Unquestioned Testimony: How the Diminution of Live Testimony Threatens the Accused's Right to Be Present During International Criminal Trials

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It is generally recognized that international criminal law provides the accused with a right to be present at trial. There are two components of that right which make it meaningful: first, as a right it can only be derogated from through an affirmative waiver made by the accused; and second, it requires more than the mere presence of the accused in the courtroom—it also demands that he or she be able to understand and participate in the proceedings. The second component of the right, that the accused be able to participate in proceedings, is increasingly threatened by evidentiary rules that restrict the accused's ability to cross-examine the witnesses who are testifying against them. This infringement creates a real danger that evidence that has not been properly tested will serve as the basis for guilty verdicts, thus increasing the likelihood of unsafe convictions.

This Article aims to examine the phenomenon of evidentiary rules that impact the accused's right to be present. It will do this in two substantive parts. First, it will demonstrate that the accused has a right to be present at trial in international law, define that right, contextualize the right in terms of the larger right to a fair trial, and discuss how the accused, at least in evidentiary matters, has a greater interest in fairness than the prosecution. Second, the Article will examine three different evidentiary practices used at international criminal justice institutions that have the tendency to limit the accused's ability to participate in trial and, in turn, his or her right to be present. This Article concludes that some, but not all, of these practices do represent a meaningful limitation on the accused's right to be present and should be used sparingly so as to avoid causing any harm to the accused's fair trial rights.

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Introduction

The accused's right to be present at trial is one of the defining components of the right to a fair trial.[1] The presence of the accused at trial is considered "[a]n essential element of procedural equality" that gives meaning to the principle that "criminal defendants are legally entitled to be personally present at their own trials."[2] The accused's presence allows him or her to exercise a number of other rights, including assisting in his or her own defense; consulting, and in some cases selecting, his or her own coun-

1. GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 137 (Koninklijke Brill NV 2d ed. 2014); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L. L. 235, 279–80 (1993).

2. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 280 (Transnational Publishers, Inc. 2002); *see also* Neil Cohen, *Trial in Absentia Re-Examined*, 40 TENN. L.R. 155, 156 (1973).

sel; confronting the witnesses or the evidence presented against him or her; and testifying on his or her own behalf at trial.[3]

Increasingly, evidentiary rules have been introduced at the international and internationalized criminal courts and tribunals that have the tendency to threaten the accused's right to be present during trial. Presence at trial must be understood as involving more than just the physical presence of the accused; it must also extend to their ability to participate in trial.[4] A fundamental part of the accused's participation is his or her ability to challenge the evidence introduced against them, which is most effectively done through cross-examination.[5] Evidentiary rules that limit the ability of the accused to fully question the witnesses testifying against them may violate the accused's right to be present and create the danger that trial may result in unfair convictions.

This Article will focus on evidentiary restrictions placed on the accused's right to be present at trial as reflected through limitations on his or her ability to participate in the proceedings. It will demonstrate that restricting the accused's ability to cross-examine the witnesses who are testifying against them constitutes an infringement on the right to be present at trial. It will do this in two substantive parts. First, it will show that the accused has a right to be present at trial in international criminal law, define that right, and explore the interconnection between the right to be present and the ability to properly examine the witnesses called to testify during trial. Second, it will look at three different ways in which witness examinations have been limited by international criminal justice institutions. The three types of limitations discussed are anonymous witness testimony; the use of written witness statements in lieu of live, in-person witness testimony; and the introduction of hearsay evidence. This Article will conclude that the limitations placed on the accused's ability to examine the witnesses against him or her impinge upon the right to be present at trial.

I. The Right To Be Present At Trial In International Criminal Law

A. The Position of the Right to be Present in International Criminal Law

Numerous human rights instruments and all of the modern international criminal statutes either explicitly refer to the accused's right to be present or describe the presence of the accused at trial as one of the mini-

3. ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 361 (Oxford Univ. Press 3d ed., 2013); *see also* STEFANO MAFFEI, THE RIGHT TO CONFRONTATION IN EUROPE: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES 9 (Europa Law Publishing 2d ed. 2012).

4. *See* CATHERINE S. NAMAKULA, LANGUAGE RIGHTS IN THE MINIMUM GUARANTEES OF FAIR CRIMINAL TRIAL 73, 87 (Springer Int'l Publishing Switzerland 2012); SARAH J. SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURE TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS 110 (Hart Publishing 2007).

5. ADRIAN A. S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 93-4 (Clarendon Press 1989).

mum guarantees of a fair trial. The International Covenant on Civil and Political Rights, the first international instrument to address the accused's presence at trial as a right, sets out a wide-ranging rights regime impacting numerous areas of life including the right to a fair trial. The right to be present at trial can be found in Article 14(3)(d), which specifically asserts that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (d) To be tried in his presence . . . ."[6] Although Article 14(3)(d) of the International Covenant does not explicitly call presence at trial a right, the Human Rights Committee later confirmed that it should be regarded as such.[7] This formulation of the accused's right to be present has served as the basis of the accused's right to be present in a variety of different contexts.

Many of the statutes of international and internationalized criminal courts and tribunals modeled their own articles relating to the accused's right to be present on the International Covenant on Civil and Political Rights and, in some instances, copied Article 14(3)(d) almost verbatim. The statutes of both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (collectively, "the *ad hoc* tribunals") closely followed the example of the International Covenant on Civil and Political Rights.[8] Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 20 of the International Criminal Tribunal for Rwanda's Statute are both titled "Rights of the Accused" and both explicitly state that the accused is "entitled" to be tried in his or her presence.[9] The use of the word "entitled" suggests that presence of the accused is regarded as a right held by the accused and not a duty to be imposed on him or her. This interpretation is reinforced in a report issued in 1993 by former United Nations Secretary-General Boutros Boutros-Ghali in which he asserted that the International Criminal Tribunal for the former Yugoslavia's Statute reflects the fact that trials *in absentia* are not consistent with the accused's entitlement to be "tried in his presence" as expressed in Article 14 of the International Covenant on Civil and Political Rights.[10]

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6. G.A. Res. 2200A (XXI), art. 14(3)(d), International Covenant on Civil and Political Rights (Dec. 16, 1966).

7. *See* U.N. Human Rights Comm., Maleki v. Italy, Communication No. 699/1996, ¶ 9.3, U.N. Doc. CCPR/C/66/D/699/1996 (July 27, 1999); U.N. Human Rights Comm., Mbenge v. Zaire, Communication No. 16/1977, ¶ 14.1, U.N. Doc. CCPR/C/OP/2 (Mar. 25, 1983); *see also* Human Rights Comm., Gen. Comment No. 13, ¶ 11, U.N. Doc. CCPR/C/GC/13 (Apr. 13, 1984).

8. Statute of the International Criminal Tribunal for the former Yugoslavia art. 21(4)(d), May 25, 1993, U.N. Doc. S/RES/827, 32 I.L.M. 1203; Statute of the International Criminal Tribunal for Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1598.

9. Statute of the International Criminal Tribunal for the former Yugoslavia art. 21, May 25, 1993, U.N. Doc. S/RES/827, 32 I.L.M. 1203; Statute of the International Criminal Tribunal for Rwanda art. 20, Nov. 8, 1994, 33 I.L.M. 1598.

10. U.N. Secretary General, *Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, ¶ 101, U.N. Doc. S/25704 (May 3, 1993).

Article 17(4)(d) of the Special Court for Sierra Leone Statute mirrors the relevant articles found in the statutes of the *ad hoc* tribunals.[11] It indicates that the accused "shall be entitled to the following minimum guarantees, in full equality: . . . (d) To be tried in his or her presence . . . ."[12] The Special Court ultimately found that Article 17(4)(d) was insufficient for its purposes and in 2003 it amended its Rules of Procedure and Evidence to specifically identify those situations in which trials may be conducted in the absence of the accused.[13] Rule 60 authorizes the Special Court to conduct trials *in absentia* in two situations, both arising after the accused has made his or her initial appearance before the court.[14] The first arises when the accused has been afforded the right to appear but refuses to do so.[15] The second occurs when the accused "is at large and refuses to appear in court."[16] In both instances, the matter can proceed if the Judge or Trial Chamber "is satisfied that the accused has, expressly or impliedly, unequivocally waived his right to be present."[17] A right, by its very nature, is something held by the right holder, which only he or she can waive.[18] By limiting trial *in absentia* to situations in which the accused has appeared before the court, and following a finding of an express or implied waiver on the part of the accused, the Special Court for Sierra Leone tacitly endorsed the notion that presence at trial is a right.

Like the statutes of the *ad hoc* tribunals and the Special Court for Sierra Leone, the Statute of the International Criminal Court also defines the accused's presence at trial as a right. Article 63(1) of the Rome Statute unequivocally states that "[t]he accused shall be present during the trial."[19] This statement, taken alone, does not conclusively show that the accused has a right or a duty to be present at trial because it allows for the possibility that the accused's presence can be required rather than resulting from the exercise of a right. However, if the statute is read as a whole, it becomes evident that the accused has a right to be present at trial. That is because Article 67, much like Article 21 of the former Yugoslavia Tribunal's Statute and Article 20 of the Rwanda Tribunal's Statute, sets out the "Rights of the Accused" and identifies presence at trial as one of the entitlements contained therein.[20] The Trial Chamber decisions in *Prosecutor v. Ruto et al.* and *Prosecutor v. Kenyatta* confirmed that Article 67(1)(d) estab-

11. Statute of the Special Court for Sierra Leone art. 17(4)(d), Jan. 16, 2002, 2178 U.N.T.S. 145.

12. *Id.* at art. 17.

13. Rules of Procedure and Evidence, Special Court for Sierra Leone, r. 60 (as amended Mar. 7, 2003).

14. *Id.*

15. *Id.* at r. 60(A)(i).

16. *Id.* at r. 60(A)(ii).

17. *Id.* at r. 60(B).

18. Martin Böse, *Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia*, 37 N.C. J. INT'L L. & COMM. REG. 489, 503 (2011).

19. Rome Statute of the International Criminal Court art. 63(1), Jul. 17, 1998, 2187 U.N.T.S. 90.

20. *Id.* at art. 67(1)(d). *But see id.* at art. 53(2) (limiting the right to be present in exceptional circumstances).

lishes the accused's right to be present at trial.[21] The *Ruto et al.* Court found that "there is no doubt that presence at trial is a right for the accused" as expressed by Article 67(1)(d) of the Statute.[22] In a similar vein, the *Kenyatta* Court also announced that "[i]t is recognised that the presence of the accused during the trial is . . . a right" and that the "[p]resence of the accused is the default position."[23]

The Extraordinary Chambers in the Courts of Cambodia also has a strong preference in favor of conducting trial in the accused's presence. Like Article 63 of the Rome Statute, Rule 81 of the Extraordinary Chambers' Internal Rules stands for the general proposition that "[t]the Accused shall be tried in his or her presence," limited only by the exceptions contained therein.[24] The approach taken by the Extraordinary Chambers appears rather neutral, however the enumerated exceptions to the rule suggest it is required that the accused be present. The Internal Rules do allow trial to proceed in the accused's absence after he or she has made his or her initial appearance, in the following situations: when the accused refuses or fails to appear for hearings; is expelled from the proceedings for causing disruptions; or is too ill to attend.[25] These scenarios, with the possible exception of absence due to illness, meet the criteria of notice and waiver suggesting that although the Extraordinary Chambers generally requires the accused to be present, his or her absence can be interpreted as an exercise of his or her right to be present.

Even the Special Tribunal for Lebanon's Statute, which famously contains a provision explicitly permitting trials *in absentia*, describes the accused as having a right to be present at trial. Article 16(4)(d) of the Special Tribunal for Lebanon's Statute is modeled on Article 14(3)(d) of the International Covenant on Civil and Political Rights and Articles 21 and 20 of the *ad hoc* tribunals. Similar to the relevant provisions in the statutes of the *ad hoc* tribunals, Article 16 is titled "Rights of the accused" and states that one of the minimum guarantees of a fair trial is that the accused "be tried in his or her presence."[26] However, the Special Tribunal for Lebanon makes the exercise of that right contingent on the terms of Article 22, the article that establishes the Special Tribunal's trial *in absentia* regime.[27] Although the right to be present at trial at the Special Tribunal for Lebanon is circumscribed by its approval of trials *in absentia*, the stat-

21. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 35 (June 13, 2013); Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ¶ 124 (Oct. 18, 2013).

22. Prosecutor v. Ruto, ¶ 35.

23. Prosecutor v. Kenyatta, ¶ 124.

24. Internal Rules, Extraordinary Chambers in the Courts of Cambodia, r. 81(1) (as amended Jan. 16, 2015) [hereinafter ECCC Internal Rules].

25. *See id.* at r. 81(4)-(5).

26. Statute of the Special Tribunal for Lebanon art. 16(4)(d), May 30, 2007, U.N. Doc. S/RES/1757.

27. *See id.*

ute tries to create a system that respects both the accused's right to be present while also allowing trial in the absence of the accused.

Regional human rights bodies have also codified the accused's right to be present at trial. In 2007, the African Commission on Human and People's Rights issued its "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa." Those Principles and Guidelines specifically indicate that a person accused of a crime has "the right to be tried in his or her presence."[28] The European Court of Human Rights and the Inter-American Court of Human Rights have also issued decisions on the accused's right to be present at trial. Although the European Convention on Human Rights does not contain a specific reference to the right to be present at trial, the European Court of Human Rights has found that the accused's right to be present is implicit in the object and purpose of Article 6(1) of the Convention.[29] The Inter-American Court of Human Rights less explicitly endorses the right of the accused to be present, however it can be extrapolated from the decision in the *Case of Valle Jaramillo et al. v. Colombia* that the Court prefers for trial to take place in the presence of the accused.[30]

B. Defining the Right to be Present in International Criminal Law

It is clear from the relevant law that a right to be present at trial exists in international criminal law and international human rights law. What is less apparent is what exactly that right entails. Put briefly, the right to be present is a qualified right that permits the accused to choose whether he or she wishes to attend trial and carries with it an attendant duty preventing international and internationalized criminal courts and tribunals from excluding the accused without his or her consent.[31] The right may be voluntarily waived so long as the accused has notice of the proceedings sufficient to permit him or her to make an informed decision not to appear.[32] The physical presence of the accused is not in and of itself sufficient to comply with the right; the accused must also be afforded the ability to understand and participate in the proceedings.[33] Therefore, the right to be present is violated when trial is conducted in a manner that limits the accused's ability to participate in proceedings and he or she has not affirmatively authorized that limitation.

