeal, *Milutinović, Ojdanić and Šainović*, *supra* note 6, § 39.
[82] Report of the International Tribunal for the Former Yugoslavia to the United Nations General Assembly on the Structure and Functioning of the Legal Aid System, 31 May 2003, Executive Summary, p. 2.
[83] Dissenting opinion of Judge David Hunt, *Milutinović, Ojdanić and Šainović*, *supra* note 81, § 36.
[84] Article 22(A) ICTY Directive (IT/73/REV. 10), 28 July 2004.
[85] Dissenting Opinion of Judge David Hunt, *Milutinović, Ojdanić and Šainović*, *supra* note 81, § 41.
[86] UN personnel do not usually pay income tax, have generous pension provisions and education allowances. Defence counsel do not enjoy the same advantages.
[87] See *supra*, Chapter II, paragraph 2.3.6.
[88] ICTR trials breaks are long. The general pace of trials with several co-accused is about a few months on, and a few months off.
[89] See *supra,* Chapter II, paragraph 2.3.6.

remuneration system of the ICC is intended to 'contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution.'[90] Fees for defence team members are derived from prosecution salaries of the ICC and at the *ad hoc* Tribunals.[91] Moreover, defence counsel will also be compensated "for the increment in professional charges".[92] Therefore, the most progressive balance between the income of prosecution and defence staff can be found at the ICC.

Should defence counsel's fees be proportionate to the salary of a prosecutor?[93] Although it is probably outside the scope of the principle of equality of arms as a human rights standard, it is desirable that the earnings of the prosecution and the defence working in the same international criminal court are compatible. In terms of a reasonable balance of powers between the prosecution and the defence, if prosecution counsel earn much more, the prosecution could appear to be more powerful. Disproportionate differences should therefore be avoided.

It has been argued that the defence, compared to the prosecution, lacks adequate facilities to prepare its cases and that this disparity damages the credibility of the international criminal justice system.[94] As mentioned, in *Kayishema and Ruzindana*, the ICTR did not exclude the right of an accused to have adequate facilities for the preparation of his defence[95] from the scope of the principle of equality of arms.[96] However, it should be examined what facilities should necessarily be provided. The ICC RPE prescribe that the Registrar should '[p]rovide the defence with such facilities as may be necessary for the direct performance of the duty of the defence'.[97] Under Article 14(3)(b) of the ICCPR, the right to have adequate facilities includes access to documents and other evidence required for the preparation of the accused's case and 'the opportunity to engage and communicate with counsel.'[98]

The prosecution office being located at the courts as well as in the country where the crimes took place could require that international criminal courts provide for office facilities for the defence. Initially, both the *ad hoc* Tribunals' Directives provided that if counsel's professional facilities were far removed from the Tribunal, 'subject to availability of space and resources', they were to be offered reasonable facilities and equipment such as photocopiers and computers. In addition, counsel could use the judges' libraries and documentation centre.[99] Since 2000, these facilities

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[90] Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16), 17 August 2004, par. 16.

[91] *Idem*.

[92] *Idem*. See also *supra* Chapter II, paragraph 2.3.6.

[93] Ellis argues that defence counsel should earn the equivalent of what prosecution counsel earn. See Ellis, Mark S., 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel', *Duke Journal of Comparative and International Law* (1997), Spring 1997, pp. 519-537, p. 32.

[94] Groulx (2000), *supra* note 47.

[95] See Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 67 (1)(b) ICC Statute.

[96] See, for instance, Tr. Ch. Judgement, *Kayishema and Ruzindana*, *supra* note 6, § 55.

[97] Rule 20(1)(e) ICC RPE.

[98] CCPR General Comment No. 13, *supra* note 26, par. 9. Cf. also Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (2nd, rev.), (Kehl, Germany [etc.]: Engel, 2005), p. 332.

[99] Article 34 ICTY Directive on the Assignment of Defence Counsel (IT/73/Rev. 2), 30 January 1995; Article 31 ICTR Directive (Rev. 3), 1 July 1999. In 1997, the ICTY provision was already cut

are no longer included in the ICTY Directive.[100] The lump sum the ICTY provides to the defence includes a substantial office costs component.[101] Defence counsel have a common room in the ICTY building, with a bare minimum of office equipment. The ICTR Directive still provides professional facilities.[102] At the ICTR, each defence team has a separate office with one desktop computer. Printing facilities are shared. At the SCSL in the *RUF* case, the defence requested a considerable amount of additional facilities[103] all of which were granted by the Trial Chamber except one, namely to have an investigator with international experience.[104]

Some basic facilities, such as a common space for defence counsel to change into their gown and to wait during intervals, or to print or copy a limited amount of documents are necessary for the defence to function effectively. Bar associations should perhaps assume responsibility over the maintenance of such common defence facilities to safeguard confidentiality. The principle of equality of arms does not require courts to provide office facilities to the defence. As defence counsel generally incur double expenses – maintaining their domestic office as well as one near the seat of the international criminal court – it is reasonable to include office costs in any international criminal court's legal aid system. The degree to which facilities such as adequate time to present a case and access to evidence are protected pursuant to this principle, will be considered in the following paragraphs.

5.3.4 Conclusion

The foregoing illustrated that defence teams assigned under the legal aid system generally comprise fewer members than prosecution teams and have fewer resources and facilities at their disposal to prepare and present their cases. Whether the principle of equality of arms will be violated by any such disparity depends on the degree to which it hinders the defence adequately to prepare and plead its case. The level of resources allocated to the defence in international criminal cases should be adequate to prepare an effective defence.

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down solely to provide for the use of the judges' library facilities. See Article 34 ICTY Directive (IT/73/Rev. 4), 1 August 1997.

100 ICTY Directive (IT/73/Rev. 8), 15 December 2000.

101 See ICTY Defence Counsel Payment Scheme for the Pre-Trial Stage, 1 May 2006, par. 24.

102 Cf. Article 31 ICTR Directive, 15 June 2007.

103 The request included a second office, a second networked computer, a car, a witness management officer to find and locate witnesses, and funding for an investigator with international experience. See SCSL Tr. Ch. I, Decision on Sesay Defence Application I - Logistical resources, 24 January 2007, (Case No. SCSL-04-15-T-691), p. 2.

104 The Chamber's requests were to be complied with by the Defence Office as well as the Registrar. The Principal Defender notified the court that he was engaging in finding additional investigative resources for the defence. See *idem*, pp. 4 and 5, and footnote 10. A second application for additional resources was denied, as it was not sufficiently substantiated. The defence requested a higher remuneration level as to the funding of two military experts. It was contended that the prosecution provided their military expert with a higher remuneration level than the Defence Office would grant to the defence for the hiring of their experts. This would put the accused 'at a huge disadvantage in being able to present his evidence'. See SCSL Tr. Ch. I, Decision on Defence Application II, (Case No. SCSL-04-15-T-715), 28 February 2007, §§ 3-6 and §§ 22-27.

In every criminal case, the prosecution will bear the burden of proving the guilt of the accused, whereas the latter is presumed innocent. The prosecution may therefore require more investigative resources than the defence. In adversarial proceedings, the defence is responsible for assembling and presenting its own evidence. Given that the proceedings of the international criminal courts included in this study are predominantly adversarial, these courts should provide an adequate standard of resources and facilities to the defence. The defence should be funded at a level allowing it to conduct its own investigations. Domestic jurisdictions have provided more substantial resources to the defence in cases that were highly complex and involved an international component. Conducting an effective defence in international criminal cases is a complicated task. Compared to what should be provided in regular domestic cases, the inherent complexity of these cases requires extra resources and facilities to be provided to the defence to satisfy the principle of equality of arms and the right to a fair trial.

The ICTY's lump sum system most efficiently tailors the needs of the defence to the complexity and expected duration of a case. In the most complicated cases, it provides a higher standard than the ICTR. The ICTR system is the least compatible where it concerns guaranteeing proportionality as to resources and facilities between the prosecution and the defence, especially in cases where one defence counsel is deemed sufficient. The assignment of two counsel should be the minimal requirement in international criminal cases. In cases of this magnitude and duration, this number is necessary to guarantee continuity of representation. If one counsel is unable to attend court proceedings or to perform any necessary task, another counsel will be available. This will also prevent a court from having to decide whether or not any other defence team members could perform such tasks while defence counsel is unavailable.

A flexible approach as to the differing needs of defence teams is necessary. Defence counsel also bear some responsibility. They have a duty to act diligently[105] and should make efficient use of the resources available to them. Any requests for additional resources that are sufficiently substantiated as being necessary for adequately preparing or presenting the defence, and are not the result of a lack of due diligence on the part of counsel, should receive proper consideration. It is desirable to have a separate defence organ instead of the Registry, or at least defence counsel involved in assessing the level of a case and whether additional resources are required. In this respect, the ICC's Legal Aid Commission that can advise the Registrar on the allocation of funds for assigned legal assistance is a suitable solution.[106] This should be more efficient and acceptable to defence teams and could limit the number of motions concerning this issue to Chambers. It could also benefit the judicial economy of international criminal courts.