It is particularly important that the accused is able to participate in those portions of the trial during which evidence is being presented and

28. The African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Doc. No. DOC/OS(XXX)247, § N(6)(c) (2003).

29. Colozza v. Italy, 7 Eur. H.R. Rep. 516, 523 (1985).

30. *See* Valle Jaramillo et al. v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 165 (Nov. 27, 2008).

31. CALEB H. WHEELER, THE RIGHT TO BE PRESENT AT TRIAL IN INTERNATIONAL CRIMINAL LAW 7 (Brill, 2018).

32. *See id.*

33. *See* SUMMERS, *supra* note 4, at 113.

examined.[34] It is through the presentation of evidence that the prosecution sets out the case against the accused and attempts to prove the charges to the appropriate evidentiary standard. Simultaneously, it is during this time that the accused is able to exercise his or her right to confrontation and to rebut the evidence against him or her. When a trial court fails to fully protect the accused's ability to examine the witnesses testifying against them it effectively limits his or her ability to participate in trial, which in turn constitutes a restriction on the right to be present.

The two important components of the right to be present to extrapolate from this definition are: 1) the accused, as the holder of the right, must affirmatively waive it before it can be derogated from; and 2) presence requires the understanding and participation of the accused and not just his or her physical attendance during trial. To establish the effective waiver of any fair trial right, including the right to be present, three conditions must be met.[35] Those conditions require that the waiver: (1) is unequivocal; (2) does not run counter to any important public interest; and (3) is attended by minimum safeguards commensurate with its importance.[36] It is apparent from the caselaw of the European Court of Human Rights that the accused's waiver of a fundamental right will largely only be effective when he or she has sufficient information to make an informed decision when making that waiver.[37] Waivers can be separated into two broad categories: express waiver and implied (or tacit) waiver. Express waiver of the right to be present is not very controversial. Conversely, determining whether an accused has implicitly waived his or her right to be present at trial requires a difficult inquiry. The European Court of Human Rights has found that in addition to the factors normally considered when establishing the effectiveness of a waiver, finding the existence of an implied waiver also requires a showing that the accused "could reasonably have foreseen the consequences of his or her waiver."[38]

The International Criminal Court implemented the most modern procedure under which an accused can waive his or her right to be present.

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34. *See id.* at 117; Fawzia Cassim, *The Accused's Right to be Present: A Key to Meaningful Participation in the Criminal Process*, 38 COMP & INT'L L.J.S. AFR. 285, 285–86 (2005).

35. *See, e.g.*, Sklyar v. Russia, App. No. 45498/11, Eur. Ct. H.R. ¶ 22 (2017); Panovits v. Cyprus, App. No. 4268/04 Eur. Ct. H.R. ¶ 68 (2009); Sibgatullin v. Russia, App. No. 32165/02 Eur. Ct. H.R. ¶ 46 (2009); Sejdovic v. Italy, App. No. 56581/00 Eur. Ct. H.R. ¶ 86 (2006); Demebukov v. Bulgaria, 50 Eur. H.R. Rep. 41, ¶ 47 (2008); Prosecutor v. Ruto, ICC-01/09-01/11, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013, ¶ 51 (Oct. 25, 2013); Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement, ¶ 108 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007).

36. Demebukov v. Bulgaria, ¶ 47.

37. WHEELER, *supra* note 31, at 7; Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, ¶ 26, COM (2011) 326 final (June 8, 2011).

38. Talat Tunç v. Turkey, App. No. 32432/96 Eur. Ct. H.R. ¶ 59 (2007); Jones v. United Kingdom, App. No. 30900/02 Eur. Ct. H.R. 12 (2003); Battisti v. France, App. No. 28796/05 Eur. Ct. H.R. 6 (2006); Hermi v. Italy, App. No. 18114/02 Eur. Ct. H.R. ¶ 74 (2006).

Rule 134 *ter* of the International Criminal Court's Rules of Procedure and Evidence permits the accused to be absent for portions of the trial, and Rule 134 *quater* could theoretically be used to absent the accused from the whole trial so as to attend to "extraordinary public duties at the highest national level."[39] In both instances the accused is required to explicitly waive his or her right to be present and the relevant Trial Chamber is not permitted to find the existence of an implicit waiver.[40] This practice clearly demonstrates that it is the accused who has control over his or her right to be present at trial. Within this construct, there is no room for the *de facto* implementation of limits on that right through the enactment of evidentiary rules.

The second crucial point about the right to be present is that the physical presence of the accused is not sufficient, by itself, to meet the demands of his or her right to be present.[41] Instead, an accused is only considered present when he or she is able to understand and participate in the proceedings.[42] The Privy Council of the United Kingdom first explored this idea in *Kunnath v. The State*, when it found:

> It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant . . . . [T]he basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him.[43]

This approach to presence makes sense because the accused's right to be present at trial would have no real meaning if it only required that the accused be physically present in the courtroom and nothing more.[44] The accused's physical presence must serve some purpose or it could be dispensed with without threatening the accused's right to a fair trial. Therefore, an accused that is physically present in the courtroom, but denied the right to fully participate in trial, is absent from trial as he or she is being prevented from engaging in the activities that give meaning to the right to be present. Participation is only thought to be effective when the accused understands the proceedings.[45] Effective participation has also been interpreted to include the requirement that the accused in a criminal trial "has a broad understanding of the nature of the trial process" and that he or she also understands what is at stake and the potential penalties that can be

39. Rules of Procedure and Evidence, International Criminal Court, r.134 *ter*(1) and r. 134 *quater*(1) (as amended 2013).

40. *See id.*

41. SUMMERS, *supra* note 4, at 113.

42. *Id.*

43. Kunnath v. The State [1993] 1 W.L.R. 1315.

44. NAMAKULA, *supra* note 4, at 84; SUMMERS, *supra* note 4, at 113.

45. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 306 (4th ed. 2011); Cassim, *supra* note 34, at 287.

imposed if the accused is found guilty.[46]

Support for the proposition that presence means more than just being physically present can also be found in the Rules of Procedure and Evidence for the International Criminal Court and the Special Tribunal for Lebanon. Rule 135 *bis* of the International Criminal Court's Rules permits the accused to submit a request asking that he or she "be allowed to be present through the use of video technology during part or parts of his or her trial."[47] The Special Tribunal for Lebanon's Rules of Procedure and Evidence takes a similar approach. Rule 104 indicates that an accused will not be considered absent from trial when he or she appears for trial via videoconference.[48] Both of these rules recognize, either explicitly or implicitly, that although the accused may be physically absent from the courtroom, he or she is present to the extent that he or she can still follow and participate in the proceedings. By indicating that an accused is considered not absent when attending via videoconference, these rules suggest that the accused's mental involvement in the trial is more important than his or her physical presence.

The accused's ability to confront the witnesses opposing them is made operative through the right to be present during trial and is considered a "*universal* feature of judicial fairness."[49] It is "linked to the presumption of innocence and the burden of the prosecution to prove guilt beyond reasonable doubt" as it allows the defense to "explore the frailties of the testimony."[50] Confrontation often manifests itself in the form of cross-examination, which is the most effective way for the accused to test the evidence against him or her.[51] Effective cross-examination "adds a dimension of credibility to the proceedings and enhances the ascertainment of the truth."[52] Preventing the accused from cross-examining the prosecution's witnesses can constitute a flagrant violation of the accused's due process rights, including the right to be present.[53]

Despite the importance of the right to be present as reflected through the accused's ability to confront the witnesses, it is also a derogable right that may be departed from through constitutional, statutory, and judicial

46. Grigoryevskikh v. Russia, App. No. 22/03 Eur. Ct. H.R. ¶ 78 (2009); Güveç v. Turkey, App. No. 70337/01 Eur. Ct. H.R. ¶ 124 (2009).

47. Rules of Procedure and Evidence, International Criminal Court, *supra* note 39, at r. 134 *bis*.

48. Rules of Procedure and Evidence, Special Tribunal for Lebanon, r. 104 (as amended Apr. 10, 2019).

49. STEFANO MAFFEI, THE RIGHT TO CONFRONTATION IN EUROPE: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES 9 (Europa Law Publishing 2d ed. 2012) (emphasis in original).

50. Eugene O'Sullivan & Deirdre Montgomery, *The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*, 8 J. INT'L CRIM. JUST. 511, 513 (2010).

51. ZUCKERMAN, *supra* note 5, at 93–94.

52. Bassiouni, *supra* note 1, at 279; Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. INT'L CRIM. JUST. 354, 369 (2005).

53. Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANS. L. 635, 682 (2007).

practice.[54] Limitations on the right to confront adverse witnesses at international and internationalized criminal courts and tribunals typically come in the form of positivist evidentiary rules or judicial decisions.[55] These act to limit the accused's right to be present even if the accused is physically present at trial. Restrictive evidentiary rules and judicial decisions manifest themselves in such a way so as to prevent the accused from fully and adequately confronting the witnesses against them, thus depriving their presence of effective meaning. So as not to render the right to be present meaningless, the effect of any limitation placed on the accused's ability to confront the witnesses against them must be counterbalanced by restricting the persuasive weight of the evidence the accused is unable to fully examine.[56] Adequate counterbalances can include implementing additional procedural safeguards to ensure the fairness of the procedures employed or limiting the probity of evidence not subject to cross-examination.[57]

International and internationalized criminal courts and tribunals have found that minor infringements on the ability of a party to question witnesses are not sufficient to constitute a violation of the right to be present. This was exemplified in *Prosecutor v. Blaškić*, when Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia found that there should be "no excessive infringement on the rights of the Prosecution, *inter alia* the right to conduct an effective cross-examination."[58] This rule was later understood by Judge Mohamed Shahabuddeen, who was a member of the Trial Chamber in the *Blaškić* case, as establishing the principle that any infringement on the right to confront witnesses must be excessive to constitute a violation, regardless of which party is attempting to examine the witness in question.[59]

This conclusion may represent too broad a reading of the ruling and raises the question of whether the prosecution and the defense both have the same right to a fair trial. The answer would appear to be yes, as demonstrated by the fact that all of the international and internationalized criminal courts and tribunals have jurisprudence extending fair trial rights to the prosecution.[60] Judicial pronouncements on this issue encompass a large temporal scope, with the earliest decision coming in 1995 in the *Tadić* Protective Measures Decision.[61] There, the Trial Chamber found that a fair

54. *See* MAFFEI, *supra* note 49, at 44–45.
55. *See, e.g.*, *id.*
56. *See id.* at 45–46.
57. *See id.* at 46.
58. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Defense Motion for Protective Measures for Witnesses D/H and D/I, 2 (Int'l Crim. Trib. for the former Yugoslavia Sept. 25, 1998), https://www.icty.org/x/cases/blaskic/tdec/en/80925PM15080.htm [https://perma.cc/FV9S-KS2G].
59. MOHAMED SHAHABUDDEEN, INTERNATIONAL CRIMINAL JUSTICE AT THE YUGOSLAV TRIBUNAL: A JUDGE'S RECOLLECTION 158 (2012).
60. YVONNE MCDERMOTT, FAIRNESS IN INTERNATIONAL CRIMINAL TRIALS 123 (2016).
61. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 55 (Int'l Crim. Trib. for the former Yugoslavia Aug. 10, 1995).

trial occurs when the prosecution, the defendant, and the witnesses are all treated fairly during proceedings.[62] This notion was reiterated as recently as January 2019, when Judge Olga Herrera Carbuccia asserted in her dissenting opinion in *Prosecutor v. Gbagbo et al.* that "[t]he right to a fair trial applies both to the Defence and Prosecutor."[63]

While it may be appropriate to recognize that the right to a fair trial applies to both parties, it should not be understood as always applying equally. This is particularly true in relation to cross-examination because of the different outcomes that might result if the right to confrontation is not properly enforced. The defense cross-examines witnesses whose testimony is necessary to prove the guilt of the accused. In the absence of cross-examination, any weaknesses or deficiencies in the witness's testimony will go unexplored and the evidence given will have the tendency of supporting the prosecution's version of events.[64] This, in turn, makes it more likely that the trial will result in an unwarranted conviction. The conviction of an innocent accused threatens the fair trial rights of all of the participants, including the victims. A fair trial is only achieved when the correct person is convicted as no trial participant can claim to have a legitimate interest in convicting an innocent accused.[65] Therefore, it is paramount that the accused has the opportunity to effectively challenge the evidence against him or her as to do otherwise could do great harm to the fair trial rights of all of the parties.

Conversely, the prosecution challenges evidence meant to create a reasonable doubt about the accused's guilt. The inability to properly cross-examine the witnesses presented by the accused might lead to an unjustified acquittal. However, the prosecution has had the opportunity to present its entire case-in-chief prior to the testimony of any defense witnesses. It is unlikely that the prosecution had a very strong case in the first place if its trial strategy is dependent on the effective cross-examination of the defense witnesses. Further, even if one accepts that the right to a fair trial extends to the prosecution, infringements of that right must be rather significant before a violation will be found.[66] This is evidenced by the approach taken in *Prosecutor v. Zigiranyirazo*. There, the Trial Chamber of the International Criminal Tribunal for Rwanda found that "[w]hile the Chamber must be diligent in ensuring that the Accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case."[67] This distinction about the extent of the duty owed

62. *Id.*

63. Prosecutor v. Gbagbo, ICC-02/11-01/15, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, ¶ 35 (Jan. 15, 2019).

64. Louise Arbour, *The Crucial Years*, 2 J. INT'L CRIM. JUST. 396, 399 (2004).

65. LAWYERS COMM. FOR HUM. RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 15 (Mar. 2000).

66. *See* Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza Via Video-Link, ¶ 18 (Int'l Crim. Trib. for Rwanda) (Nov. 16, 2006).

67. *See id.*

by the trial court to the different trial participants is illuminating. The protection afforded to the accused in this decision is much greater than that owed to the prosecution. The duty owed to the accused is absolute; it requires the trial court to act diligently to ensure that he or she is not deprived of any fair trial rights.[68] In contrast, the trial court's responsibility in relation to the prosecution is much more qualified. First, not all of the prosecution's rights need to be protected, only those pertaining to the presentation of evidence. Second, some encroachment on the prosecution's ability to present its case is permissible, so long as it is not "unduly hampered" in its ability to do so. It should come as no surprise that the duty owed to the prosecution is limited in this way. The "unduly hampered" language of the *Zigiranyirazo* decision closely mirrors the "excessive infringement" described in the *Blaškić* decision.[69] Both clearly envision a lesser protection for the prosecution than the more unconditional approach required to protect the rights of the accused.

It is relatively uncontroversial to conclude that international criminal law affords the accused a right to be present at trial. That right has two substantive parts. First, as a right held by the accused, it should only be derogated from with his or her permission. Second, for the right to have any real meaning, it cannot be understood as only requiring the accused's physical presence in the courtroom during trial; it also demands that the accused has the ability to understand and participate in proceedings. When international criminal justice institutions limit the accused's ability to participate in the proceedings they are, in effect, violating the accused's right to be present. Evidentiary rules designed to expedite trial by allowing witnesses to testify in ways other than in-court *viva voce* testimony are a particular threat to the accused's right to be present as they can deprive the accused of the ability to cross-examine the witnesses used against them.[70] This can inhibit the accused's ability to fully challenge the evidence against him or her, increasing the likelihood that trial may result in an unfair conviction.

II. Evidentiary Restrictions on the Accused's Ability to Participate in Trial

There are three primary areas in which the international and internationalized criminal courts and tribunals have imposed some form of evidentiary restriction on the accused's ability to question the witnesses used against them. They are: (1) permitting anonymous witnesses to testify at trial; (2) the admission of written statements in lieu of oral testimony; and

68. *See id.*

69. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Defense Motion for Protective Measures for Witnesses D/H and D/I, 2 (Int'l Crim. Trib. for the former Yugoslavia Sept. 25, 1998), https://www.icty.org/x/cases/blaskic/tdec/en/80925PM15080.htm [https://perma.cc/FV9S-KS2G].

70. *See* Nicolas A. J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, 11 HUM. RTS. L. REV. 91, 116–17 (2011).

(3) the admission of hearsay evidence. The impact each of these limitations has on the accused's ability to participate—and by extension his or her right to be present at trial—will be considered in turn.

A. Witness Anonymity

The extent to which witnesses may be allowed to remain anonymous when testifying at international and internationalized criminal courts and tribunals is a highly contentious issue.[71] Allowing witnesses to testify anonymously has been called "[t]he gravest form of interference with the right to cross-examine" because it prevents the accused from being able to adequately test the accuracy and veracity of the witness's testimony.[72] It is thought that the accused's ability to successfully challenge a witness's testimony is severely limited when the witness is allowed to testify anonymously.[73] When determining the modality of witness anonymity, trial courts are required to weigh two significant competing interests. On one hand, courts must consider whether maintaining the anonymity of the witness is necessary to protect against acts of witness intimidation.[74] By contrast, they must also evaluate the extent to which preventing the accused from learning the identity of the witness will inhibit the accused's ability to participate in trial and impact his or her right to be present.[75] These conflicting demands indicate that a procedure must be established that will protect witnesses and their families from actual or threatened violence against their persons without also depriving the accused of his or her right to be present at trial.

1. *The* ad hoc *Tribunals*

The different international and internationalized criminal courts and tribunals have approached the issue of witness anonymity in a variety of ways. It was first raised at the International Criminal Tribunal for the former Yugoslavia in the Trial Chamber's ruling on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses in the *Prosecutor v. Tadić*.[76] With regard to this issue, the Trial Chamber determined that witness anonymity does not necessarily violate the accused's right to

71. Mirjan Damaška, *Reflections on Fairness in International Criminal Justice*, 10 J. INT'L CRIM. JUST. 611, 617–18 (2012).

72. Nicolas Croquet, *Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses: The Tension Between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests*, MELB. J. INT'L L., Nov. 2010, at 27, 30–31; *see also* Monroe Leigh, *Editorial Comments: The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AMERICAN J. INT'L L. 235, 236 (1996).

73. Damaška, *supra* note 71, at 617–18.

74. Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on Victims' Participation, ¶ 130 (Jan. 18, 2008); *see also* Michael E. Kurth, *Anonymous Witnesses Before the International Criminal Court: Due Process in Dire Straits*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 615, 622–23 (Carsten Stahn & Göran Sluiter eds., Martinus Nijhoff Publishers 2009).

75. Kai Ambos, *International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?*, 3 INT'L CRIM. L. REV. 1, 13–14 (2003).

76. *See* O'Sullivan & Montgomery, *supra* note 50, at 512.

"examine, or have examined, the witnesses against him."[77] According to the Chamber, the right remains intact so long as the accused is given "ample opportunity" to question the anonymous witness and the right is only "restrict[ed] . . . to the extent that is necessary."[78] It reached this conclusion after weighing "the ability of the defendant to establish facts" against the interest in maintaining the anonymity of the witness.[79] The Chamber further found that balancing these competing interests "is inherent in the notion of a 'fair trial'" as set out in Article 20 of the Statute.[80]

Article 20 asserts that trials at the International Criminal Tribunal for the former Yugoslavia must be "fair and expeditious" and that they be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[81] The wording of Article 20 led the Trial Chamber to conclude that it had the discretion to limit the disclosure of the identity of the witnesses, but that its discretion could only be exercised in "exceptional circumstances."[82] In *Tadić*, the Trial Chamber overcame this limitation by declaring that an ongoing armed conflict of the sort taking place in the former Yugoslavia at the time constituted an exceptional circumstance "*par excellence*."[83] The Trial Chamber then announced five factors to be considered when determining whether to protect the anonymity of a witness: (1) there must be real fear for the safety of the witness or her or his family; (2) the testimony of the particular witness must be important to the Prosecutor's case; (3) the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy; (4) the ineffectiveness or non-existence of a witness protection program; and (5) any measures taken should be strictly necessary and a less restrictive measure should be applied if it can secure the necessary protection.[84]

The Trial Chamber recognized that because witness anonymity involves a restriction on the accused's ability to properly examine the witness, certain safeguards also needed to be introduced to "redress any diminution of the right to a fair trial."[85] Those safeguards are: (1) that the Judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony; (2) the Judges must be aware of the identity of the witness, in order to test the reliability of the witness; (3) that the defense must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts; and (4) the

77. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 67 (Int'l Crim. Trib. for the former Yugoslavia Aug. 10, 1995).

78. *Id.*

79. *Id.* ¶¶ 55, 57.

80. *Id.* ¶ 55.

81. Statute of the International Criminal Tribunal for the former Yugoslavia art. 20(1), May 25, 1993, U.N. Doc. S/RES/827, 32 I.L.M. 1203.

82. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 60.

83. *Id.* ¶ 61.

84. *Id.* ¶¶ 62–66.

85. *Id.* ¶ 69.

identity of the witness must be released when there are no longer reasons to fear for the security of the witness.[86] It is interesting to note that all of the identified factors or safeguards identified by the Trial Chamber are directed towards the interests of the witnesses and none of them require any consideration of whether the accused will be prejudiced by the anonymous testimony.[87]

Judge Stephen strongly dissented from the majority opinion set out in the Protective Measures Decision in *Tadić*. Judge Stephen concluded that the statute did not permit the witness to remain anonymous if doing so would have any real impact on the rights of the accused.[88] Judge Stephen also failed to find any support in the Rules of Procedure and Evidence for permitting witnesses to remain anonymous from the defendant during trial.[89] Judge Stephen cited a string of European Court of Human Rights cases to support his position, starting with *Kostovski v. The Netherlands*, which stood for the proposition that using anonymous statements as sufficient grounds to find a conviction is "irreconcilable" with the fair trial guarantees in the European Convention on Human Rights.[90] Based on the absence of any affirmative authorization in the statute or the Rules permitting witnesses to testify anonymously, the existing European Court of Human Rights caselaw, or American, English, and Australian caselaw, Judge Stephen found that "in this case to permit anonymity of witnesses whose identity is of significance to the defendant will not only adversely affect the appearance of justice being done, but is likely actually to interfere with the doing of justice."[91]

The *Kostovski* case is an interesting one in the context of the *Tadić* Protective Measures Decision because both the majority and the dissent rely on it to some extent to justify their positions. The majority identified two necessary safeguards to "redress any diminution of the right to a fair trial," which they drew directly from the *Kostovski* case and, when they combined them with the two other safeguards, deemed them sufficient to permit witnesses to testify anonymously.[92] However, the majority distinguished the rest of the *Kostovski* decision on the grounds that it was too factually dissimilar from *Tadić* to be instructive.[93] The majority's decision

86. *Id.* ¶ 71.

87. *Id.* ¶ 71.

88. Prosecutor v. Tadić, Case No. IT-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 6 (Int'l Crim. Trib. for the former Yugoslavia Aug. 10, 1995), www.icty.org/x/cases/tadic/tdec/en/50810pmn.htm [https://perma.cc/27TT-PWTJ].

89. *Id.* at 8.

90. Kostovski v. Netherlands, App. No. 11454/85, Eur. Ct. H.R. ¶ 44 (1989).

91. Prosecutor v. Tadić, Case No. IT-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 11.

92. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 69, 71 (Int'l Crim. Trib. for the former Yugoslavia Aug. 10, 1995) (citing Kostovski v. Netherlands, App. No. 11454/85, Eur. Ct. H.R. ¶ 43 (1989)).

93. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 68.

to de-emphasize the impact of the *Kostovski* decision does not accord with Judge Stephen's belief that *Kostovski* and its progeny are decisive when ruling on the issue.[94]

The majority's choice to disregard most of the *Kostovski* decision and its successors demonstrates that it intended to forge its own path in reaching its finding, rather than rely on the existing jurisprudence on witness anonymity. The Trial Chamber reasoned that the unique characteristics of the International Criminal Tribunal for the former Yugoslavia's Statute, in particular its affirmative obligation to protect witnesses and victims, required that it be interpreted on its own terms and not through the decisions of other courts.[95] The Trial Chamber also indicated that because the International Criminal Tribunal for the former Yugoslavia operated during a time of continued conflict, without a police force or witness protection programs, the circumstances distinguished its decision from any previous decision regarding Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.[96]

The effect of the Protective Measures Decision in *Tadić* was not limited to the International Criminal Tribunal for the former Yugoslavia. In *Prosecutor v. Rutaganda*, Trial Chamber I of the International Criminal Tribunal for Rwanda specifically took notice of the Protective Measures Decision in *Tadić* when reaching a decision on the appropriate protective measures to take in Mr. Rutaganda's case.[97] The Chamber found that the prosecution only had to disclose the identity of certain witnesses to the defense to give "sufficient time to allow the defense to prepare for trial," without elaborating as to what constituted sufficient time.[98] This position was reiterated in *Prosecutor v. Musema*.[99]

In *Prosecutor v. Bagosora*, Trial Chamber III of the International Criminal Tribunal for Rwanda again relied on the *Tadić* Protective Measures Decision when it held that an exceptional circumstance existed for allowing the prosecution to withhold witness identities from the defense until thirty-five days before a witness would be called to testify.[100] The Trial Chamber never identified the precise nature of the special circumstances which justified the late disclosure of witness identities.[101] Trial Chamber III also found in *Bagosora* that the accused's right to a fair trial is a qualified one,

94. *Id.* ¶¶ 67–70.
95. *Id.* ¶ 26.
96. *Id.* ¶ 27.
97. Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgement and Sentence, ¶ 18 (Int'l Crim. Trib. for Rwanda Dec. 6, 1999).
98. Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses, ¶ 7 (Int'l Crim. Trib. for Rwanda Sept. 26, 1996).
99. Prosecutor v. Musema, Case No. ICTR 96-13-T, Decision on the Prosecutor's Motion for Witness Protection, ¶ 23 (Int'l Crim. Trib. for Rwanda Nov. 20, 1998).
100. Prosecutor v. Bagosora, Case No. ICTR 98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ¶¶ 9, 22 (Int'l Crim. Trib. for Rwanda Dec. 5, 2001).
101. *See id.*

and that the Trial Chamber has the right to control the accused's exercise of that right to the extent that the Trial Chamber is obligated to provide protection to victims and witnesses.[102] In so doing, the Trial Chamber acknowledged that it was not giving effect to the literal words of Rule 69(C), which requires the prosecution to disclose witness identities before trial, because doing so would "unnecessarily tax any real notion of witness protection without advancing the Accused's right to effective cross-examination in any meaningful way."[103] This demonstrates that although the Trial Chamber declared that its obligation to protect victims and witnesses is of equal importance to the accused's fair trial rights, in fact it viewed that obligation took precedence over guaranteeing the accused's right to a fair trial.

The International Criminal Tribunal for Rwanda's reliance on the *Tadić* Protective Measures Decision to limit the disclosure of the identity of witnesses can be partially explained by the fact that the statutes of the *ad hoc* tribunals contain identical provisions on the relationship between the fair trial rights of the accused and the Tribunal's obligations to protect victims and witnesses.[104] However, the International Criminal Tribunal for Rwanda's decisions on this issue fail to account for the fact that the International Criminal Tribunal for the former Yugoslavia justified its exercise of discretion in *Tadić* on the grounds that an exceptional circumstance existed in the form of an ongoing military conflict.[105] This omission is significant because although the *Bagosora* court found that there were exceptional circumstances permitting it to exercise its discretion, it never explicitly stated what those special circumstances were or explained what made them exceptional.[106] Therefore, its reliance on the *Tadić* Protective Measures Decision is flawed, as one of the fundamental elements underpinning that decision is underdeveloped in the *Bagosora* opinion. It may well be that exceptional circumstances did exist, but without disclosing what they are it is difficult to accept that they are so exceptional as to allow an infringement on the fair trial rights of the accused.

The *Bagosora* court's decision to preference the protection of witnesses over the fair trial rights of the accused is remarkable in light of the fact that the International Criminal Tribunal for the former Yugoslavia made decisions after *Tadić* indicating that the original *Tadić* decision was too permissive. In *Prosecutor v. Blaškić*, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia reaffirmed the importance of imposing witness protective measures, but emphasized that the rights of the accused

102. *Id.* ¶ 14.

103. *Id.* ¶ 9.

104. *See id.* ¶ 4.

105. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 61 (Int'l Crim. Trib. for the former Yugoslavia Aug. 10, 1995).