Only disproportionate differences between defence and prosecution resources will violate the principle of equality of arms as a human rights standard. Generally, there are no truly disproportionate differences in the basic provisions of international criminal courts amounting to a violation of this principle. But the adversarial principle requiring that each party should have adequate opportunity

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[105] See Articles 3(iii) and 11 ICTY Code of Professional Conduct; Article 6 ICTR Code of Professional Conduct; Article 5 ICC Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1).
[106] Cf. *supra* Chapter III, note 56.

effectively to prepare and present its case, could be at risk. This will be so most particularly under the legal aid system of the ICTR, but also where the protection by immunities and special privileges is concerned.

5.4 Disparities in Time and Number of Witnesses

In international criminal cases, the number of prosecution witnesses generally exceeds the number of defence witnesses. The question is whether this violates the principle of equality of arms. For many reasons, there may be more prosecution witnesses than defence witnesses. As the prosecution bears the burden of proof, it could need more witnesses than the defence to establish the guilt of the accused. It can be a matter of defence strategy only to call those witnesses that will be absolutely necessary to contest the prosecution's case. Hence, it could be desirable for the defence to call only a limited number of solid witnesses.[107] When it is a strategic choice of the defence to call fewer witnesses than the prosecution, the principle of equality of arms is not violated, for there has been an equal opportunity to plead the case and to present evidence.

This could be different where the defence calls fewer witnesses because it was unable to present any more than the prosecution. It is often difficult for the defence to find witnesses since many persons are afraid to be associated with war criminals and may therefore refuse to testify for them.[108] It is also difficult to trace suitable defence witnesses as many persons will be relocated after an international or internal large scale conflict. Moreover, the defence may have insufficient resources for contacting or speaking to all relevant persons.[109] It is not self-evident that this inequality should lead to a finding of inequality of arms.

In *Kayishema and Ruzindana*, where the accused claimed a violation of the principle of equality of arms *inter alia* because of the difficulty for the defence to locate and contact potential witnesses, the ICTR Appeals Chamber argued 'that the principle of equality of arms does not apply to "conditions, outside the control of a court", that prevented a party from securing the attendance of certain witnesses.'[110] It was not denied that the conditions that may prevent the defence from calling all the witnesses necessary for their case puts it at a disadvantage vis-à-vis the prosecution. In addition, were it to be contended that a lack of resources prevented the defence from tracing important witnesses, the court could have provided for more resources, and thus may have had control over the disparity. Provided however, that the defence was able to quantify the resources it needed to trace a specific witness and could substantiate the importance of that witness for the defence case. In addition, the defence should show why the resources already provided would not be enough.

The principle of equality of arms may also be at stake where the defence is required to limit its number of witnesses solely to expedite the trial proceedings. As

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[107] Interview with Howard Morrison QC, Arusha, 9 October 2004. Notes on file with the author.
[108] Potential defence witnesses regularly fear for the safety of their family members if they were to testify for the defence. See ICTR Tr. Ch. I, Transcripts (in French), *Ntakirutimana and Ntakirutimana* (Case Nos. ICTR-96-10-T and ICTR-96-17-T), 2 April 2001, pp. 36, 37.
[109] This issue was raised in the context of the principle of equality of arms, for instance, in *Kayishema and Ruzindana*. See App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 65.
[110] *Ibid.,* § 73, footnote in citation omitted.

noted in Chapter IV, judges at international criminal courts increasingly control the manner of proceedings. To ensure that trials will not last forever, judges may limit the number of witnesses that the defence may call[111] and determine the time available for the presentation of its evidence[112] prior to the defence case. Judges have similar powers regarding the prosecution's case. The defence may request to have additional time or to call additional witnesses during the defence case,[113] so if judges impose upon the defence stricter limits than on the prosecution regarding the number of witnesses or the amount of time, such limitations may give rise to a violation of the principle of equality of arms. However, in *Milošević* it was held that to restrict the number of defence witnesses the accused could call, while granting him an equal period as the prosecution to present his case and evidence,[114] neither violated his right to a fair trial, nor the principle of equality of arms.[115]

This contention, that denying the defence the opportunity to present the same number of witnesses as the prosecution will not violate the principle of arms, is questionable for the following reasons. Before the start of the defence case, the Trial Chamber assured the accused that the number of defence witnesses and the time available for his defence case would be based on the number of prosecution witnesses and the amount of time that the prosecution had to present its case.[116] Therefore, expectations were raised that the defence could in practice call the same number of witnesses as the prosecution. Nonetheless, the limitations in time were repeated in subsequent orders from 2004 onwards.[117] Consequently, Milošević was aware of these limits. However, if the time available to an accused to present his case is severely limited and he is able to substantiate why he needs more time to present his witnesses to render his defence more effective, courts should reconsider the amount of time provided to him. If cases of such complexity are processed in an adversarial system, a balance should be sought between the freedom of the parties and the trial management capacities of the judges. Additionally, the HRC and the ECHR have established that restricting the defence in its right to cross-examine prosecution witnesses, and in its right to call witnesses may amount to inequality of arms. Like the

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111 Rule 73*ter*(C), ICTY RPE; Rule 73*ter*(D) ICTR RPE.

112 Rule 73*ter*(E), ICTY RPE; Rule 73*ter*(C) ICTR RPE.

113 Rule 73*ter*(D) and (F), ICTY RPE; Rule 73*ter*(E) ICTR RPE.

114 This amounted to the following time allotment: The defence case should take no longer than 150 days, consisting of 90 days to present the case in chief (equaling the amount of time the Prosecution needed) added up with another 60 days (two-thirds of 90) for cross-examination of defence witnesses and dealing with administrative matters. See ICTY Tr. Ch., Order Rescheduling and Setting the Time Available to Present the Defence Case, *Milošević* (Case No. IT-02-54), 25 February 2004 (hereinafter: Order Rescheduling and Setting the Time).

115 According to the Trial Chamber, equality of time for the prosecution and the defence to present their respective cases is one way to achieve fair and equal treatment of parties. See Decision in Relation to Severance, Extension of Time and Rest, *Milošević* (Case No. IT-02-54-T), 12 December 2005 (hereinafter: Decision in Relation to Severance), § 24.

116 Order Rescheduling and Setting the Time, *Milošević*, *supra* note 114.

117 See *ibid.*; Second Order Recording Use of Time in the Defence Case, *Milošević* (Case No. IT-02-54-T), 23 March 2005; Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, *Milošević* (Case No. IT-02-54-T), 19 May 2005.

statutory fair trial provisions of the *ad hoc* Tribunals,[118] Article 14(3)(e) of the ICCPR entitles an accused in criminal proceedings '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'. It is intended to grant the accused the same legal powers as the prosecution to compel the attendance of witnesses and to examine or cross-examine witnesses.[119] The HRC held in *Larrañaga v. Philippines* that in case of serious charges, a court's refusal to hear particular 'defence witnesses without any further justification other than that the evidence was "irrelevant and immaterial" and the time constraints, while, at the same time, the number of witnesses for the prosecution was not similarly restricted', violated Article 14(3)(e).[120] Thus, if time constraints lead to a disparity, they are not legitimate according to the HRC. According to the ECHR in *Vidal v. Belgium*, Article 6(3)(d) of the ECHR[121] generally leaves it to the court 'to assess whether it is appropriate to call witnesses', and 'does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter'.[122] As the accused's four witnesses for the defence were not called, Article 6 was violated. This case is a good illustration of a civil law approach towards defence evidence. The Brussels Court of Appeal deemed that the evidence available in the dossier sufficiently established the guilt of the accused and for that reason, no further investigations were necessary "for establishing the truth".[123] As the prosecution did not call any witnesses, the ECHR reasoned that the principle of equality of arms does not exhaust the contents of Article 6(3)(d), nor the contents of Article 6(1) guaranteeing a fair trial.[124] Finally, the ECHR held that 'the rights of the defence were restricted to such an extent' that the applicant did not receive a fair trial.[125] Moreover, it awarded the defendant more than EUR 6000,- for non-pecuniary damages.[126] Although the court has discretion with regard to calling witnesses, the essential aim of Article 6(3)(d) being "full equality of arms", this implies that the number of prosecution witnesses should form the basis for assessing what number of defence witnesses can be called.

In *Milošević*, the accused had less power to compel the attendance of witnesses than the prosecution. The court could have remedied this disadvantage. Granting him the same number of witnesses as the prosecution would not have been necessary. But, rather than rigidly holding on to a time limit, the court should have made more effort to reinforce the rights of the accused. According to assigned counsel, the 'inequality in strength' between the prosecution and the accused needed compensation.[127] Even though it is impossible for an international criminal court to compensate an accused

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[118] See Article 20(4)(e) ICTR Statute; Article 21(4)(e) ICTY Statute.
[119] See CCPR General Comment No. 13, *supra* note 26, par. 12.
[120] HRC, *Larrañaga v. Philippines*, CCPR/C/87/D/1421/2005 (14 September 2006), § 7.7.
[121] This clause is equal to Article 14(3)(e) ICCPR.
[122] ECHR, *Vidal v. Belgium* (Appl. No. 12351/86), 22 April 1992, § 33.
[123] *Ibid.*, § 31.
[124] *Ibid.*, § 33.
[125] *Ibid.*, § 35.
[126] The amount was 250.000 Belgian Francs. See ECHR, *Vidal v. Belgium (Article 50),* (Appl. No. 12351/86), 28 October 1992.
[127] Decision in Relation to Severance, *Milošević*, *supra* note 115, § 13.

for every disadvantage he may suffer vis-à-vis the prosecution, in this case, the court could have made a more substantial effort. Milošević represented himself. The Tribunal appointed *amici curiae* and later assigned counsel to complement his defence.[128] While their appointment was against the wishes of the accused, the time that they used seems to have been counted as defence time.[129] It is unfair to let these *amici* or counsel curtail the accused's time without compensating him for it. This should have been a compelling reason for granting Milošević more time than the prosecution.