106. Prosecutor v. Bagosora, Case No. ICTR 98-41-A, Judgement, ¶ 82 (Int'l Crim. Trib. for Rwanda Dec. 14, 2011).

must be favored over the rights of witness.[107] The *Blaškić* court also drew a distinction between the identity protections owed to a witness during the pre-trial period versus the trial period.[108] In reaching its decision, the *Blaškić* court explicitly agreed with the holding in *Kostovski* and Judge Stephen's dissent in *Tadić*.[109] In spite of this, the *Bagosora* court made no mention of the *Blaškić* decision and instead relied on the earlier *Tadić* decision.[110] The failure of the *Bagosora* court to take notice of the *Blaškić* decision is particularly notable as *Blaškić* was decided more than five years before *Bagosora*.[111]

The *Bagosora* court's reliance on the *Tadić* Protective Measures Decision would not be so concerning if *Tadić* and *Blaškić* were the only two decisions on this issue. However, there is a string of International Criminal Tribunal for the former Yugoslavia cases which pre-date *Bagosora* and more closely follow the *Blaškić* decision than the *Tadić* decision. In *Prosecutor v. Delalić, et al.*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found that the accused "has a right to know the identities of the witnesses" that the prosecution intends to call during trial.[112] The notion that the accused can only conduct adequate cross-examination if the accused has a sufficient time to conduct a pre-trial investigation reinforces this right.[113] The *Delalić* court also identified the appropriate balance between the fair trial rights of the accused and the protection owed to the victims and witnesses. It clarified that "full respect" is to be given to the rights of the accused and that the court must act with "due regard" for the protection of victims and witnesses.[114] The implication of this finding is that the rights of the accused are in a superior position to the protection of victims and witnesses. Just over a month later, the *Delalić* Court again considered the issue of witness anonymity. In this second decision, the Trial Chamber reviewed the decisions in *Tadić* and *Blaškić* and specifically adopted the holding in *Blaškić* on the grounds that allowing a witness to testify anonymously constituted a violation of the

107. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, ¶ 39 (Int'l Crim. Trib. for the former Yugoslavia Nov. 5, 1996).

108. *Id.* ¶ 24.

109. *Id.* ¶¶ 28–29, 34.

110. *See* Prosecutor v. Bagosora, Case No. ICTR 98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ¶ 8 (Int'l Crim. Trib. for Rwanda Dec. 5, 2001).

111. *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement (Int'l Crim. Trib. for the former Yugoslavia July 29, 2004); Prosecutor v. Bagosora, Case No. ICTR 98-41-A, Judgement, cover page (Int'l Crim. Trib. for Rwanda Dec. 14, 2011).

112. Prosecutor v. Delalić, Case No. IT-96-21, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, ¶ 17 (Int'l Crim. Trib. for the former Yugoslavia Mar. 18, 1997), www.icty.org/x/cases/mucic/tdec/en/70318WI2.htm [https://perma.cc/4236-MAUH].

113. *Id.* ¶ 19.

114. *Id.* ¶ 15.

accused's right to participate in trial.[115]

The International Criminal Tribunal for the former Yugoslavia further developed its thinking about witness anonymity in *Prosecutor v. Brđanin, et al.* There, the Trial Chamber found that any balancing of the accused's fair trial rights necessarily results in a less than perfect trial but that does not mean that the trial will not be fair.[116] As a result, it concluded that a witness may only remain anonymous if it is established that the individual witness is "in fact" in danger or in risk of danger.[117] The Trial Chamber also found that the anonymity of a witness could be maintained only as long as required to give the defense "adequate time" to prepare its case.[118] The Trial Chamber further expanded on this idea in a subsequent decision where it held that when reaching a decision as to the issue of witness anonymity, the rights of the accused are to be considered first and the need to protect victims and witnesses should be considered second.[119]

The International Criminal Tribunal for Rwanda revisited the decision in *Bagosora* in 2003.[120] In the interim the case had been transferred to Trial Chamber I for consideration on its merits and following the transfer the defense challenged the original order entered by Trial Chamber III concerning witness anonymity.[121] Trial Chamber I abandoned the rolling disclosure regime established by Trial Chamber III and ordered the prosecution to disclose the identities and unredacted statements of all of the remaining witnesses it intended to call at least thirty-five days before the next scheduled trial session.[122]

Both *ad hoc* tribunals began to adhere more closely to the *Blaškić* decision after the revision to the *Bagosora* decision in 2003. The decisions issued by the International Criminal Tribunal for the former Yugoslavia largely took notice of the fact that a witness could remain anonymous during the pre-trial phase of proceedings but that anonymity had to give way prior to trial.[123] The International Criminal Tribunal for Rwanda also fol-

115. Prosecutor v. Delalić, Case No. IT-96-21, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", ¶¶ 60–61 (Int'l Crim. Trib. for the former Yugoslavia Apr. 28, 1997).

116. Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Motion by Prosecution for Protective Measures, ¶ 31 (Int'l Crim. Trib. for the former Yugoslavia July 3, 2000).

117. *Id.* ¶ 32.

118. *Id.*

119. Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Second Motion by Prosecution for Protective Measures, ¶ 18 (Int'l Crim. Trib. for the former Yugoslavia Oct. 27, 2000).

120. Prosecutor v. Bagosora, Case No. ICTR-98-4-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (Int'l Crim. Trib. for Rwanda July 18, 2003).

121. *Id.* ¶ 2.

122. *Id.* at 7.

123. *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, ¶ 34 (Int'l Crim. Trib. for the former Yugoslavia Oct. 30, 2008); Prosecutor v. Perišić, Case No. IT-04-81-PT, Decision on Prosecution Motion for Protective Measures for Witnesses, 5 (Int'l Crim. Trib. for the former Yugoslavia May 27, 2005), https://www.icty.org/x/cases/perisic/tdec/en/050527.htm [https://perma.cc/ALA2-VWLV]; Prosecutor v. Stanišić, Case No. IT-03-69-PT, Decision on Confidential

lowed a similar rule whereby disclosure of the identities of protected witnesses had to take place thirty days before the start of trial and all at one time.[124] Therefore, both *ad hoc* tribunals ended up applying similar rules regarding anonymous witness testimony despite the initial disagreement about how to properly balance the fair trial rights of the accused with the need to provide protection to vulnerable witnesses.

2. The International Criminal Court

The International Criminal Court has examined the issue of anonymous witness testimony from the perspective of whether anonymous victims can participate in proceedings. This was, in part, necessary because of the more active role that victims play in proceedings at the International Criminal Court.[125] In *Prosecutor v. Lubanga*, the Trial Chamber rejected the assertion of the prosecution and the defense that witnesses should not be permitted to testify anonymously.[126] Instead, the court found that witnesses could testify anonymously only if that witness met certain criteria.[127] The Trial Chamber also cautioned that anonymous victim participation could not "be allowed to undermine the fundamental guarantee of a fair trial" and that the extent and significance of the witness's proposed testimony should be taken into account when determining whether he or she could participate anonymously.[128] The court reserved for itself the responsibility of evaluating the potential prejudice anonymous victim participation could have on the parties.[129] In *Prosecutor v. Katanga*, Trial Chamber II found that the accused does not have an absolute right to know the identity of the witnesses giving testimony against him or her.[130] Instead, it found that the Trial Chamber must strike a balance between the rights of the accused and the rights of the witness when the protection of the witness's safety is at issue.[131] However, any restriction on the accused's right to know the identities of the witnesses against him must be strictly necessary and any infringement on the accused's rights must be counterbalanced by other procedural measures.[132] Trial Chamber II also authorized disclosure of the identities of the witnesses on a rolling

Prosecution Motions for Protective Measures, 5 (Int'l Crim. Trib. for the former Yugoslavia Oct. 26, 2004).

124. *See* Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7 (Int'l Crim. Trib. for Rwanda May 6, 2009).

125. *See* HUMAN RIGHTS CENTER, UC BERKELEY SCHOOL OF LAW, THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT 13 (2015).

126. Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on Victims' Participation, ¶ 130 (Jan. 18, 2008).

127. *See id.* ¶ 131.

128. *Id.*

129. *Id.*

130. Prosecutor v. Katanga, ICC-01/04-01/07, Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009, ¶ 31 (May 28, 2009).

131. *Id.*

132. *Id.* ¶ 33.

basis.[133]

A practice has developed at the International Criminal Court whereby a party may provide a preliminary list of witnesses identified only by pseudonyms. Trial Chamber IX approved of this practice in *Prosecutor v. Ongwen*, when it found that the defense need not be provided with the identity of vulnerable witnesses until leave has been requested to call those witnesses and the relevant participant has identified which witnesses, from a larger list, it actually intends to call.[134] However, witnesses included on a preliminary witness list cannot be protected by pseudonyms when the party preparing that list has tacitly indicated that it already knows which of those witnesses it intends to call.[135] That is because preliminary witness lists would serve no useful purpose if the party issuing it could simply shield the identities of the witnesses it knew it was going to call during trial.[136]

The anonymous witness decisions in *Lubanga* and *Katanga* are reminiscent of the earlier decisions of the *ad hoc* tribunals without directly referencing them. The *Katanga* decision reintroduces rolling disclosure obligations rather than necessitating witness identity disclosure by a particular date.[137] It also provides a reminder of the balancing tests common at the International Criminal Tribunal for the former Yugoslavia, and particularly of the *Tadić* decision and its declaration that the rights of the accused and the rights of a witness are co-equal.[138] Finally, and most importantly, it introduces the strictly necessary standard whereby the accused's right to have information disclosed to him or her about the testifying witnesses can only be restricted to the extent that such limitations are strictly necessary.[139]

3. *The Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia*

The Special Tribunal for Lebanon did not have to consider the issue of keeping the identities of witnesses from the accused as all of the accused are tried *in absentia*.[140] The Special Tribunal for Lebanon regularly issues orders protecting the identities of witnesses from the public and the media, but those orders are outside the purview of this Article. The Special Tribu-

133. *Id.* ¶¶ 47–48.

134. Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on Defence Request for the Identities of Potential Witnesses on the Legal Representatives of Victims' Preliminary Lists of Witnesses, ¶ 11 (Dec. 22, 2017).

135. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Further Directions on the Conduct of the Proceedings in 2016, ¶ 19 (Dec. 9, 2015).

136. *See id.*

137. Prosecutor v. Katanga, ICC-01/04-01/07, Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009, ¶ 34 (May 28, 2009).

138. *See id.* ¶ 31.

139. *Id.* ¶ 33.

140. *See Rafik Hariri Murder: Suspects to be Tried in Absentia*, BBC (Feb. 2, 2012), https://www.bbc.com/news/world-middle-east-16849508 [https://perma.cc/M58H-3CVN].

nal's Rules of Procedure and Evidence do set out a procedure whereby the pre-trial judge can question an anonymous witness outside of the presence of the parties.[141] Although the pre-trial judge is charged with interviewing the anonymous witness, the interview can take place during any point of proceedings and is not confined to the pre-trial stage.[142] After questioning the witness, the pre-trial judge must provide the parties with a transcript of the interview and a declaration of his or her opinion about the veracity of the witness's statement.[143] The transcript is then included, along with all of the other evidence, in the file given to the Trial Chamber.[144] The anonymous witness's testimony may be introduced during trial so long as its probative value is not substantially outweighed by its prejudicial effect.[145] The weight given by the Trial Chamber to anonymous evidence when making its decision is limited to the extent that a conviction cannot be solely based on the anonymous evidence, nor can it be considered decisive.[146]

The Extraordinary Chambers in the Courts of Cambodia also has a system whereby the statements of anonymous witnesses can be recorded in the case file.[147] As stated in their Internal Rules, the Co-Investigating Judges and Chambers may implement measures to protect the identity of a witness when the life or health of the witness, or of his or her family members, is in serious danger.[148] To achieve that goal, the witness's statement can be recorded without his or her name being recorded in the case file.[149] Like the procedure used at the Special Tribunal for Lebanon, a statement recorded using this procedure cannot be the only evidence supporting the conviction of the accused.[150]

4. Conclusion

International and internationalized criminal courts and tribunals have found that the accused's right to cross-examine the witness testifying against them, as part of his or her right to be present, generally means that the witness's identity cannot be withheld from the accused. Instead, courts and tribunals considering this issue have tended towards imposing temporal limits on the disclosure of the identity of witnesses. This is done in an effort to provide the witness with protection while still giving the accused adequate time to prepare his or her examination of the protected witness.[151] More recently, some courts and tribunals have adopted a proce-

141. Rules of Procedure and Evidence, Special Tribunal for Lebanon, *supra* note 48, at r. 93.
142. *Id.*
143. *Id.*
144. *Id.* at r. 95.
145. *Id.* at r. 149(D), (F).
146. *Id.* at r. 159.
147. ECCC Internal Rules, *supra* note 24, at r. 29(4).
148. *Id.* at r. 29(3).
149. *Id.* at r. 29(4).
150. *Id.* at r. 29(6).
151. *See* Prosecutor v. Katanga, ICC-01/04-01/07, Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009, ¶¶ 32-33 (May 28, 2009).

dure whereby anonymous testimony can be recorded and used to inculpate the accused, but it cannot be the only evidence, or the decisive evidence, supporting a conviction.[152] This procedure may help protect vulnerable witnesses from harm while also ensuring that the accused will not be convicted on the basis of anonymous testimony.[153] Unfortunately, it also has the tendency to encourage courts and tribunals to rely on written witness statements that have not been subjected to cross-examination.[154] This poses a different risk to the accused's right to participate and right to be present at trial.

B. Replacing Live Testimony with Written Witness Statements

A second evidentiary issue affecting the accused's right to be present a trial is the prosecution's use of written witness statements during trial instead of live testimony. Written witness statements are out-of-court statements made by witnesses and offered into evidence in lieu of in court testimony.[155] Written witness statements can be useful tools for expediting trials, but overreliance on them "undermines the purposes of cross-examination" and "creates doubt about the reliability of the statement."[156] Written witness statements include: affidavits, interview transcripts, transcripts from other court proceedings, and summaries of witness statements. The introduction of written witness statements into evidence often takes one of two forms. The first allows the written statement to be admitted as a replacement for direct in-court testimony but the declarant must still appear in court and be subjected to cross-examination.[157] The second form permits the written statement to entirely replace the witness's live testimony and the witness is never subject to cross-examination.[158]

The Nuremberg Tribunal held after the Second World War was the first international or internationalized criminal court or tribunal to allow the introduction of written witness statements into evidence.[159] Although not specifically authorized by the Statute or the Rules, the International Military Tribunal allowed the introduction of affidavits in lieu of live testimony but required that the declarant be made available for cross-examination.[160] The International Military Tribunal for the Far East, held in Tokyo

152. *See, e.g.*, Rules of Procedure and Evidence, Special Tribunal for Lebanon, *supra* note 48, at r. 159.

153. *See* ECCC Internal Rules, *supra* note 24, at r. 29(1).

154. *See, e.g.*, Rules of Procedure and Evidence, Special Tribunal for Lebanon, *supra* note 48, at r. 149(D), (F).

155. *See, e.g.*, Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, r. 92 *bis* (as amended 2015).

156. Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1398–99 (2001).

157. *See, e.g.*, Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L. J. 47, 53 (2003).

158. *See, e.g.*, Charter of the International Military Tribunal for the Far East art. 13, Apr. 26, 1946, T.I.A.S. No. 1589.

159. *See* Megan A. Fairlie, *The Abiding Problem of Witness Statements in International Criminal Trials*, 50 N.Y.U. J. INT'L L. & POL. 75, 79 (2017).

160. *See* Fairlie, *supra* note 157, at 53.

from 1946-1948, also allowed the prosecution to introduce written witness evidence.[161] Its statute specifically permitted the admission of affidavit evidence, and the Tribunal issued a ruling at the beginning of the trial indicating that evidence could be presented by affidavit.[162] The Tribunal decided to allow the admission into evidence of affidavits despite the fact that it was aware that doing so would strip the rule against leading questions of "all its practical importance."[163] The use of affidavits in the post Second World War context was justified on the grounds that it would expedite trial proceedings and allow the introduction of evidence from witnesses that might not otherwise be able to testify in person.[164]

1. The International Criminal Tribunal for the former Yugoslavia

The *ad hoc* tribunals also embraced the introduction of written witness statements in an effort to expedite trials.[165] The admission of written witness statements was not originally part of the rules of the *ad hoc* tribunals, however the practice was introduced in 1998 through an amendment to the International Criminal Tribunal for the former Yugoslavia's Rules of Procedure and Evidence. The newly introduced rule, Rule 94 *ter*, specifically authorized the parties to offer affidavits into evidence to corroborate the testimony of a witness that offered live in-court testimony.[166] The rule also required that the affidavits be filed prior to the introduction of the live testimony to which the affidavits relate.[167] There was no mandatory right to cross-examine the affiants, although the party not offering the affidavit as evidence could object to its introduction and the Trial Chamber could order that the witness be made available for cross-examination.[168]

The Appeals Chamber of the *ad hoc* tribunals was called on to interpret Rule 94 *ter* in *Prosecutor v. Korkić and Èerkez*. Three separate issues about the interpretation of Rule 94 *ter* were raised on appeal. The first related to

161. *See* Charter of the International Military Tribunal for the Far East, *supra* note 158, at art. 13.

162. *Id.* at art. 13(c)(3); *see also* Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L. L. 725, 751 (1999).

163. May & Wierda, *supra* note 162, at 751(citing The United States of America and Others v. Araki Sadao et al., Judgment of the Hon'ble Mr. Justice Pal Member from India, 299 (Int'l Military Trib. for the Far East 1948)).

164. MARK KLAMBERG, EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS: CONFRONTING LEGAL GAPS AND THE RECONSTRUCTION OF DISPUTED EVENTS 384 (Martinus Nijhoff Publishers 2013); *see* NEIL BOISTER & ROBERT CRYER; THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 311 (Oxford Univ. Press 2008); Fairlie, *supra* note 157, at 52-53; Paul E. Spurlock, *The Yokohama War Crimes Trials: The Truth About a Misunderstood Subject*, 36 ABA J. 387, 389 (1950).

165. *See*, Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, Sixth Annual Report, ¶ 116, U.N. Doc. A/54/187 (Aug. 25, 1999) [hereinafter Sixth Annual Report]; KLAMBERG, *supra* note 164, at 384.

166. Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, *supra* note 155, at r. 93 *ter* (deleted Dec. 2000).

167. *See id.*

168. *See id.*

the Trial Chamber's finding that the requirement that the affidavits be filed in advance of the testimony was nothing more than a "technical procedural requirement" which, if interpreted literally, "would certainly lead to or may lead to a defeat to the interests of justice."[169] In the alternative, the Trial Chamber found that the rule must be given "useful effect" in accordance with a "principle of international law."[170] The Appeals Chamber disagreed, finding that Rule 94 *ter* contains strict procedural protections and that if evidence is admitted "in contravention of these protections, the intent of the Rule becomes distorted."[171] Rather, to properly give effect to the rule, the Trial Chamber must balance protecting the rights of the accused against the need to ensure properly and expeditiously conducted trial proceedings.[172] That balance can only be struck by strictly following the procedural requirements of Rule 94 *ter* as those technical requirements are "an integral part of the Rule protecting the rights of the accused."[173]

The second issue considered by the Appeals Chamber was whether an objection to the admission of an affidavit automatically led to the affidavit being excluded from evidence if the affiant was not produced for cross-examination.[174] The Appeals Chamber found that it did not.[175] Rather, the rule only granted the right to object to the party not offering the evidence with the Trial Chamber maintaining the discretion to order the affiant to appear for cross-examination.[176] Third, the Appeals Chamber agreed with the Trial Chamber's finding that the affidavit must address some fact in dispute and that the term "fact in dispute" must not be construed too narrowly.[177] However, the Appeals Chamber found that the Trial Chamber interpreted the term "fact in dispute" too broadly and that there must be a clear link between the testimony and the affidavit testimony introduced to support it.[178]

Soon after the Appeals Chamber announced its decision in *Korkić and Èerkez*, the judges of the International Criminal Tribunal for the former Yugoslavia, sitting in plenary session, deleted Rule 94 *ter* from the Rules and replaced it with Rule 92 *bis*.[179] This change represented the culmination of an on-going process aimed at shortening the length of trials at the Tribunal.[180] The President of the International Criminal Tribunal for the

169. Prosecutor v. Korkić, Case No. IT-95-14-2/T, Trial Transcript, p. 16487 (Int'l Crim. Trib. for the former Yugoslavia Mar. 10, 2000), https://www.icty.org/x/cases/kordic_cerkez/trans/en/000310ed.htm [https://perma.cc/E9AQ-TEZQ].

170. *Id.*

171. Prosecutor v. Korkić, Case No. IT-95-14-2/T, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, ¶ 27 (Int'l Crim. Trib. for the former Yugoslavia Sept. 18, 2000).

172. *See id.* ¶ 28.

173. *Id.* ¶ 34.

174. *See id.* ¶ 35.

175. *Id.*

176. *Id.* ¶¶ 35, 37.

177. *Id.* ¶ 39.

178. *Id.*

179. *See* KLAMBERG, *supra* note 164, at 386; Fairlie, *supra* note 157, at 71.

180. *See* Fairlie, *supra* note 157, at 72.

former Yugoslavia, Antonio Cassese, established a working group in December 1997 tasked with investigating how trial could be conducted more expeditiously "without jeopardising respect for the rights of accused persons."[181] The findings of the working group led to the amendment in 1998 of numerous court rules particularly directed towards speeding up the pre-trial stage of proceedings.[182] These changes did not resolve the length of trial concerns, however, and the matter was taken up again in August 1999.[183] At that time, the judges reiterated their commitment to reducing the length of trial and specifically reminded the United Nations General Assembly and Security Council that unlike the International Military Tribunals at Nuremberg and Tokyo following World War II, the Yugoslavia Tribunal was primarily receiving evidence through live in-court testimony rather than affidavits.[184] Although the Tribunal did not directly state that the use of live in-court testimony was slowing down proceedings, the implication was clear.

The judges were not alone in being concerned about the efficiency of the *ad hoc* tribunals. In November 1998, the United Nations' Advisory Committee on Administrative and Budgetary Questions called for a comprehensive review of the management and structure of the International Criminal Tribunal for the former Yugoslavia.[185] In response, the General Assembly simultaneously adopted two resolutions requesting that the Secretary-General conduct a review of the Tribunal's efficient use of resources by each of the *ad hoc* tribunals.[186] To comply with those resolutions, the Secretary-General set up an expert group to conduct the requested reviews.[187]

The expert group established to review the operations of the tribunals issued its report and recommendations on November 11, 1999.[188] It noted that "[m]ajor concerns have been voiced not only by United Nations officials, Member States and others, but also by all the organs of the Tribunals with regard to the slowness of the pace of proceedings."[189] The expert group identified a number of reasons for the delays, including an inadequate number of courtrooms and judges, the necessity of translating large

181. Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Fifth Annual Report, ¶ 106, U.N. Doc. A/53/219 (Aug. 10, 1998).

182. *Id.* ¶¶ 107–08.

183. *See* Sixth Annual Report, *supra* note 165, ¶ 13.

184. *Id.*

185. *See* Rep. of the Advisory Comm. on Admin. and Budgetary Questions, Revised Budget Estimates for 1998 and Proposed Requirements for 1999 of the International Tribunal for the former Yugoslavia, ¶ 65, U.N. Doc. A/53/651 (Nov. 9, 1998).

186. *See* G.A. Res. 53/212, ¶ 5, U.N. Doc. A/RES/53/212 (Feb. 10, 1999); *see also* G.A. Res. 53/213, ¶ 4, U.N. Doc. A/RES/53/213 (Feb. 10, 1999).

187. *See* Rep. of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the Int'l Criminal Tribunal for the former Yugoslavia and the Int'l Criminal Tribunal for Rwanda, ¶ 3, U.N. Doc. A/54/634 (Nov. 22, 1999).

188. *See id.* at 3.

189. *Id.* ¶ 35.

amounts of evidence, and pre-trial and trial motion practice.[190] Significantly, the expert group also identified a lack of judicial control over trials, including, but not limited to, a failure on the part of the judges to satisfactorily limit the manner in which evidence was being presented.[191] This led to a recommendation suggesting that a rule might be added to the Rules of Procedure and Evidence whereby the prosecution could introduce written witness statement into evidence in lieu of direct testimony, and the accused would have the opportunity to cross-examine the person making the statement if the accused so wished.[192]

This all culminated in December 2000 with the introduction of Rule 92 *bis* and the deletion of Rule 94 from the Rules of Procedure and Evidence.[193] The purpose of this new rule was to facilitate the admission of peripheral and background information through written submissions in order to expedite the proceedings while simultaneously protecting the fair trial rights of the accused.[194] The addition of Rule 92 *bis*, together with the deletion of Rule 90(A), which codified the primacy of oral testimony, was described by Judge Patricia Wald as part of "the emerging dominance of written testimony."[195] Rule 92 *bis* allows the Trial Chamber to admit "in whole or in part, the evidence of a witness in the form of a written statement . . . in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."[196] The primary effect of Rule 92 *bis* as compared to Rule 94 *ter* is that Rule 92 *bis* deemphasized the importance of the affidavit corroborating oral testimony, making corroboration just one of six factors to consider when deciding whether to accept the affidavit into evidence.[197] Commentators at the time noted that the rule change appeared to have had a dramatic effect on the way in which the prosecution was seeking to present its cases.[198] For example, in *Prosecutor v. Plavšić and Krajišnik*, the prosecution sought to present the written statements of approximately 170 witnesses in lieu of oral testimony.[199]

It was generally thought that the introduction of Rule 92 *bis* would help shorten trials at the International Criminal Tribunal for the former

190. *See id.* ¶¶ 37–38, 40, 49.
191. *See id.* ¶¶ 76–77.
192. *See id.* ¶ 86.
193. Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, Eighth Annual Report, ¶ 51, U.N. Doc. A/56/352 (Sept. 17, 2001) [hereinafter Eighth Annual Report].
194. *Id.*
195. *See generally* Patricia Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L. J. 535, 545–48 (2001).
196. Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, *supra* note 155, at r. 92 *bis* (as amended Jul. 8, 2015).
197. *Id.*
198. Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court*, 12 CRIM. L. FORUM 167, 176–77 (2001).
199. *Id.*

Yugoslavia by reducing "pointless and repetitive cross-examination."[200] However, a study conducted by Máximo Langer and Joseph Doherty of trials held between April 26, 1995 and July 1, 2006 demonstrated just the opposite.[201] Langer and Doherty found that rather than decreasing the length of trial, Rule 92 *bis*, together with other new rules adopted by the Tribunal, actually increased the length of trials.[202] They attributed this to the fact that the measures introduced to shorten trial actually created new procedural steps and requirements that made trial longer.[203] The study also revealed that written witness statements were being offered into evidence in addition to, rather than in lieu of, live in-court testimony.[204] The study did find that there was a slight decrease in the number of live witnesses testifying during trial after Rule 92 *bis* was introduced.[205] Despite that, this reform largely failed to achieve the goals underlying its purpose of reducing the length of trials at the Tribunal.[206] This demonstrates the dangerous proposition of reducing the accused's rights when lacking certainty that the proposed infringement will create some tangible benefit.

Both the language of Rule 92 *bis* and the 2001 Annual Report on the International Criminal Tribunal for the former Yugoslavia emphasize that Rule 92 *bis* is only meant to admit written statements into evidence that relate to "peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused under the Statute."[207] However, the first decision to interpret that rule indicated that the Tribunal intended to employ Rule 92 *bis* more broadly than the language of the rule or the 2001 Annual Report might suggest. In *Prosecutor v. Sikirica, et al.*, the Trial Chamber specified that when reaching a decision as to whether it should order a witness to appear for cross-examination following the introduction of his or her written statement, it must consider whether the written statement "goes to proof of a critical element of the Prosecution's case against the accused."[208] By applying this approach, the *Sikirica* Trial Chamber admitted written evidence from three different witnesses directly relating to Mr. Sikirica's intent to commit genocide, as well as the written testimony of one witness which did not directly implicate any of the accused but had a bearing on the case in a "a significant and direct

200. Prosecutor v. Sikirica, Case No. IT-95-8, Trial Transcript, 2441 (Int'l Crim. Trib. for the former Yugoslavia Apr. 24, 2001), www.icty.org/x/cases/sikirica/trans/en/010424me.htm [https://perma.cc/4HSJ-BK6H].

201. Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of ICTY Reforms*, 36 YALE J. INT'L L. 241, 252 (2011).

202. *Id.* at 243.

203. *Id.*

204. *Id.* at 273–74.

205. *Id.* at 274.

206. *Id.* at 269.

207. Eighth Annual Report, *supra* note 193, ¶ 51.

208. Prosecutor v. Sikirica, Case No. IT-95-8, Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis*, ¶ 4 (Int'l Crim. Trib. for the former Yugoslavia May 23, 2001), www.icty.org/x/cases/sikirica/tdec/en/10523AE515806.htm [https://perma.cc/8UHP-NLHE].

way."[209]

The Trial Chamber did allow the defense to cross-examine all four of these witnesses, but that fact misses the larger point. Both Rule 92 *bis* and the 2001 Annual Report clarify that only background and peripheral evidence should be admitted through written evidence.[210] The *Sikirica* Trial Chamber ignored that aspect of the rule completely and allowed the introduction of written evidence relating directly to the crimes alleged.[211] Simply because the Chamber allowed these witnesses to be cross-examined does not change the fact that the witnesses' direct evidence was in written form. When a witness proposes to testify as to facts that are material to the charges brought against the accused, he or she should be required to present that evidence orally. One of the fundamental purposes of live testimony is to allow the Trial Chamber to observe the demeanor of the witness while he or she is testifying.[212] That cannot be accomplished if the witness can present some part of his or her testimony in writing. The *Sikirica* court ignored that purpose in its ruling.[213] From the outset, Rule 92 *bis* was applied in a manner inconsistent with itself.

Despite this inconsistency, Rule 92 *bis* continued to be used to allow the introduction of written witness testimony during trial that had a direct bearing on the guilt or innocence of the accused. That written witness statements were being used in this way was tacitly recognized in *Prosecutor v Limaj*. There, the Trial Chamber found that "when a written statement touches upon the very essence of the prosecution case against the accused, the witness should be available for cross-examination."[214] This pronouncement demonstrates that written witness statements were being introduced that related to critical elements of the prosecution's case, despite the fact that doing so clearly exceeded the scope and purpose of the Rule. This approach to written witness testimony constitutes an infringement on the accused's right to participate in trial and the right to be present.[215] It enhanced the possibility that an accused would be convicted on the basis of evidence he or she did not have the opportunity to test and raised the likelihood of his or her conviction on an improper basis.

The Appeals Chamber of the *ad hoc* tribunals extended this permissive approach to allowing the introduction of written witness statements during trial in a 2003 decision in *Prosecutor v. Milošević*. There, the Appeals

209. *Id.* ¶¶ 11, 16, 21, 35.

210. *See* Eighth Annual Report, *supra* note 193, ¶ 51; *see also* Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, *supra* note 155, at r. 92 *bis*.

211. *See* Prosecutor v. Sikirica, Case No. IT-95-8, Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis*, ¶ 11.

212. *See* Elaine D. Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. L. REV. 145, 146 (1986).

213. Prosecutor v. Sikirica, Case No. IT-95-8, Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis*, ¶ 11.

214. Prosecutor v. Limaj, Case No. IT-03-66-T, Decision on Prosecutor's Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, ¶ 6 (Int'l Crim. Trib. for the former Yugoslavia Mar. 9, 2005).

215. *See* Gordon, *supra* note 53, at 684.

Chamber found that a written statement could be introduced at trial as evidence in chief against the accused so long as the witness: "a) is present in court, b) is available for cross-examination and any questioning by the judges, and c) attests that the statement accurately reflects his or her declaration and what he or she would say if examined."[216] This decision reflected the Appeals Chamber's belief that the presence of the witness in the courtroom, and his or her attestation to the veracity of the written statement, makes the witness's statement both written and oral and takes it outside of the ambit of Rule 92 *bis*.[217]

The broader approach taken in the *Milošević* decision was met with approval. This was made clear when Rule 92 *ter* was adopted containing almost the identical language used in the *Milošević* decision.[218] Two additional Rules relating to this issue would also be added, Rule 92 *quater* and Rule 92 *quinquies*. Rule 92 *quater* permits the Trial Chamber to admit written statements relating to the acts and conduct charged in the indictment from unavailable witnesses (including the deceased), witnesses that cannot be found, and witnesses that are either physically or mentally unfit to attend trial.[219] Rule 92 *quinquies* authorizes the Trial Chamber to consider the written statements of witnesses who have been interfered with in such a way that prevents that witness from appearing in court to testify or, if the witness does appear, results in the witness declining to give full and truthful evidence.[220] These evidentiary rules, taken together with the Tribunal's interpretation of them, largely allow any sort of written evidence to be admissible at trial. This represents a complete departure from the original Rules of the Tribunal, which indicated a clear preference for oral testimony.[221] Unfortunately, this change in how evidence was received by the Tribunal did not represent an effort to find a better approach, but rather was the result of pressure being placed on the Tribunal to prosecute the defendants more expeditiously.[222] In so doing the accused's right to participate in trial was greatly limited.

2. *The International Criminal Tribunal for Rwanda and Special Court for Sierra Leone*

Both the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone have placed significantly less reliance on written witness statements than the International Criminal Tribunal for the former

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216. Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, Disposition (Int'l Crim. Trib. for the former Yugoslavia Sept. 30, 2003).

217. *Id.* ¶ 16.

218. Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, *supra* note 155, at r. 92 *ter*.

219. *Id.* at r. 92 *quater*.

220. *Id.* at r. 92 *quinquies*.

221. *See* Alex Whiting, *The ICTY as a Laboratory of International Criminal Procedure*, *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 97-98 (Bert Swart, Alexander Sahar & Göran Sluiter eds., 2011).

222. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 415 (2d ed. 2008).

Yugoslavia. With respect to the International Criminal Tribunal for Rwanda, this divergence is largely the result of different approaches taken to how evidence was received during trial.[223] Unlike the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda maintained the primacy of oral testimony during trial and only adopted Rule 92 *bis* and not Rules 92 *ter*, 92 *quater*, and 92 *quinquies*.[224] Further, Rule 92 *bis* remained largely unused, with *Prosecutor v. Karamera et al.* being the only case in which a significant number of Rule 92 *bis* statements were admitted.[225] The Trial Chamber's decision to more liberally admit written witness statements in that case has been attributed to the fact that the prosecution had already presented oral testimony during trial corroborating the facts discussed in the written statements.[226]

The Special Court for Sierra Leone readily adopted its own versions of Rules 92 *bis*, 92 *ter*, and 92 *quater*, but did not demonstrate any urgency in applying them. The Special Court denied the only request to admit statements pursuant to Rule 92 *ter*, citing the fact that an agreement between the parties is a condition precedent to admitting evidence under the Rule.[227] During *Prosecutor v. Taylor*, the Special Court did admit the transcripts of two deceased witnesses that testified in other Special Court trials prior to their deaths.[228] The Special Court for Sierra Leone specifically found that the proposed evidence was both reliable and relevant.[229] The use of written testimony in this way would prove to be the exception—and not the rule—at the Special Court for Sierra Leone.[230]

3. International Criminal Court

Like the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court has changed its position over time to make it easier to admit written witness statements during trial. Article 69 of the Rome Statute expressly identifies a preference for live, in-person witness testimony, although that preference is subject to Rule 68 of the International Criminal Court's Rules of Procedure and Evidence.[231] The original version of Rule 68 permitted the introduction of written witness statements

223. *See, e.g.*, ICTR Rules of Procedure and Evidence, 109–11 (Int'l Crim. Trib. Of Rawanda as amended May 13, 2015).

224. *Id.* at 110; *see also* Yvonne McDermott, *The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis*, 26 LEIDEN J. INT'L L. 971, 976–77 (2013).

225. McDermott, *supra* note 224, at 978.

226. *Id.*

227. *See* Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*, 3 (Special Ct. for Sierra Leone Jan. 25, 2008).

228. *See* Prosecutor v. Taylor, SCSL-03-1-T, Decision on Public with Confidential Annexes C to E Prosecution Motion for Admission of the Prior Trial Transcripts of Witnesses TF1-021 and TF1-083 Pursuant to Rule *92quater*, ¶ 31 (Special Ct. for Sierra Leone Feb. 5, 2009).

229. *Id.* ¶¶ 27, 30.

230. *See* McDermott, *supra* note 224, at 977.

231. Rome Statute of the International Criminal Court art. 69, Jul. 17, 1998, 2187 U.N.T.S. 90.

during trial, subject to the limitation that such statements would only be admitted if the party not introducing the written statement either had the opportunity to examine the witness when the statement was being recorded or the witness was present during trial and available to be cross-examined.[232] That changed in 2013 when the Assembly of States Parties broadened the circumstances under which written witness statements would be allowed into evidence by adopting a rule analogous to Rule 92 *bis* at the International Criminal Tribunal for the former Yugoslavia.[233] The new Rule 68(2)(b) permits the introduction of prior recorded testimony that "goes to proof of a matter other than the acts and conduct of the accused" and does not necessitate giving the opposing party the opportunity to question the witness either when the statement was made or during trial.[234] Trial Chamber IX would later explain that the purpose of the rule is to recognize that some evidence, "in light of its content and significance to the case," need not be tested orally during trial.[235]

The meaning of the term "acts and conduct of the accused" has been the subject of litigation at the International Criminal Court. In *Prosecutor v. Ongwen*, the Trial Chamber found that the "acts and conduct of the accused" must be given its plain meaning, which extends only to "the personal actions and omissions of the accused."[236] Left out of this narrow definition are the acts or omissions of others that may be attributed to the accused under one of the modes of liability described in Article 25(3) of the Rome Statute.[237] In reaching its decision, Trial Chamber IX specifically recognized that its definition of "acts and conduct of the accused" accords with the approach taken by the International Criminal Tribunal for the former Yugoslavia when determining the admissibility of Rule 92 *bis* witness statements.[238] Trial Chamber IX then set out a comprehensive set of factors it would consider when determining whether a prior witness statement should be introduced under Rule 68(2)(b). Those factors are: whether the testimony relates to matters not materially in dispute; whether the interests of justice are better served by the introduction of the disputed testimony; whether the written statement possesses sufficient indicia of reliability; and whether the evidence is of such a nature that it is unnecessary to call the witness to testify.[239]

The Trial Chamber's characterization of the first of these factors is interesting because it does not necessarily comport with the language of

232. Rules of Procedure and Evidence, International Criminal Court, *supra* note 39, at r. 68.
233. *Id.*; Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, *supra* note 155, at r. 92 *bis*.
234. Rules of Procedure and Evidence, International Criminal Court, *supra* note 39, at r. 68(2)(b).
235. Prosecutor v. Ongwen, ICC-02/04-01/15, Public Redacted Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ¶ 7 (Nov. 18, 2016).
236. *Id.* ¶ 11.
237. *Id.* ¶ 11, n.24.
238. *Id.*
239. *Id.* ¶¶ 15–20.

the Rules of Procedure and Evidence. Rule 68(2)(b) permits the introduction of written evidence that "goes to proof of a matter other than the acts and conduct of the accused."[240] When given its plain meaning, the language of the Rule forecloses the use of prior witness statements whenever they deal with the accused's acts and conduct, regardless of the relationship those acts may have to the crimes charged.[241] By contrast, the Trial Chamber broadened the instances in which prior witness statements might be utilized during trial by introducing the materiality of the accused's actions into its consideration.[242] Whereas Rule 68(2)(b) discusses any acts and conduct of the accused, the Trial Chamber's decision suggests that it will permit the use of prior witness statements about the accused's acts and conduct except when the acts and conduct in question relate to the crimes charged.[243] The Trial Chamber made it even more likely that prior witness statements relating to the accused's actions would be admitted during trial when it interpreted "materially" to mean matters that are "soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment."[244] This approach reaches well beyond the plain meaning of the language of the Rule and makes it significantly easier for evidence to be introduced during trial that is not subject to cross-examination. By expanding the types of evidence that can be admitted without being subject to cross-examination, the new Rule represents a significant threat to the accused's right to be present.

Other issues have also arisen with how these new rules are to be used. In *Prosecutor v. Ruto et al.*, the International Criminal Court confronted an issue similar to that addressed by the International Criminal Tribunal for the former Yugoslavia's Rule 92 *quinquies*. Several witnesses in the *Ruto* case recanted their testimony, allegedly under pressure from individuals acting to benefit the defendants.[245] The prosecution sought to offer into evidence those statements made by the relevant witnesses prior to their recantations.[246] However, the court rule allowing the introduction of prior recorded statements, Rule 68, was amended during the pendency of the trial, and the provisions which the prosecution were seeking to rely upon were introduced as part of the amended rule.[247] As a result, the court was required to determine if the retroactive application of the rule would detrimentally impact the accused.[248]

240. Rules of Procedure and Evidence, International Criminal Court, *supra* note 39, at r. 68(2)(b).
241. *Id.*
242. ICC-02/04-01/15, Public Redacted Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ¶ 15.
243. *Id.* ¶ 20.
244. *Id.* ¶ 15.
245. Prosecutor v. Ruto, ICC-01/09-01/11, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 25–26 (Aug. 19, 2015).
246. *Id.* ¶ 1.
247. *Id.* ¶ 12.
248. *Id.* ¶ 19.