However, all circumstances considered, it is obvious why the Chamber let expedience prevail over the rights of the accused under the pretext of acting under its duty of guaranteeing him a fair trial. Milošević's choice to conduct his own defence in combination with his health had produced considerable delays. He used nearly all of the time that was made available to him to defend himself against the counts on one out of the three joint indictments against him. He requested more than a 100% additional time to present his 190 witnesses, without seriously considering the use of written witness testimony to save court time, as the prosecution had done.[130] As a result, the Chamber was not in the least convinced that Milošević genuinely *tried* to conduct his defence efficiently. An accused is entitled to 'a reasonable and adequate opportunity to present his case'. Because of his pertinent failure to be reasonable as to the presentation of his case and the Chamber's fundamental obligation to bring a trial to a fair and expeditious conclusion, the Chamber considered equality of time to amount to 'an appropriate measure of fairness'.[131] According to the ECHR in *Asch v. Austria,* '[a]ll the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that the statement of a witness must always be made in court and in public if it is to be admitted in evidence, in particular, this may prove impossible in certain cases.'[132] The ECHR in this case confirmed that written prosecution witness statements are admissible as evidence as long as the accused receives adequate opportunity to challenge those statements.[133] However, the degree to which a court may require an accused to produce written witness statements rather than having his witnesses examined in court, is a different question. Particularly, since the *ad hoc* Tribunals generally favour oral testimony over written testimony.[134] It could be argued that the need for an expeditious trial may necessitate that both the prosecution and the defence present their evidence in a more efficient manner. The *ad hoc* Tribunals are under such time pressure, that strict time limits are applied in all cases. For instance, in the ICTY's lump sum system, each level of complexity as to which a defence team may be classified, also stands for a limited amount of time.[135] However, as noted earlier, if the

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[128] As to the right to self-representation and its consequences, see *infra*, Chapter VII.
[129] See Decision in Relation to Severance, *Milošević*, *supra* note 115, § 19.
[130] See *ibid.*, § 14.
[131] See *ibid.*, §§ 24-26.
[132] ECHR, *Asch v. Austria* (Appl. No. 12398/86), 26 April 1991, § 27.
[133] See *idem*.
[134] Cf. *supra*, Chapter IV, paragraph 4.3.4.
[135] Level 2 cases get roughly two times more time than level 1 cases and level 3 cases get roughly three times more time than level 1 cases. See ICTY Defence Counsel Payment Scheme for the Pre-Trial Stage, 1 May 2006, par. 29.

defence needs additional time, a flexible approach is preferable over a rigid time management attitude. Therefore, the ECHR standard of applying a full equality of arms to witness testimony should have prompted the Tribunals at least to consider allowing the accused approximately the same number of live witnesses as the prosecution had presented and to present the remainder through written witness statements. But this was not even attempted. In addition, the fact that the defence may not have the same tools as the prosecution to produce written witness statements, was not considered a reason to grant the accused more time to present his witnesses. The assigned counsel's confirmation that all defence teams before the Tribunal lacked resources to produce written witness testimony[136] did not persuade the court.

In *Orić*, the prosecution was allowed to call 50 witnesses and had 100 days of testimony time, whereas the defence could only call 30 witnesses (instead of the 73 requested) and was granted 27 days of testimony time.[137] The Appeals Chamber stressed that the principle of equality of arms does not imply that the prosecution and the defence are 'entitled to precisely the same amount of time or the same number of witnesses'.[138] For instance, because of their different roles, the prosecution might have greater quantitative needs in terms of evidence to present than the defence:

> 'The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses.'[139]

This reasoning is rather general. It was obvious in this case that the defence endeavoured to do a lot more than 'poking targeted holes' in the prosecution's case. But even if poking holes would be the focus of a defence case, the size of the prosecution case may require the defence to tailor its case to it, as a matter of strategy. The more evidence the prosecution presents, the more there is for the defence to refute. Nonetheless, the Appeals Chamber took a more flexible approach than the Trial Chamber in *Milošević*. Holding that 'a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides', the Appeals Chamber in *Orić* weighed up both time and the number of witnesses of the prosecution and the defence against each other. It also tried to find a balance between the Trial Chamber's power under Rule 73 *ter* of the Rules of Procedure and Evidence to limit the length of time and number of witnesses allocated to the defence case and Article 21 of the Statute that safeguards the rights of the accused. To reach this balance, the Appeals Chamber applied an objective test to establish whether the allocated time would be 'objectively adequate' for the accused to conduct his defence 'in a manner consistent

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136 See Decision in Relation to Severance, *Milošević*, *supra* note 115, § 20.

137 According to a calculation by the defence this would come down to having one hour per witness for the examination in chief. ICTY App. Ch., Interlocutory Decision on Length of Defence Case, *Orić* (Case No. IT-03-68-T), 20 July 2005, § 9.

138 *Ibid.,* § 7.

139 *Ibid.,* § 7.

with his rights.'[140] Considering the complexity of the issues at stake, the amount of time as well as the number of witnesses allotted to the defence should be reasonably proportional to the prosecution's allotment and should give the accused a fair opportunity to present his case. The disparity in this complex case between the number of witnesses and the amount of time allotted to both parties was so obvious, that it was not necessary for the defence to show any specific prejudice.[141]

When the defence is seriously limited in presenting its case, that may affect its effectiveness. As the prosecution was not put under similar restrictions in *Orić*, this case constituted a violation of the principle of equality of arms. The Appeals Chamber considered that had the defence been granted more time, its 'strategy with the witnesses presented so far – both in terms of the subject matter discussed and in terms of the amount of time taken for examination – might have been very different.'[142] How to repair the damage suffered by the defence is a difficult question at such a late stage of proceedings. The Chamber deemed that to allow the defence extra time to enable it to recall some of its witnesses to fully address the issues the defence considers necessary, was sufficient compensation. Balancing this compensation against the expediency concerns, the Chamber stressed that this opportunity was granted on the condition that it would not be abused.

The different approaches in *Orić* and *Milošević* with regard to applying the principle of equality of arms in the context of allotting time and witnesses to the defence are explicable by the different circumstances of both cases. In the view of the Chamber, Milošević did not make any effort to use his time efficiently. In *Orić*, not only was the defence limited in the number of witnesses it wished to present, it was also limited in the time to present its case without the prosecution being under the same constraints. Thus, the inequality of arms between the prosecution and the defence was more evident. Given that the prosecution has more resources at its disposal than the defence it could therefore be more difficult for the defence to produce written witness evidence. It requires the presence of an official of the Tribunal.[143] The defence could genuinely be unable to process the same number of witnesses as the prosecution when given an equal amount of time. Any inequality as to means, resources and, also in some cases as to experience in international criminal proceedings might prevent the defence from being genuinely able to use its time as efficiently as the prosecution. The Appeals Chamber in *Orić*, in addition to testing the proportionality of time and witnesses available to the defence and the prosecution also applied an objective test as to whether the time allocated to the defence would be objectively adequate taking into account all the relevant circumstances, including the complexity of the case. This two-step approach seems better in line with the principle of equality of arms and the right to a fair trial than the approach taken in *Milošević*. Merely applying mathematics to ensure that the accused will be granted the exact same amount of time as the prosecution, without considering any compensation were the

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[140] *Ibid.,* § 8.

[141] See *ibid.*, § 9.

[142] *Ibid.,* § 10.

[143] Cf. *supra*, Chapter IV, paragraph 4.3.4. See Rule 92*bis*(B) ICTY and Rule 92*bis*(B) ICTR RPE. Cf. also ICTR Tr. Ch. I, Decision on Bagosora Defence Request for Court to Direct ICTR Registrar to Attend Kigali on Mission to Witness Signing of Defence Witness Statement(s), *Bagosora et al* (Case No. ICTR-98-41-T), 20 February 2007.

defence to be significantly disadvantaged, is less fair than the Trial Chamber contended in *Milošević*. In *Prlić*, the Appeals Chamber considered a proposal of the Trial Chamber to reduce the time for the prosecution case. It held: 'The Trial Chamber's duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests. This is particularly so in a trial of this scope and complexity, for which there is little precedent.'[144] The Appeals Chamber decision in *Orić* has made defence teams at the ICTR appeal a decision to limit the number of their witnesses to half the number of prosecution witnesses.[145]

Overall, it can be concluded that the policy-implementing goal of the *ad hoc* Tribunals to expedite proceedings cannot legitimately be achieved through imposing limits on the number of defence witnesses or on the amount of time for the defence to present its case, if the same restraints are not imposed on the prosecution.

5.5 State Cooperation and Access to Evidence

In *Blaškić*, the ICTY Appeals Chamber remarked that 'the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States.'[146] In national criminal proceedings, if the defence is unable to obtain evidence from state authorities, judges can make the authorities comply with the defence requests through court orders. Due to the lack of adequate enforcement mechanisms, international criminal courts can have more difficulty to compel uncooperative authorities to cooperate, even though states have a duty to cooperate with international criminal courts.[147] Nonetheless, states can be reluctant to provide sensitive information or material to the defence, to protect national security interests. If state authorities comply more readily with prosecution requests for evidence than with defence requests, this could produce disparity in access to evidence. For the principle of equality of arms to be satisfied, should the defence have equal access to evidence as the prosecution? And if the defence is unable to access evidence, what, if any, should be the consequences? This paragraph examines whether the lack of equal access violates the principle of equality of arms and whether this entitles the defence to any compensation.