On August 19, 2015, Trial Chamber V(A) accepted into evidence the prior written statements of four witnesses that it found had been improperly interfered with, leading those witnesses to recant their earlier testimony or give false testimony during trial.[249] The Trial Chamber concluded that Rule 68 is not inherently detrimental to the accused because any party to the proceedings can employ it and the prosecution's use of the rule to request the introduction of evidence adverse to the defendant does not automatically make it detrimental to the accused.[250] The Trial Chamber also found that admitting the prior recorded statements was in the interest of justice as it promoted the accused's right to be tried without undue delay and fulfilled the Article 69(3) provision that the Trial Chamber take into account all evidence it considers necessary for determining the truth.[251] Therefore, Rule 68, as amended by the Assembly of State Parties after the trial commenced, could be applied retroactively.[252] The Trial Chamber also found that the prior recorded statements could be introduced into evidence even though they addressed the acts and conduct of the accused, on the basis that the defense had the opportunity to cross-examine the witnesses during trial.[253]

The Appeals Chamber reversed the Trial Chamber's decision to admit the prior recorded statements on the grounds that the Trial Chamber inaccurately evaluated the detriment to the accused when admitting the prior recorded statements and in finding that the rule was not being applied retroactively.[254] The Appeals Chamber found that the Trial Chamber limited its interpretation of "detriment" to a consideration of whether the accused's rights would be prejudiced.[255] The Appeals Chamber determined that "detriment" needs to be interpreted more broadly and can be found if the accused's overall position in the proceedings is negatively disadvantaged.[256] It also found that Mr. Ruto and Mr. Sang were negatively disadvantaged by the admission of the prior recorded statements as they could only have been admitted under the amended rule, that the amendments to the rule expanded the exceptions to the principle of orality, and that the amended rule also restricted the accused's right to cross-examination beyond that which was in effect at when trial commenced.[257] Therefore, the retroactive application of the rule was to the defendants' detriment as it negatively impacted their ability to participate in trial.[258]

249. *Id.* ¶¶ 55, 79, 109, 126.
250. *Id.* ¶¶ 24–25.
251. *Id.* ¶¶ 60, 81, 111, 128.
252. *Id.* ¶ 23.
253. *Id.* ¶¶ 60, 81, 111, 128.
254. Prosecutor v. Ruto, Case No. ICC-01/09-01/11 OA 10, Judgment on the Appeals of Mr William Samoei Ruto and Mr Joseph Arap Sang Against the Decision of Trial Chamber V(A) of 19 August 2015 Entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ¶¶ 96, 98 (Feb. 12, 2016).
255. *Id.* ¶ 76.
256. *Id.* ¶ 78.
257. *Id.* ¶ 95.
258. *Id.*

Although the Appeals Chamber ultimately decided that the prior recorded statements could not be admitted in the *Ruto et al.* case, the disagreement between the parties that gave rise to the decision serves to emphasize the International Criminal Court's growing move away from the principle of orality. The Appeals Chamber's decision highlighted the fact that Rule 68 was amended in an effort to expedite the court's proceedings and streamline the presentation of evidence by increasing the number of instances in which prior recorded testimony could be introduced at trial.[259] This reinforces the conclusion that the International Criminal Court chose to follow the lead of the International Criminal Tribunal for the former Yugoslavia. It opted to restrict the presentation of oral testimony at trial in an effort to expedite proceedings at the expense of the accused's right to be present at trial as reflected through his or her right to participate.[260]

4. The Extraordinary Chambers in the Courts of Cambodia

Initially, it was an open question whether the parties could submit written statements in lieu of testimony during trial at the Extraordinary Chambers in the Courts of Cambodia. Rule 92 of the Extraordinary Chambers in the Courts of Cambodia's Internal Rules is quite broad in that it permits the parties to "make written submissions" to the Trial Chamber at any time before closing arguments.[261] When this rule is read together with Rule 87, which states that all evidence is admissible unless specifically excluded by the Internal Rules, it leads to the conclusion that the parties may present written statements in place of live oral testimony.[262] In contrast, Rule 84 provides the accused with the "absolute right to summon witnesses against him or her," suggesting that the accused must have the opportunity to examine all the witnesses if he or she wishes, even if their direct testimony is introduced in writing.[263] This interpretation is strengthened in light of the rights of the accused enshrined in Article 13 of the "Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea," which in relevant part asserts that the accused has the right to "examine or have examined the witnesses against him or her."[264]

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259. *Id.* ¶¶ 32, 35 (citing INT'L CRIM. COURT, REPORT OF THE WORKING GROUP ON AMENDMENTS, ¶¶ 8–10, Doc. No. ICC-ASP/12/44 (Oct. 24, 2013) [hereinafter REPORT OF THE WORKING GROUP ON AMENDMENTS]; *see also* Official Report, Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, Vol. I, ICC-ASP/12/20, at 71 (The Hague, Netherlands, Nov. 20–28, 2013), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-vol-I.pdf [https://perma.cc/KHA3-VJ8H].

260. REPORT OF THE WORKING GROUP ON AMENDMENTS, *supra* note 259, at ¶¶ 8–10.

261. ECCC Internal Rules, *supra* note 24, at r. 92.

262. *See id.* at r. 87(1).

263. *Id.* at r. 84(1).

264. Agreement Between the United Nations and the Royal Government of Cambodia Concerning Prosecution Under Cambodian Law of Crimes Committed During the

This matter came to a head in *Prosecutor v. Chea et al.*, when the prosecution attempted to introduce 1,415 written witness statements into evidence. The Trial Chamber relied on the existing jurisprudence at the *ad hoc* tribunals when deciding that under some circumstances such statements could be introduced.[265] In particular, it found that written statements that go to proof of "the acts and conduct of the accused as charged in the indictment" were not admissible unless the accused had been afforded the opportunity to examine the declarant of the statement.[266] Conversely, written statements that do not relate to the culpability of the accused are admissible, however a determination must be made as to the probative value afforded to such statements.[267] This approach conforms to a strict interpretation of the rule originally established by the International Criminal Tribunal for the former Yugoslavia and minimizes the harm done to the accused's right to be present.[268] It also offers a possible template for other international and internationalized criminal courts and tribunals to follow as it demonstrates that there can be room for written witness testimony without overly burdening the accused's right to be present at trial.

5. The Special Tribunal for Lebanon

The Special Tribunal for Lebanon has rules governing the admission of witness statements that are similar to those of the other courts and tribunals. Rule 155 of the Special Tribunal for Lebanon's Rules of Procedure and Evidence permits the introduction of written statements in lieu of oral testimony, which go to "proof of a matter other than the acts and conduct of the accused as charged in the indictment."[269] In addition to the rules, the Special Tribunal for Lebanon also issued Practice Directions that function as guidelines designed to ensure the proper implementation of certain rules, including Rule 155.[270] The Practice Directions for Rule 155 set out how witness statements should be taken and what information they should include to later be considered admissible by a trial chamber.[271] In *Prosecutor v. Ayyash, et al.*, the parties agreed that certain statements that did not comply with the Practice Directions could be admitted into evidence but

Period of Democratic Kampuchea, Cambodia-U.N. art. 13(1), June 6, 2003, 2329 U.N.T.S. 117.

265. Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, June 20, 2012, Prosecutor v. Chea, Case No. 002/19-09-2007/ECCC/TC, Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, ¶ 20.

266. *Id.* ¶ 21.

267. *Id.* ¶¶ 23, 25.

268. *See* Eighth Annual Report, *supra* note 193, ¶ 51.

269. Rules of Procedure and Evidence, Special Tribunal for Lebanon, *supra* note 48, at r. 155(A).

270. Special Tribunal for Lebanon, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, Doc. No. STL-PD-2010-02, at 2 (Jan. 15, 2010) [hereinafter Practice Direction].

271. *See* Rules of Procedure and Evidence, Special Tribunal for Lebanon, *supra* note 48, at r. 155(A); *see also* Practice Direction, *supra* note 270, at 5–7.

disagreed about the extent to which the statements could deviate from the Practice Directions.[272] The Trial Chamber found that although Practice Directions are legally binding documents, they can be departed from "where the interests of justice so require."[273] The Chamber went on to find that minor breaches of the Practice Directions should not preclude the admissibility of witness statements but that there are certain elements of the Practice Directions that are "so fundamental to establishing the indicia of reliability that it is difficult to envisage overlooking non-compliance."[274] In the latter circumstance, the Trial Chamber must take into account five principles when determining whether a non-complaint witness statement is admissible.[275] Those factors are: (1) that the purpose of the inquiry is to determine the reliability of the witness statement; (2) that it will only depart from the Practice Directions for compelling reasons; (3) that each statement be considered individually and on a case-by-case basis; (4) that some breaches will be so consequential so as to make it impossible to overlook them; and (5) that minor breaches may be overlooked if there is a sufficient indicia of reliability.[276]

The Special Tribunal for Lebanon later rendered multiple judgments regarding the admissibility of witness statements in lieu of oral testimony. In a December 20, 2013 decision, the Trial Chamber determined that twenty-three witness statements containing either minor breaches or consequential breaches had sufficient indicia of reliability to permit their introduction into evidence without the need to cross-examine the declarant.[277] Conversely, the Trial Chamber also found that ten statements lacked sufficient reliability and could only be admitted if the declarant was made available for cross-examination.[278] On January 30, 2014, the Trial Chamber admitted the statements of twenty additional witnesses and required further sixteen witnesses to appear for cross-examination before their statements could be admitted.[279] Between December 11, 2014 and June 30, 2015, an additional thirty-two witness statements were admitted without the need for cross-examination while the Trial Chamber only ordered the cross-examination of an additional nine witnesses.[280] Therefore, despite

272. Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, ¶ 6 (Special Trib. for Lebanon May 30, 2013).

273. *Id.* ¶¶ 20–21.

274. *Id.* ¶¶ 28–29.

275. *Id.* ¶¶ 29, 31.

276. *Id.* ¶ 31.

277. Prosecutor v. Ayyash, Case No. STL-11-01/PT/TC, First Decision on the Prosecution Motion for Admission of Witness Statements under Rule 155, ¶¶ 31, 33 (Special Trib. for Lebanon Dec. 20, 2013).

278. *Id.* ¶¶ 31–33.

279. Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 19 (Special Trib. for Lebanon Jan. 30, 2014).

280. Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on the Prosecution Motion for Admission Under Rule 155 of Witness Statements in Lieu of Oral Testimony Relating to Rafik Hariri's Movements and Political Events, 7 (Special Trib. for Lebanon Dec. 11, 2014); Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on the Prose-

finding that the admission of witness statements without cross-examination should be the exception and not the rule, the Trial Chamber admitted seventy-five witness statements without cross-examination and only required the cross-examination of thirty-five witnesses.[281] This indicates that the exception was allowed to subsume the rule.

6. Conclusion

Rule 92 *bis* of the *ad hoc* tribunals and its corollary rules at the International Criminal Court, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone, accurately encompass the current state of international criminal law as it pertains to the admission of witness statements in lieu of testimony. It is important to note that all of these rules are designed to only allow the introduction of written witness statements about peripheral or background information without the need for cross-examination. They are not meant to involve proof of the elements contained in the indictment or confirmation of charges. Unfortunately, both Rule 92 *bis* at the International Criminal Tribunal for the former Yugoslavia and Rule 68(2)(b) at the International Criminal Court have been interpreted in such a way as to allow the introduction of written witness statements that may contain information relating to the guilt or innocence of the accused while also depriving the accused the ability to question the declarant. This practice directly threatens the accused's right to be present as it countenances the introduction of voluminous amounts of evidence that remains unchallenged by the accused. Under these circumstances, the prosecution is allowed to submit its case without any meaningful participation by the accused.

Trial Chambers considering whether to admit written witness statements are presented with two challenges. First, they must decide if the written statements are sufficiently reliable to be admitted into evidence. Second, they also must decide if the statements relate to peripheral evidence or direct evidence. Properly identifying these distinctions can be difficult, but it is also a vital inquiry. If the trial court allows the introduction of written evidence that is unreliable or that addresses the elements of the crimes charged, the accused has functionally been denied his or her right to cross-examine the witnesses against him or her as to those issues.

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cution Motion for Admission Under Rule 155 of Written Statements in Lieu of Oral Testimony Relating to 'Red Network' Mobile Telephone Subscriptions, 7 (Special Trib. for Lebanon Jan. 19, 2015); Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH082, PRH041 and PRH459, and to Amend the Rule 91 Exhibit List, 5 (Special Trib. for Lebanon Feb. 27, 2015); Prosecutor v. Ayyash., Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 9 (Special Trib. for Lebanon Mar. 27, 2015); Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH007, PRH115, PRH396 AND PRH661, 7 (Special Trib. for Lebanon May 14, 2015); Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision on Prosecution Motion to Admit Under Rule 155 the Statements of 13 Witnesses in Relation to Telephone Distribution and Subscription, 12–13 (Special Trib. for Lebanon June 30, 2015).

281. Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, at ¶ 5.

That denial of the right to cross-examine also constitutes a denial of the accused's right to be present at trial, even if the accused is present in the courtroom.

C. Admission of Hearsay Evidence

Hearsay evidence is generally admissible in international and internationalized criminal courts and tribunals.[282] For where hearsay evidence is inadmissible, its prohibition is largely a creation of the adversarial legal tradition designed to protect against lay jurors being misled by statements made by a declarant other than the one testifying at trial.[283] Because professional judges, and not lay jurors, perform the fact-finding function at international criminal institutions, it is thought that the danger of the court giving undue weight to misleading hearsay evidence when reaching its verdict is significantly reduced.[284] However, the admission of hearsay evidence does have an impact on the right to participate, and consequently the right to be present, because the defense is necessarily unable to cross-examine a declarant that is not present in the courtroom.[285]

Hearsay evidence had been a feature of international criminal law since the post-World War II tribunals. In his dissenting opinion to the Tokyo Judgment, Judge Radhabinod Pal noted that "[w]e admitted much materials which normally would have been discarded as hearsay evidence," and "[t]he major part of the evidence given" during trial "consists of hearsay."[286] This clearly troubled Judge Pal when he warned "[m]uch caution will be needed in weighing this evidence."[287] Judge Pal's concern about how much weight to give hearsay evidence proved prescient, as that has been the dominant topic of discussion regarding hearsay evidence at modern international courts and tribunals.[288] As Judge Shahabuddeen noted about the International Criminal Tribunal for the former Yugoslavia's Statute, hearsay evidence is admissible and the only question is "the weight that the Tribunal will attach to the evidence."[289]

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282. *See* KNOOPS, *supra* note 1, at 246, 249; Patrick Matthew Hassan-Morlai, *Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone*, 3 AFR. J. LEG. STUD. 96, 111 (2009).

283. *See* Michael E. Hartmann, *Protection of Human Rights Through the Criminal Justice System: Protection and Participation of the Victims of Crime, and the Prosecution of Their Oppressors*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 179 (Eugene Cotran & Adel Omar Sherif eds., Kluwer Law International, 1997); KNOOPS, *supra* note 1, at 246.

284. *See* Hassan-Morlai, *supra* note 282, at 111; O'Sullivan & Montgomery, *supra* note 50, at 514; *see also* Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to its Reliability, ¶ 13 (Int'l Crim. Trib. for the former Yugoslavia Jan. 21, 1998).

285. *See* Richard A. Seid, *Trial in the Absence of the Accused*, 26 AM. J. COMP. L. SUP. 481, 483 (1977-1978).