It has been argued that considering the Tribunals' predominantly adversarial system, the Statute and Rules of Procedure and Evidence fail to provide the necessary

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144 ICTY App. Ch., Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing the Prosecution Case, 6 February 2007, *Prlić, et al.* (Case No. IT-04-74-AR73.4) (hereinafter: Decision on Prosecution Appeal), § 16.

145 As this appeal was still pending at the point where the research for this project was finished, its result unfortunately could not be included in this study. See ICTR Tr. Ch. II, Decision on Joseph Kanyabashi's Motion for Certification to Appeal the Decision of 21 March 2007, *Kanyabashi et al.* (Case No. ICTR-96-15-T; Joint Case No. ICTR-98-42-T), 3 May 2007.

146 ICTY App. Ch., Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (Case No. IT-95-14-A R108*bis*), 29 October 1997 (hereinafter: Judgement on the Request of Croatia).

147 See Article 28 ICTR Statute; Article 29 ICTY Statute. State Parties to the Rome Statute have a duty to cooperate with the ICC.

rights for the defence to function effectively and to gather evidence.[148] In *Tadić*, the defence contended that the Serbian authorities gave it neither an effective opportunity to gain access to defence witnesses, nor to the key sites in the Prijedor region where the alleged crimes were committed. According to the defence, this constituted inequality of arms.[149] The Appeals Chamber notes 'that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case'[150] and 'that the Prosecution and the Defence must be equal before the Trial Chamber'.[151] The judges recognized that states can impede counsel's efforts to obtain the evidence in their custody. However, they felt that a court has a limited role to ensure equality between the defence and the prosecution if the disparity results from external factors, such as a lack of state cooperation. Notwithstanding the defence's argument that this principle should guarantee procedural equality as well as substantive equality in order to ensure a fair trial,[152] the Appeals Chamber concurs with the ECHR and HRC that this principle reflects procedural rather than actual equality.[153] The Appeals Chamber argued that the ECHR and HRC case law on this principle does not stipulate that the principle should also apply 'to conditions, outside the control of a court'. In the ECHR cases where this principle was at issue, the judges were in a position to grant the applications of the defence and to put it on a par with the prosecution. Furthermore, whereas domestic courts can 'control matters that could materially affect the fairness of a trial' through state enforcement mechanisms,[154] international criminal courts have no autonomous enforcement agencies at their disposal to achieve this.[155] Conditions that may put the defence at a substantial disadvantage and which are outside the court's control are excluded from the scope of this principle.[156] International criminal courts give the principle of equality of arms '*a more liberal interpretation*[157] than that normally upheld with regard to proceedings before domestic courts'.[158] This potentially has severe implications for the defence. The ICTY does not believe it has any legal obligation to compensate the defence for a lack of state cooperation, even if this significantly harms the defence in comparison to the prosecution. The court will just provide 'every practicable facility it is capable of granting under the Rules and Statute' if a party requests the court's assistance, and trusts that its legal provisions 'alleviate the difficulties faced by the parties so that each side may have equal access to witnesses.'[159] Rule 54 of the ICTY RPE allows the Chamber to issue subpoenas to compel the attendance of witnesses or to order states

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[148] Calvo-Goller, Karin N., *The Trial Proceedings of the International Criminal Court. ICTY and ICTR Precedents*, Martinus Nijhoff Publishers (Leiden, Boston 2006), p. 50.
[149] App. Ch. Judgement, *Tadić*, *supra* note 6, § 31.
[150] *Ibid.,* § 48.
[151] *Ibid.*, § 52.
[152] *Ibid.*, § 30.
[153] *Ibid.*, § 50. Cf. *supra* note 20.
[154] *Ibid.,* § 51.
[155] Cf. *ibid.*, §§ 49-52.
[156] Cf. *ibid.*, §§ 49-52; App. Ch. Judgement (Reasons), *Kayishema and Ruzindana*, *supra* note 27, § 73.
[157] Emphasis added, J.T.T.
[158] App. Ch. Judgement, *Tadić*, *supra* note 6, § 52.
[159] *Idem.*

to produce evidence. When its measures fail to deliver, it may adjourn or stay the proceedings.[160]

That the Tribunal calls this approach "more liberal" led to confusion. It has been believed to imply a more lenient approach favouring the defence.[161] However, in the context of *Tadić*, "more liberal" means that the Chamber will help the defence obtain equal access to evidence only in as far as this would be within its control. If every endeavour to obtain a state's cooperation fails, this will not affect the principle of equality of arms and does not require a remedy. This approach is not necessarily at odds with what the ECHR prescribes. For instance, in *Barberà v. Spain*, the ECHR, even though it concluded that the defence was impeded from examining a certain witness, and this conflicted with the adversarial principle, Spain was not held accountable for its failure to ensure the attendance of a particular witness, as the court had issued a warrant.[162]

Nonetheless, the Tribunal could have been more creative in finding solutions to bring the defence and prosecution more on a par. If the defence is unable to present relevant evidence, this can have a substantial impact on the overall fairness of a trial. Access to the territory where the crimes took place can be vital to prove the accused's innocence or a lower degree of criminal responsibility. The accused has a right to challenge the evidence against him. If important information will be withheld from the defence because of national security concerns, whereas it is available to the prosecution, it is impossible for the defence to challenge it or to verify its reliability, unless it is disclosed by the prosecution. One remedy for this disparity is to give the defence better access to documents in possession of the prosecution. In *Blaškić* it was suggested that this could be established through appointing an independent officer for this matter, preventing defence counsel having full access to prosecution documents.[163] Disclosure obligations of the prosecution are however distinct from obligations of international organizations or states to grant access to its documents. If the inequality between the prosecution and defence would remain disproportional, judges could compensate the defence by excluding prosecution evidence that was gained through the cooperation of a state authority, if these authorities consistently refused to cooperate with the defence. Such measures to compensate the defence are only warranted if the defence has made proper efforts to obtain the information or material by itself.

Where disclosure is concerned, a lack of due diligence has serious consequences. In order to obtain a review of a verdict, where new facts are discovered after proceedings have resulted in a verdict, this can only lead to a review on the condition that these facts 'could not have been discovered through the exercise of *due diligence'*.[164]

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[160] See *idem*.

[161] Cf. Knoops, Geert-Jan Alexander, *Theory and Practice of International and Internationalized Criminal Proceedings* (The Hague: Kluwer Law International, 2005), pp. 39, 40; Negri, Stefania, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure', 5 *International Criminal Law Review* (2005), pp. 513–571, p. 545.

[162] ECHR, *Barberà, Messegué and Jabardo v. Spain* (Appl. No. 10590/83), 6 December 1988, § 85.

[163] See ICTY Tr. Ch., Decision on the Production of Discovery Materials, *Blaškić* (Case No. IT-95-14-PT), 27 January 1997. Cf. McIntyre (2003), *supra* note 42, p. 320.

[164] Rule 119 ICTY RPE; Rule 120 ICTR RPE. Emphasis added, JTT.

Before requesting a court to order state authorities to cooperate, a party itself must try to obtain the required information. Following the Appeals judgement in *Tadić*, Rule 54*bis* of the Rules of Procedure and Evidence was introduced, formulating the conditions under which a party can request the Chamber to secure state cooperation. A party should take "reasonable steps" to secure the information or documents.[165] In *Milutinović et al.*, the Chamber held that by refusing conditional offers of a state regarding the requested information, the defence could not 'be said to have failed to take reasonable steps to secure voluntary cooperation'.[166]

The specificity requirement entails that the requesting party should describe the requested documents or information in as much detail as possible.[167] In *Aleksovski*, the Appeals Chamber argued that defence counsel must 'make proper enquiries as to what evidence is available' in their client's defence.[168] In *Blaškić*, it was ruled that requests should concern specific documents, not *broad* categories.[169] In subsequent cases, the ICTY held that a request *may* include the production of documents falling under a category, provided that it is 'defined with sufficient clarity to permit ready identification of its members and […] is not so broad as to be oppressive'.[170] A clearly defined category could meet the specificity requirement of Rule 54*bis*(A)(i).[171] To satisfy the requirement, a request could for instance be 'temporally circumscribed', and indicate the persons that the information concerns. Furthermore, as was held in *Milutinović et al.*, a Rule 54*bis* request should be 'reasonable in light of all the circumstances'.[172] The requesting party should indicate the relevance of the documents or information and the necessity thereof for a fair determination of a matter at issue in the case.[173] Obviously, this can be very difficult without the information being available.

Although the ICTR has not included a provision as Rule 54*bis* in its RPE, the same conditions seem to apply at this Tribunal. In *Karemera et al*, the defence made apparent attempts to obtain a specific videotape from the Rwandese authorities and convinced the Chamber of its relevance for the trial. The Prosecution had also unsuccessfully attempted to obtain it. Therefore, the Chamber decided formally to request the cooperation of Rwandan authorities to secure a copy of the videotape.[174]

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165 See Rule 54*bis*(B)(ii) ICTY RPE.

166 ICTY Tr. Ch., Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*BIS*, *Milutinović et al.* (Case No. IT-05-87-PT), 17 November 2005 (hereinafter: Decision on Second Application), § 24.

167 Rule 54*bis*(A)(i) ICTY RPE.

168 Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 18.

169 Judgement on the Request of Croatia, *Blaškić*, *supra* note 146, § 32.

170 ICTY Tr. Ch., Order to the Republic of Croatia for the Production of Documents. Opinion by Judge Mohamed Shahabuddeen, *Blaškić* (Case No. IT-95-14), 21 July 1998, p. 12.

171 See ICTY App. Ch., Decision on the Request of the Republic of Croatia for Review of a Binding Order, *Kordić and Čerkez* (Case No. IT-95-14/2-A), 9 September 1999 (hereinafter: Decision on the Request of the Republic), § 38.

172 See, for instance, Decision on Second Application, *Milutinović et al*, *supra* note 166, § 20.

173 See Rule 54*bis* (A)(ii) ICTY RPE.

174 ICTR Tr. Ch. III, Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND Videotape - Article 28 of the Statute of the Tribunal, *Karemera et al* (Case No. ICTR-98-44-T), 14 December 2006, §§ 4-7.

A State may not limit the information requested to those documents that are favourable to the requesting party only. 'If a specific request is made for the production of material relevant to an issue in the case, then the primary obligation of a State is to co-operate with the Applicant by searching for any material falling within the terms of the Request.'[175] In *Kordić* and *Čerkez*, it was ruled that the Chamber makes the final determination as to the relevance of the information that is requested. States are not in a position to challenge the relevance thereof.[176]

International organizations have likewise denied the defence proper access to their documents. In *Hadžihasanović and Kubura*, the defence was denied full access to the archives of the European Union Monitoring Mission (EUMM).[177] According to the defence, the principle of equality of arms requires that if the Prosecution has 'access to a relevant archive of documents, the Defence should be afforded the same access to prepare for trial'. The Trial Chamber denied that the defence should have access to exactly the same material as the prosecution. The Rules of Procedure and Evidence expressly allow for exceptions.[178] Rule 70(B) involves an exception to the disclosure obligations of the prosecution concerning information that was provided to it on a confidential basis. If the information was solely used to assemble new evidence, the prosecution does not need to disclose it.[179] Nonetheless, as soon as the defence had added more details to its application regarding the EUMM archives, the Chamber instructed the organization to allow the defence access to a specific part of the evidence it had requested.[180]

States may want to protect information for national security reasons. The ICC Statute provides that if a state refuses disclosure in order to protect national security information, 'if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused', it may nonetheless order disclosure, request cooperation or 'make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances'.[181] It seems that the ICC is prepared to compensate the defence when authorities are unwilling to cooperate.

The fact that the defence knows particular information or evidence exists, does not imply that the information will be provided to it if authorities refuse to cooperate. It may conflict with the principle of equality of arms to deny the defence access to particular information that the prosecution has access to if the defence has made proper efforts to secure it. Counsel must at all times exercise due diligence and

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[175] Decision on Second Application, *Milutinović et al*, *supra* note 166, § 23. The Chamber issued an order that particular states as well as NATO should supply the defence with its sources. Cf. also Warrell, Helen, 'Defence Teams Demand Equality', *IWPR Tribunal Update No. 435* (2005), 23 December 2005.

[176] Decision on the Request of the Republic, *Kordić and Čerkez*, *supra* note 171, § 40.

[177] See, for instance, ICTY Tr. Ch. II, Decision on Defence Access to EUMM Archives, *Hadžihasanović and Kubura* (Case No. IT-01-47), 12 September 2003.

[178] ICTY Tr. Ch. II, Decision on Joint Defence Application for Certification of Decision on Access to EUMM Archives of 12 September 2003, *Hadžihasanović and Kubura* (Case No. IT-01-47), 25 September 2003.

[179] Rule 70 (B) ICTY RPE.

[180] See ICTY Tr. Ch. II, Decision on Defence Motion for Access to EUMM Archives, *Hadžihasanović and Kubura* (Case No. IT-01-47), 15 December 2003.

[181] See Article 72(7) ICC Statute.

make a genuine attempt to obtain the requested information or material. Well-founded requests are more difficult for any Chamber to dismiss without proper motivation than so-called "fishing-expeditions". To help a Chamber respond positively to any request to assist the defence in obtaining evidence, the defence should specify the required information or materials as much as possible. Even so, equal access to evidence cannot always be secured, as international criminal courts will not always succeed in getting states or organisations to cooperate, in particular where it concerns highly confidential information. If the defence misses an opportunity to obtain relevant evidence for the determination of the guilt or innocence of the accused, it cannot advance an adequate defence. If the prosecution has better access to evidence, this clearly puts the defence at a substantial disadvantage, which conflicts with the principle of equality of arms as well as with the adversarial principle. The ICTY's "more liberal" interpretation of the principle of equality of arms should have been accompanied by adequate compensation mechanisms. Even if the Chamber did everything in its power to compel compliance with the defence requests, if the defence remains handicapped, this requires compensation. This could include the exclusion of evidence or mitigation of the punishment. If it is likely that the lack of evidence may have affected the outcome of the trial, that should warrant a retrial.

5.6 The Prosecution's Reliance on the Principle of Equality of Arms

Some privileges afforded to the defence are not available to the prosecution. It is questionable whether this requires compensation. Because the principle of equality of arms is a fair trial requirement and fair trial standards are adopted to serve the accused,[182] this could imply that the defence alone is able to invoke this principle. Under the ICC Statute, solely the defence, not the prosecution, may file as a ground of appeal any 'ground that affects the fairness or reliability of the proceedings or decision.'[183] In a domestic context, the prosecution, being a representative of a state, is not protected by fair trial rights.[184] According to the ICTY Appeals Chamber in *Aleksovski* however, 'application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged'.[185] Clearly, the balance of advantages between the defence and the prosecution can be lopsided to the detriment of the prosecution. The prosecution has the burden to prove the accused's guilt beyond a reasonable doubt, but whether any disadvantages for the

[182] More specifically, in the view of Fletcher, the requirement of a fair trial is not about satisfying the rights of a particular accused, but is primarily meant to set a standard for the way in which criminal defendants as a whole should be dealt with in assessing individual liability. See Fletcher, George P., Justice and Fairness in the Protection of Crime Victims, *Lewis & Clark Law Review*, Fall 2005, Vol. 9, pp. 547-556, p. 548.
[183] Article 81(1)(b)(iv) ICC Statute.
[184] Cf. Spaniol, Margret, *The Right to Assistance of Defence Counsel under the Constitution and under the European Convention on Human Rights* (Das Recht auf Verteidigerbeistand im Grundgesetz und in der Europäischen Menschenrechtskonvention) (Berlin: Duncker & Humblot, 1990), pp. 231, 233.
[185] See, for instance, Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 25.

prosecution allow it to invoke the principle of equality of arms in international criminal proceedings is doubtful.

At the ICTY in *Tadić*, the prosecution invoked the principle of equality of arms, to make the defence disclose a prior statement of a defence witness. Judge Vohrah argued that in criminal proceedings the principle of equality of arms applies to the defence, not to the prosecution.[186] Judge Stephen similarly argued that the prosecution should regard the "fruits" of its investigation as public property to see that justice will be done. The defence has different disclosure obligations and is in no way obliged to help the prosecution secure a conviction. The defence and the prosecution have differing disclosure obligations in the majority of legal systems.[187] In *Delalić et al*, the Trial Chamber argued that the Tribunal's Statute intends to safeguard parity of opportunity both for the prosecution and the defence.[188] The right to have an adversarial trial is closely related to the concept of equality of arms.[189] Consequently, meeting the prosecution's request, the defence was ordered to disclose the names of defence witnesses before the commencement of trial because the prosecution was equally under the obligation to disclose its list of witnesses to the defence. Given the circumstances, the application of the principle of equality of arms to the benefit of the prosecution would 'shorten delays and reduce unnecessary and avoidable tension on the victims and witnesses'.[190] The Chamber thereby went further than the Rules of Procedure and Evidence of the Tribunal, which at that time[191] imposed such an obligation on the defence solely if it planned on raising a special defence, such as the defence of alibi.[192] The Appeals Chamber in *Aleksovski* followed this line of reasoning arguing that 'it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.'[193] In *Prlić et al*, the ICTY Appeals Chamber reiterated that 'under Article 20(1) of the Statute […], the requirement of the fairness of a trial is not uniquely predicated on the fairness accorded to any one party. Indeed, the principle of equality of arms, falling within the fair trial guarantee under the Statute,

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186 Separate Opinion of Judge Vohrah, *Tadić*, *supra* note 43.

187 ICTY Tr. Ch., Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, *Tadić* (Case No. IT-96-1-T), 27 November 1996.

188 See ICTY Tr. Ch., Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, *Delalić et al.* (Case No. IT-96-21-T), 4 February 1998, § 46.

189 *Ibid.,* § 47.

190 *Idem*.

191 The Rules of Procedure and Evidence were revised in the end of 1999, obliging the defence to disclose its witness list and exhibits to the prosecution before the start of the defence case. The current Rule 65*ter*(G) stipulates that the defence should file its list of witnesses and its list of exhibits after the close of the Prosecutor's case and before the commencement of the defence case. The witness list should include a summary of the facts and points in the indictment that they will testify on; the number of witnesses; whether it will be live or written testimony on the basis of Rule 92*bis*; an estimation of the time needed for each witness and of the total time for the presentation of the defence case.

192 See Rule 67(A) ICTY RPE.

193 Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 25. The Appeals Chamber also emphasized that defence counsel is under a firm obligation 'to make proper enquiries as to what evidence is available' in his client's defence. *Ibid.*, § 18.

applies to the Prosecution as well as the Defence.'[194] Therefore, the ICTY equally allows the prosecution and the defence to invoke the principle of equality of arms.

In *Dombo Beheer BV v. The Netherlands,* the ECHR argued that equality of arms requires a fair balance between the parties. This, however, concerned civil proceedings in which parties may be relatively equal. In *Delcourt v. Belgium*, a criminal case, the ECHR acknowledged that there was an inequality for the prosecution at a particular stage of proceedings but this did not produce a reason to compensate the prosecution.[195] Cassese distinguishes between the principle of equality of arms as a concept developed in ECHR case law, which solely applies to the accused, and the concept that parties should be equal in adversarial proceedings. The latter applies to both parties. Cassese contends that these two concepts are occasionally confused in the case law of the ICTY, for instance, in *Aleksovski*.[196]

According to the Appeals Chamber in *Aleksovski*, the ECHR interprets the principle of equality of arms and of adversarial proceedings as entailing equality both for the prosecution and the defence.[197] However, the ECHR never considered that the prosecution was entitled to compensation for any lack of equality of arms. Therefore, it cannot safely be concluded that the ECHR will allow the prosecution to invoke this principle to its own benefit on the same basis as the defence.

The Statute guarantees a fair trial to the accused, not to the prosecution. Even so, according to the Appeals Chamber in *Aleksovski*, the concept of a fair trial should be applicable to the prosecution as well as the defence, because the Prosecution acts on behalf of and in the interests of the victims and of the international community.[198] Moreover, it is reasoned, provided that his fundamental protections, such as his right not to incriminate himself, will not be jeopardized, the accused need not be favoured over the prosecution.[199]

Given the adversarial character of the proceedings at the ICTY, the Rules of Procedure and Evidence should provide for a fair contest between the parties. The defence and the prosecution should be granted an equal opportunity effectively to present their respective cases. As a representative of the international community, and being an organ of the court, the prosecution generally enjoys a stronger position than the defendant. To compensate for this, the defence should be granted certain privileges that will not equally be granted to the prosecution. Only in cases of an exceptional, disproportional and *unjustifiable* difference vis-à-vis the defence should the prosecution be successful in invoking the principle of adversarial fairness. That should be in those instances where it was genuinely unable properly to participate in the contest. In *Prlić*, the Trial Chamber reduced the amount of time it had promised the prosecution to present its case by 107 days. Thereupon, the prosecution contended that this "impermissibly" prioritized the Completion Strategy 'over the rights of the

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[194] Decision on Prosecution Appeal, *Prlić et al*, *supra* note 144, § 14 (footnotes omitted).

[195] *Delcourt v. Belgium*, *supra* note 10, § 19, in which the ECHR considered that there had been inequality but that this had worked out in the advantage of the defendant.

[196] See Cassese, Antonio, *International Criminal Law* (Oxford: Oxford University Press, 2003), pp. 395 and 396 including footnote 14.

[197] Cf. Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 24. See for instance, the ECHR cases *Brandstetter v. Austria*, § 67 and *Barberà v. Spain*, § 78.

[198] See Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 25.

[199] See *idem*.

victims, the Prosecution and the international community.'[200] The Appeals Chamber finally ordered the Chamber to reassess whether the prosecution would still have 'a fair opportunity to present its case in the light of the complexity and number of issues that remain' if its time were to be substantially reduced.[201] Rather than raising the principle of equality of arms, this reasoning acknowledges the necessity in adversarial proceedings for each party to present its case in a fair manner.

Obviously, not every disparity between the prosecution and the defence requires reparation. If the accused is favoured over the prosecution in the law of the Tribunal, that might be intended to compensate the accused for his inferior position vis-à-vis the prosecution in other respects. In the context of disclosure obligations, to reason that 'for the purposes of fair play the Defence must show part of its hand to the Prosecution'[202] may remove any edge the defence was intended to have on the prosecution.

The defence has made important sacrifices where its disclosure obligations are concerned. The ICTY RPE formerly obliged the prosecution to 'disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.' [203] The purpose of the prosecution's duty to disclose exculpatory evidence to the defence was to lower the burden on the defence to conduct its own investigations. It should also enhance the search for the truth.[204] In the end of 2003, the Rule regarding the prosecution's disclosure obligations was amended. Only those materials of which the prosecution has "actual knowledge" of being exculpatory must be disclosed. Furthermore, the prosecution no longer has any obligation to disclose if doing so might 'prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State'.[205] In such a case, the prosecution should request the Chamber *in camera* to relieve it from its duty. It has been argued that, if no "corresponding safeguards" are installed for the defence, this provision 'will have an unjustifiably detrimental effect for the defendant.'[206]

The ICTY has been reluctant in using its power under Rule 68*bis* of the Rules to issue sanctions upon a party's failure to meet its disclosure obligations. In *Krstić,* for instance, the ICTY Appeals Chamber acknowledged that the prosecution had fallen short of its disclosure obligations to the defence. Nonetheless, absent any proof that the prosecution had *deliberately* failed in its duties and where the defence could not demonstrate any material prejudice, no formal sanction was imposed.[207]

Considering the prosecution's lowered disclosure obligations regarding exculpatory evidence at the ICTY, the Tribunal should accept that the prosecution is

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[200] Decision on Prosecution Appeal, *Prlić et al*, *supra* note 144, § 13.
[201] *Ibid.,* § 24.
[202] ICTY Tr. Ch. I, Decision on Notification of Cross-Examination Material, *Haradinaj et al.* (Case No. IT-04-84), 31 May 2007, § 8.
[203] See Rule 68 ICTY RPE (IT/32/REV.6), 6 October 1995.
[204] Cf. Zappalà, Salvatore, 'The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE', 2 *JICJ* (2004), pp. 620-630, pp. 621, 622.
[205] Rule 68(iv) ICTY RPE.
[206] Zappalà (2004), *supra* note 204, p. 626.
[207] See ICTY App. Ch., Judgement, *Krstić* (Case No. IT-98-33-A), 19 April 2004, §§ 213, 214.

sometimes disadvantaged as compared to the accused. As Judge Vohrah argued in *Tadić*, no compelling reason justifies the prosecution in having fair trial rights in international criminal justice whereas this is unusual in national systems. The legitimate interest of the prosecution does not extend any further than its entitlement to a fair contest given the adversarial nature of the proceedings. This can be sufficiently safeguarded under the general duty of a Chamber to guarantee the fairness and integrity of the proceedings conducted before it. The principle of equality of arms as recognized as a fair trial right by the ECHR does not equally belong to the prosecution as to the defence. Therefore, it is unnecessary and unwarranted for the prosecution to invoke this right as such.

5.7 EQUALITY OF ARMS & JOINDER

It has been argued that a trial can be considered fair if 'two desiderata of equal treatment' are met. On the one hand, equality of arms between the prosecution and the defence and on the other, that all defendants shall be equal.[208] The latter is incorporated in the Statutes of international criminal courts.[209] According to the Chamber of the ICTY, that all persons shall be equal is based upon the principle of equality of arms.[210] The two concepts are sometimes confused. In *Prlić et al.*, the Trial Chamber prevented one accused from enjoying a particular privilege because this 'would compromise the principle of equality of arms.'[211] The Chamber probably meant to refer to equality among defendants rather than to the principle of equality of arms between the prosecution and the defence. When being tried jointly, equal treatment may thus result in privileges being withheld from one accused to prevent favouring him over his co-accused, whereas in a separate trial the same privilege might have been granted. As far as equal treatment of accused tried jointly is concerned, the RPE provide that '[i]n joint trials, each accused shall be accorded the same rights as if he were being tried separately.'[212] That equal treatment in joint trials should result in privileges being denied to any accused is an undesirable effect. The topic of joinder deserves attention.[213] This paragraph endeavours to establish whether the practice of joinder impedes the principle of equality of arms between the defence and the prosecution.

It is common at the *ad hoc* Tribunals that trials involve more than one accused.[214] Persons can be jointly charged and tried on the condition that they are 'accused of

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[208] Fletcher (2005), *supra* note 182, p. 548.
[209] See Article 21(1) ICTY Statute; Article 20(1) ICTR Statute; Article 17(1) SCSL Statute; Article 27(1) ICC Statute.
[210] See Decision on Prosecutor's Appeal, *Aleksovski*, *supra* note 1, § 23.
[211] See ICTY Tr. Ch. III, Decision on the Mode of Interrogating Witnesses, *Prlić et al.* (Case No. IT-04-74), 10 May 2007, § 13.
[212] Rule 82(A) ICTR RPE; Rule 82(A) ICTY RPE; Rule 136(2) ICC RPE.
[213] See for instance, Lombardi, Greg, Joinder of Cases. Commentary, in Sluiter and Klip (ed), *Annotated Leading Cases of International Criminal Tribunals. The International Criminal Tribunal for Rwanda 2000-2001* (Antwerp - Oxford - New York: Intersentia, 2003), pp. 134-142.
[214] Cf. Decision on Prosecution's Oral Request for the Separation of Trials, *Brđanin and Talić* (Case No. IT-99-36/1), 20 September 2002, § 18.

the same or different crimes committed in the course of the same transaction'.[215] This serves efficiency. In *Delalić*, the Chamber contended that this practice not only saves expenses, but it could also be desirable and in the interests of transparent justice for persons accused of the same offences to receive equal treatment and the same verdict. Trying these offenders separately would inevitably lead to discrepancies and inconsistencies.[216] The prosecution need not prove the same crime repeatedly. Its evidence can be corroborated for several accused at the same time. For prosecution witnesses it suffices to travel to the Tribunal only once.[217] According to the Trial Chamber in *Milutinović et al.* and *Pavković et al.* this minimises hardship to witnesses.[218] Furthermore, it was deemed that the duration of one joint trial was 'likely to be significantly shorter than the combined period necessary for two separate trials'.[219] The Chamber adopted a similar view in *Prlić*: 'While a joint trial seems to result in some delay, […] the time required to try the six Accused jointly will be significantly shortened with a joint trial and avoids that some accused wait to be tried until after the trials of other accused is concluded.'[220] Persons who are charged jointly may be tried separately if this is considered necessary to avoid prejudice to an accused, to protect the interests of justice, or if any person pleads guilty. The Chamber decides whether or not persons will be tried jointly.[221] It should strike a fair balance between, on the one hand, the guarantee each individual accused has to a fair and reasonably expeditious trial without being unjustifiably prejudiced, and on the other hand, the advantages of joint trials, including judicial economy and the decreased burden on victim witnesses to testify in multiple trials. The Chamber has considerable discretion in this.[222] It should also be considered that some differences between individual accused cannot be repaired even when they are treated as equals by the court. For instance, the time that is required to conduct an effective cross-examination may depend on the qualities, skills or even the legal background of the individual(s) conducting the defence. Judges should be considerate of those differences while conducting trials involving multiple accused. There may be circumstances that call for co-accused to be treated differently in order to guarantee a fair trial to each of them. This requires delicate balancing. In *Prlić et al*, one of the accused actively cross-examining witnesses in person was restrained by the judges who considered him to lack expertise and to ask mostly irrelevant questions, hereby delaying not only his own trial, but also that of his five co-

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[215] See Rule 48 ICTY RPE and Rule 48 ICTR RPE.

[216] ICTY Tr. Ch., Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, *Delalić and Delić* (Case No. IT-96-21-T), 1 July 1998 (hereinafter: Decision on the Motion), § 35.

[217] See Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the Security Council 13 June 2005, 13 June 2005, ICTY Press Release **(**CDP/MOW/977-e), available at www.un.org/icty/pressreal/2005/p977-e.htm.

[218] See ICTY Tr. Ch., Decision on Prosecution Motion for Joinder, *Milutinović, Šainović & Ojdanić* (Case No. IT-99-37-PT) and *Pavković, Lazarević, Đorđević & Lukić* (Case No. IT-03-70-PT), 8 July 2005.

[219] *Idem*.

[220] ICTY Tr. Ch. I, Decision on Defence's Motions for Separate Trials and Severance of Counts, *Prlić, Stojić, Praljak, Petković, Ćorić, and Pušić* (Case No. IT-04-74), 1 July 2005, § 24.

[221] See Rule 82(B) ICTR RPE; Rule 82(B) ICTY RPE; Article 64(5) ICC Statute, Rule 136(1) ICC RPE.

[222] Decision on the Motion, *Delalić and Delić*, *supra* note 216, § 35.

accused. The Chamber argued that '[i]n every multiple accused trial, a Chamber must make sure that the intervention of an accused does not affect the rights of other accused to an expeditious and fair trial.'[223]

In 2005, the Prosecutor of the ICTY recommended joining cases 'whenever possible so as to save court time while preserving all guarantees of due process.'[224] Whereas in 1998, the ICTR Prosecutor unsuccessfully endeavoured to have 29 accused tried in one trial,[225] in 2004, a successor argued that experience at the ICTR had shown that the total duration of conducting several single accused trials was shorter than the duration of one joint trial involving the same number of accused. Thus, as a prosecution strategy, joint indictments will no longer be favoured at the ICTR.[226]

It could be argued that the more defendants are tried in one trial, the more weight should be given to the defence as a whole vis-à-vis the prosecution. That would enhance the balance of advantages between the prosecution and the defence to the benefit of the defence. Nevertheless, if different accused are jointly tried, their defence strategies will not necessarily support each other's cases. Where the interests of the individual defendants diverge, the differing defence teams may undermine each other's defence strategies.

The higher the number of defendants in one trial, the more their interests and strategies may diverge. In *Mugenzi,* defence counsel for one accused argued that because his client intended to present evidence criticising the party of which his co-accused allegedly were influential members, his co-accused 'might be affected by this criticism and respond to the Accused in like manner'.[227] That could cause serious prejudice, but did not persuade the Chamber to sever the trial.[228] In *Talić*, the Chamber argued that '[a] joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other.'[229] The "personal interest" of each individual accused deserves specific attention, but no accused is entitled to be tried without his co-accused giving evidence that incriminates him. This was not considered to constitute serious prejudice.[230] In *Kovačević et al,* the defence *inter alia* argued that a joint trial and 'the concurrent presentation of evidence against all four accused would lead to a conflict of interest in their defence strategies, which would

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[223] See Decision on the Mode of Interrogating Witnesses, *Prlić et al.*, *supra* note 211, § 10.
[224] Address by Carla Del Ponte (2005), *supra* note 217.
[225] See ICTR Judge Khan, Dismissal of Indictment, *Bagosora & 28 Others* (Case No. 98-37-I), 31 March 1998.
[226] See Justice Hassan B. Jallow, 'The OTP-ICTR: ongoing challenges of completion', ICC-OTP *Guest Lecture Series of the Office of the Prosecutor,* The Hague, 1 November 2004, available at www.icc-cpi.int/library/organs/otp/Jallow_presentation (lastly visited: 22 May 2008), p. 3.
[227] ICTR Tr. Ch. II, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), *Mugenzi et al.* (Case No. ICTR-99-50-I), 8 November 2002, § 40.
[228] Neither did the argument of judicial economy. See *ibid.*, §§ 40-41.
[229] ICTY Tr. Ch. II, Decision on Motions by M_ Talić for a Separate Trial and for Leave to file a Reply, *Brdanin and Talić* (Case No. IT-99-36/1), 9 March 2000, § 29.
[230] See *idem*.

substantially prejudice the accused in their right to a fair trial.'[231] This potential prejudice and the right to an expeditious trial made the Chamber reject the request to joint presentation of evidence for all four accused.[232] Before the ICTR in *Bagosora et al,* defence counsel argued 'that it would be difficult to produce all the testimony for his client without being compelled to take into account the interests of the other accused.'[233] Co-accused testifying against each other is not considered to constitute serious prejudice warranting severance. For defence counsel, it may be a matter of professional courtesy not to prejudice the case of his client's co-accused. But whenever the interests of co-accused collide, counsel will be professionally negligent if not defending his client's interests with all the means legally available to him.

Being tried jointly puts an additional burden on the defence in the presentation of its evidence, which is an essential aspect of conducting a case in adversarial proceedings. The prosecution does not have to worry about the interests of co-defendants. Therefore, this tactical disadvantage only affects the defence. It may seem that the problem of a joint trial for the defence mainly concerns the right to equal treatment. However, proceedings structured as an adversarial contest may become contaminated if defence teams have not only the prosecutor as their adversary to worry about, but also their co-defendants. This could violate the principle of equality of arms between the defence and the prosecution.

In *Prlić et al.*, defence counsel was concerned that in this joint trial 'the accused are not accorded the same rights as if such accused were being tried separately. […] we have been denied at times the opportunity to fully cross-examine because time had to be divided among the accused.'[234] When the defence lacks the time effectively to conduct cross-examinations, but the prosecution does not encounter a similar problem, the principle of equality of arms and the right to a fair trial are violated.

In *Prlić et al.*, one of the six jointly tried accused lost his privately engaged legal assistance. He had simply run out of finances.[235] As his trial was about to start, and he had no legal training himself, the one option he had left was to conduct his own defence. A co-defendant's counsel submitted that without legal representation, the whole trial could be delayed which could bias the fairness of the trial for his co-accused.[236] Therefore, the Chamber decided to assign two counsel to him in the interests of justice 'especially having regard to the interest of the co-accused'.[237]

The time that a joint trial will save, will in most cases be at the expense of the accused. Particularly at the ICTR, the duration of several joint trials is beyond any reasonable limits. The adversarial proceedings in which the majority of the evidence is

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[231] ICTY Tr. Ch., Decision on Motion for Joinder of Accused and Concurrent Presentation of Evidence, *Kovačević, Kvočka, Radić, and Žigić* (Case No. IT-97-24), 14 May 1998 (hereinafter: Decision on Motion for Joinder of Accused), § 4(a).
[232] See *ibid.*, § 10.
[233] ICTR Tr. Ch. III, Decision on the Prosecutor's Motion for Joinder, *Bagosora* (Case No. ICTR-96-7), *Kabiligi and Ntabakuze* (Case Nos. ICTR-97-34 and ICTR-97-30) and *Nsengiyumva* (Case No. ICTR-96-12), 29 June 2000, § 58.
[234] See Transcript, *Prlić et al.* (Case No. IT-04-74), 7 May 2007, p. 17982.
[235] ICTY Tr. Ch. II, Decision on Assignment of Defence Counsel, *Prlić, Stojić, Praljak, Petković, Ćorić, and Pušić* (Case No. IT-04-74), 15 February 2006, § 11.
[236] *Idem*.
[237] *Ibid.*, § 12.

presented live are partly to blame. But joint trials also cause accused to remain in custody for an exceedingly long duration. The trial of Bagosora, whose case was finally joined with "only" three other accused rather than 28 is still being conducted before the Trial Chamber as this research project is being finished. Bagosora has been in custody since March 1996. In any system, that is a disturbingly long time for someone whose guilt has not yet even been established. Many reasons may account for trials being delayed in international criminal justice. For instance, where one defence team would be unable to attend trial, because of illness or for other reasons, the whole trial would be postponed for that reason. The longer a trial continues, the more opportunities for delay will occur.

Obviously, being tried jointly in comparison to being tried individually takes much longer. Considering that the ICTR does not grant any accused provisional release, joint trials account for exceedingly long pre-trial detention periods for the majority of the accused. Some accused however, prefer to be jointly tried, rather than individually. In *Kunarac, Kovac and Vukovic*, three defendants requested to be tried jointly.[238] The Chamber was willing to permit this on the condition that one of the accused gave up a fair amount of preparation time in order for the trial to start no later than originally planned.[239] The cases were subsequently joined.[240] If an accused voluntarily waives his right to adequate preparation time for his trial in order to be joint with the trial of two others, this certainly does not require any compensation and does not violate the right to a fair trial.

Joint cases may involve a higher number of defence team members than of OTP members, unless the prosecution would add staff to joint cases to compensate for this. As long as the prosecution will be able effectively to present its case, the principle of equality of arms between the defence and the prosecution will not be violated by this difference. Since the prosecution generally takes the initiative in joining cases, if the defence would outnumber the prosecution, any resulting inequality is brought about by the prosecution. Generally, Chambers allow joinders at the request of the prosecution. Not every defence team opposes such requests. In *Milutinović et al.* and *Pavković et al.*, where the prosecution sought to try seven accused in one trial, only one accused objected.[241] But even so, taking into account that co-accused may impair each other's cases, they could assist the prosecution in proving his case against a co-accused. This contaminates the contest and might diminish the chances of each individual accused to "win" the case from the prosecution. That would not necessarily impinge on the principle of equality of arms as interpreted by the ECHR. It could however affect the adversarial principle or balance of advantages.

Since the crimes falling under the jurisdiction of international criminal courts are generally committed on a large scale and involve multiple perpetrators, conducting mega trials is obviously an attractive option. The *ad hoc* Tribunals' judges have not

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[238] See ICTY Tr. Ch., Decision on Joinder of Trials, *Kunarac et al* (Case No. IT-96-23&23/1), 9 February 2000, §§ 10-13.

[239] See *ibid.*, § 13.

[240] Cf. ICTY Tr. Ch., Order for Severance and Combined Case Number, *Kunarac et al* (Case No. IT-96-23&23/1), 16 February 2000.

[241] It could prejudice his right to a fair and expeditious trial, particularly 'given the substantial differences in the levels of preparation of the two cases'. Decision on Prosecution Motion for Joinder, *Milutinović, Ojdanić and Šainović* and *Pavković, Lazarević, Đorđević and Lukić*, *supra* note 218.

been particularly willing to sever any trial because of disadvantages for individual accused. Judicial economy goals, particularly time saving, are not achieved as much as expected through conducting joint trials. Therefore, international criminal courts should carefully consider the extent to which any envisioned advantages will actually materialize, especially if any of the accused involved opposes to being tried jointly. If, as an alternative, trials were to be conducted separately, but in concert with each other, this would at least save travel costs of witnesses. It will also avoid that proceedings be postponed because of the illness or involuntary absence of a co-accused or his counsel. However, simultaneously conducting trials will not minimize hardship for victims. In addition, it has been argued that having the same Chamber conducting two trials simultaneously could 'lead to confusion of the issues and evidence.'[242]

Considering the adversarial nature of the procedural system of the *ad hoc* Tribunals, limits should be imposed on the number of accused to be tried jointly. The economic law of diminishing returns could apply.[243] As *Milošević* has shown, it is highly undesirable for international criminal courts to be unable to reach a verdict because trial proceedings lingered on for too long. It could be questioned as to whether the slow trial pace in *Milošević* could partly be blamed on the fact that he was tried alone and no interests of co-defendants needed to be taken into account when balancing his wishes against the interest of conducting an expeditious trial. By conducting a trial with three accused, judicial economy goals are more likely to be accomplished. Conducting a mega trial of 29 accused is clearly beyond any reasonable limits.

All in all, the main beneficiary of a joint trial is likely to be the prosecution rather than the defence. Reasons of efficiency should not outweigh the right of an accused to a fair trial without due consideration. But judges letting the interests of judicial economy prevail over the accused's interest in being tried separately does not necessarily impinge on the fair trial principle of equality of arms. It is however indicative of a policy-implementing attitude. Joint trials involving accused with conflicting interests are allowed, notwithstanding that this could contaminate the contest between the prosecution and the defence. Efficiency arguments thus prevail over maintaining a balance of advantages between the defence and the prosecution, notwithstanding the adversarial character of the proceedings of the *ad hoc* Tribunals.

5.8 CONCLUSION

The principle of equality of arms potentially has a wide scope. It is often equated with the adversarial principle and has also been deemed to underline the principle of equal treatment of defendants. As a human rights standard, the principle should guarantee that each party to the proceedings has a reasonable opportunity to present its case and will not be at a substantial disadvantage vis-à-vis his opponent. It requires procedural

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[242] Decision on Motion for Joinder of Accused, *Kovačević, Kvočka, Radić, and Žigić*, *supra* note 231, § 10(d).

[243] This theory is best explained through a simple example. If you mow the lawn together with your neighbour rather than just by yourself, this will save you half the time. But if you would have three or four of your neighbours assist you, you will be in each other's way. From a certain point, efficiency benefits will decline.

equality. It also applies to criminal proceedings, even though the position of the parties to these proceedings, the prosecution and the defence, are intrinsically different. The adversarial principle requires a fair contest in which both parties are able effectively to present their cases.

Given their differing roles and institutional positions, equalizing the prosecution and the defence is an unattainable and unnecessary goal. As a human rights principle, the principle of equality of arms does not require actual equality in terms of means and resources, but it entails procedural equality. Therefore, by not granting the defence the same amount of resources, facilities, or personnel as the prosecution, international criminal courts do not violate this principle as such.

Even so, international criminal courts should pay due attention to the actual differences in resources and facilities between the prosecution and the defence. International criminal cases generally involve a high level of complexity and crimes committed on a large and often international scale. In addition, these courts are mostly situated away from the *locus delicti* and, at least where the *ad hoc* Tribunals are concerned, have predominantly adversarial procedeedings. The conduct of an effective defence in international criminal cases therefore requires more resources than in a typical domestic jurisdiction. Even national jurisdictions display a trend that better resources should be provided to the defence in highly complicated cases with an international component, regardless of the procedural system. Overall however, international criminal courts make obvious efforts to put the prosecution and the defence on a par, including where issues such as salaries or their institutional positions are concerned, as was shown in Chapter III.

The principle of equality of arms requires that the defence and the prosecution case are proportionate as regards the amount of time available to them and the number of witnesses. Rather than having exactly the same amount of time or number of witnesses, each party should have adequate opportunity to present its case. If one party alone is restricted by the judges in the presentation of his case because of time constraints in light of the Completion Strategy, this violates the adversarial principle and constitutes a clash of policy-implementing objectives with the contest proceedings of the *ad hoc* Tribunals.

Because of the exceptional circumstances and the lack of proper enforcement mechanisms in international criminal justice, if any authorities refuse to cooperate with the defence while they assist the prosecution, the defence is at a disadvantage. This disadvantage could be substantial as it may prevent the defence from achieving one of its core goals in adversarial proceedings: to assemble exculpatory evidence to present to the court. The *ad hoc* Tribunals recognize this problem, but out of practical considerations, have excluded this disparity from the scope of the principle of equality of arms. This does not in itself violate ECHR case law on the principle. Nonetheless, considering the consequences for the defence at international criminal trials of consistently being denied access to evidence that may be vital to its case, in light of its adversarial proceedings, international criminal courts should compensate the defence for this obvious disadvantage vis-à-vis the prosecution.

The defence used to enjoy some procedural advantage over the prosecution regarding disclosure obligations. Instead of removing such tactical advantages, out of "fair play" concerns, the ICTY could have left them intact, thus compensating the defence for difficulties accessing evidence due to a lack of state cooperation. It almost

seems as if the ICTY attempted to establish absolute procedural equality without properly considering the overall differences between the prosecution and the defence. For efficiency reasons, the *ad hoc* Tribunals conduct joint trials involving multiple accused, notwithstanding the negative impact any conflicts of interests could have on their defence case. These examples may account for an instrumentalist approach that could conflict with conflict-solving proceedings.