286. The United States of America and Others v. Araki Sadao et al., Judgment of the Hon'ble Mr. Justice Pal Member from India, 282-83 (Int'l Military Trib. for the Far East 1948).

287. *Id.* at 283.

288. *See* KNOOPS, *supra* note 1, at 249.

289. SHAHABUDDEEN, *supra* note 59, at 159.

1. The International Criminal Tribunal for the former Yugoslavia

In *Prosecutor v. Tadić*, the defense challenged whether hearsay evidence could be introduced at the International Criminal Tribunal for the former Yugoslavia.[290] The *Tadić* Trial Chamber reviewed the Statute and the Rules and found that there was no rule explicitly precluding the admission of hearsay statements into evidence.[291] The Trial Chamber determined that the exclusion of hearsay evidence is unique to the adversarial system and that because the tribunal's rules are an amalgamation of adversarial and inquisitorial rules, it is not required to follow a peculiarly adversarial rule.[292] The Trial Chamber then considered what weight to give hearsay evidence and found that it must be relevant, probative, and that "indicia of . . . reliability" exist showing that the out-of-court statement was "voluntary, truthful, and trustworthy."[293] It also found that when a Trial Chamber is making a decision about the weight to give hearsay evidence, it must consider both the content and the circumstances under which the statement was made.[294] The International Criminal Tribunal for the former Yugoslavia's Trial Chamber followed this holding in *Prosecutor v. Blaškić*, while also elaborating about the type of inquiries that must be made to determine the proper weight to give the evidence.[295] In particular, the *Blaškić* Trial Chamber identified cross-examination and judicial questioning about the source of a hearsay statement and the manner in which the witness came to learn the hearsay statement as ways to determine the appropriate weight to be given to the statements.[296]

Following the *Tadić* and *Blaškić* decisions, it was generally agreed that hearsay evidence was admissible at the International Criminal Tribunal for the former Yugoslavia.[297] This has resulted in hearsay being accepted in a number of different situations, including the admission of both open and closed session testimony given in other cases and the admission of recorded statements made by deceased witnesses prior to their deaths.[298] This practice continued after the introduction of Rule 92 *bis*. When deciding *Prosecutor v. Galić*, the Trial Chamber explained that Rule 92 *bis* was

290. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, ¶ 1 (Int'l Crim. Trib. For the former Yugoslavia Aug. 5, 1996).
291. *Id.* ¶ 7.
292. *Id.* ¶ 14.
293. *Id.* ¶¶ 16, 19.
294. *Id.* ¶ 19.
295. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to its Reliability, ¶¶ 10, 12-13 (Int'l Crim. Trib. for the former Yugoslavia Jan. 21, 1998).
296. *Id.*
297. *Id.* ¶ 10; KNOOPS, *supra* note 1, at 246–47, 251.
298. *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶¶ 21, 28 (Int'l Crim. Trib. For the former Yugoslavia Feb. 16, 1999), https://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm [https://perma.cc/MN62-VJGZ]; Prosecutor v. Galić, Case No. IT-98-29-T, Decision on the Admission into Evidence of Written Statement by a Deceased Witness, Hamdija Čavčić, and Related Report Pursuant to Rule 92*bis* (C) (Int'l Crim. Trib. for the former Yugoslavia Aug. 2, 2002), www.icty.org/x/cases/galic/tdec/en/11111443.htm [https://perma.cc/PS5H-DKZN].

introduced "to qualify the previous preference in the Rules for 'live, in court' testimony, and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable."[299] This move away from the principle of orality opened the door for the introduction of more hearsay testimony as written statements made out of court could be more easily introduced into evidence.[300] This trend is largely unchanged since the early days of the Tribunal.[301]

2. The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda has also found hearsay evidence to be admissible during trial. In *Prosecutor v. Akayesu*, the Trial Chamber indicated in its judgment that hearsay evidence "is not inadmissible per se" and that it considered hearsay evidence with caution when reaching its verdict.[302] The Appeals Chamber affirmed that decision and cited the caselaw of the International Criminal Tribunal for the former Yugoslavia with approval to the extent that it permits the introduction of hearsay evidence.[303] The Appeals Chamber did comment that although hearsay is admissible, "the weight and probative value" afforded to it will usually be less than that given to testimony under oath and subject to cross-examination.[304] Relevant criteria to consider when determining the probative value of hearsay evidence include: the source of the information, the precise character of the information, and whether it is corroborated by other information.[305] The Supreme Court of Cambodia would later endorse this approach when admitting hearsay evidence in the Extraordinary Chambers in the Courts of Cambodia.[306]

3. The International Criminal Court

The International Criminal Court also permits the admission of hearsay evidence during trial. The *Lubanga* Trial Chamber determined that the statute's drafters intentionally avoided proscribing the introduction of any types of evidence, including hearsay evidence, and left the Trial Chambers open to consider any type of evidence so long as it meets certain crite-

299. Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), ¶ 12 (Int'l Crim. Trib. for the former Yugoslavia June 7, 2002).

300. *See* O'Sullivan & Montgomery, *supra* note 50, at 516.

301. *See* KNOOPS, *supra* note 1, at 180.

302. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 136 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

303. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶¶ 286, 289 (Int'l Crim. Trib. for Rwanda June 1, 2001).

304. Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgement, ¶ 96 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010) (citing Karera v. Prosecutor, Case No. ICTR-01-74-A, Judgment, ¶ 39 (Int'l Crim. Trib. for Rwanda Feb. 2, 2009)).

305. Case No. ICTR-01-74-A, Judgment, ¶ 39.

306. *See* Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Nov. 23, 2016, Prosecutor v. Chea, Case No. 002/19-09-2007/ECCC/SC, Appeal Judgement, ¶ 302.

ria.[307] The evidence must be necessary to determining the truth (i.e., relevant), subject to decisions on relevancy and admissibility and "bearing in mind the dictates of fairness."[308] When the admissibility of hearsay evidence is challenged it must be evaluated for: (1) relevance; (2) probative value; and (3) the probative value must be weighed against the prejudicial effect.[309] This list of factors is not exhaustive and other tools should be considered by the Trial Chamber, including the "indicia of reliability," but without imposing "artificial limits on its ability to consider any piece of evidence freely."[310]

The *Lubanga* Trial Chamber's approach to evaluating hearsay evidence was explicitly adopted in the context of the Confirmation of Charges hearing by the Pre-Trial Chamber sitting in the *Katanga* case.[311] The Kenya Confirmation of Charges Decisions also followed the *Lubanga* Trial Chamber and found that when considering hearsay evidence it must first evaluate its relevance and probative value.[312] Additionally, the Confirmation of Charges decisions in both of the Kenya cases indicated that hearsay evidence, as indirect evidence, is admissible during the hearing but should be afforded lower probative weight than direct evidence and that charges should not be confirmed solely on the basis of one piece of indirect evidence.[313]

4. The Special Court for Sierra Leone and the Special Tribunal for Lebanon

The Special Court for Sierra Leone also admitted hearsay evidence during trial.[314] Although the Statute and the Rules of Procedure and Evidence are silent as to whether hearsay should be allowed into evidence, Rule 89(c) was consistently interpreted in a manner that allowed the relevant Trial Chamber to consider it. Rule 89(c) is a brief rule, only stating that "[a] Chamber may admit any relevant evidence."[315] The Appeals Chamber of the Special Court for Sierra Leone clarified this rule by explaining that relevant evidence should be admissible during trial regard-

307. Prosecutor v. Lubanga, ICC-01/04-01/06, Corrigendum to Decision on the Admissibility of Four Documents, ¶ 24 (Jan. 20, 2011).

308. *Id.*

309. *Id.* ¶¶ 27–28, 31.

310. *Id.* ¶ 29.

311. Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 137 (Sept. 30, 2008).

312. Prosecutor v. Ruto, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 75 (Jan. 23, 2012); *see* Prosecutor v. Muthaura, ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 87 (Jan. 23, 2012).

313. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 74; ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 86.

314. Prosecutor v. Brima, Case No. SCSL-04-16-PT, Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95, ¶ 12 (Special Ct. for Sierra Leone May 24, 2005).

315. Rules of Procedure and Evidence, Special Court for Sierra Leone, r. 89(C) (as amended Nov. 30, 2018).

less of whether it is the product of hearsay.[316] It justified its decision on several considerations. First, the Appeals Chamber felt that Rule 89(c) prevents "the administration of justice" from being "brought into disrepute by artificial or technical rules," particularly those designed for use during jury trials.[317] Next, it felt that, like many other international and internationalized criminal courts and tribunals, when judges act as the fact-finder they can give the evidence the appropriate probative value weight regardless of its source.[318] Finally, this approach avoids "sterile legal debate," giving the court more time to consider more "pragmatic" legal issues.[319]

Much like its predecessors, the Special Tribunal for Lebanon also admits hearsay evidence.[320] In the Trial Chamber's view, whether evidence is hearsay affects the credibility of the evidence—and therefore the weight that should be afforded to it—but not its admissibility.[321] The Trial Chamber set certain parameters for its decision regarding the credibility of the hearsay evidence. First, it explained that credibility decisions must not be made in isolation, but instead it should be determined by taking into account the totality of the evidence.[322] However, when considering what weight to afford hearsay evidence, it is relevant to consider the source of the hearsay information. When hearsay evidence is taken from a written statement, meaning that both the original declarant and the person who recounted the earlier statement are both unavailable for cross-examination, it will decrease its probative value.[323] This seems to be a reasonable limitation when considered in light of the accused's right to be present. It is difficult to see how the accused's presence can have meaning if he or she is in any real danger of being convicted on the basis of a hearsay statement contained in the transcript of a written interview, and the accused is deprived of the possibility of questioning either declarant.

5. *Conclusion*

It is an uncontroversial position that hearsay evidence will be accepted into evidence during international criminal trials. All of the international and internationalized criminal courts and tribunals admit hearsay evidence on the basis that it can contribute to the goal of determining the

316. Prosecutor v. Norman, Case No. SCSL-04-14-AR65, Fofana—Appeal Against Decision Refusing Bail, ¶ 25 (Special Ct. for Sierra Leone Mar. 11, 2005).
317. *Id.* ¶ 26.
318. *Id.*
319. *Id.*
320. Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision Admitting Into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) Under Rule 158 and Three Related Documents Under Rule 154, ¶ 69 (Special Ct. for Sierra Leone Oct. 20, 2017).
321. *Id.* ¶ 65 (citing Prosecutor v. Ayyash, Case No. STL-11-01/T/TC, Decision Admitting 10 Documents Related to the Death of Mustafa Amine Badreddine, ¶ 36 (Special Ct. for Sierra Leone June 23, 2017)).
322. Case No. STL-11-01/T/TC, Decision Admitting Into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) Under Rule 158 and Three Related Documents Under Rule 154, ¶ 69.
323. *Id.* ¶ 86.

truth about the situation being adjudicated.[324] Although most international and internationalized criminal courts and tribunals recognize that admitting hearsay evidence can constitute an infringement on the accused's rights to confrontation and participation, it has generally been decided that because the fact-finders are trained judges they will be able to afford hearsay evidence its proper weight.[325] This does not entirely eliminate the threat to the accused's right to be present at trial, but it does reinforce the idea that it is a qualified right that international and internationalized criminal courts and tribunals may abridge when trying to determine the objective truth. It also supports the notion that the rights of the accused must sometimes give way in favor of the proper administration of justice.

Conclusion

Several of the evidentiary practices implemented by the international and internationalized criminal courts and tribunals have had the real-world effect of limiting the accused's right to be present at trial. That is because the right to be present only has meaning if the accused's presence enables him or her to fully participate in trial. When the accused is prevented from challenging the evidence against him or her, they are being denied the ability to participate and therefore are effectively absent.

Denying the accused the ability to know the identity of his or her accuser acts as a significant limitation on the right to be present. Knowing who the witness is, and how they are involved in the case, is essential to preparing an effective cross-examination. However, international and internationalized criminal courts and tribunals also have a responsibility to protect vulnerable witnesses from violence or other impermissible pressures. This has caused many of them to introduce systems pursuant to which temporal limitations are placed on the disclosure of identifying witness information. This approach acts to balance the demands of disclosure against the need to protect vulnerable witnesses. It is an imperfect solution, as it still acts as a limitation on the right to be present, but so long as disclosure is made in an adequate amount of time to allow the accused to fully prepare his or her defense, it should be seen as a minor enough infringement that does not threaten the overall fairness of the trial.

Some international criminal justice institutions have begun implementing procedures whereby anonymous witness testimony can be recorded in advance of trial and used to inculpate the accused. While it is permissible to introduce testimony in this way, it cannot be the only evidence, or the decisive evidence, supporting a conviction. This falls under the larger regime relating to written witness testimony. The rules at the

324. *See, e.g.*, KNOOPS, *supra* note 1, at 246, 249.

325. *See* Hassan-Morlai, *supra* note 282, at 113; O'Sullivan & Montgomery, *supra* note 50, at 514; *see also* Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay with No Inquiry as to its Reliability, ¶ 13 (Int'l Crim. Trib. for the former Yugoslavia Jan. 21, 1998).

various international and internationalized criminal courts and tribunals provide some safeguards against the accused being convicted on the basis of written testimony by limiting the subject of evidence introduced in the manner to matters relating to peripheral or background information. Unfortunately, in practice that protection has not always been observed and there are instances in which uncross-examined witness testimony relating to the guilt of the accused has been admitted during trial. This constitutes a major threat to the accused's right to be present as it effectively deprives the accused of the ability to challenge the evidence against him or her. While the trial court must make some value judgment about the written statement before it is admitted, particularly as to its reliability and the type of information it relates to, it is of vital importance that they reach the correct conclusion as the failure to do so can raise serious questions as to whether trial has been fair.

How the judiciary weighs the evidence is also an important consideration when it chooses to admit hearsay into evidence during trial. Hearsay is generally admissible during international criminal trials on the basis that the court in its role as fact-finder is capable of affording such evidence its proper weight. While this approach has a tendency to reduce the risk of the accused's right to be present being violated, it does not eliminate it. It does, however, highlight the notion that the right to be present is a qualified right that can sometimes give way in favor of the proper administration of justice. In this case, courts are valuing the ability to gain truthful information, regardless of the source, over the infringement caused by admitting partially untested evidence.

The right to be present at trial is a fundamental aspect of the accused's right to a fair trial. A present accused can understand the charges against them and participate in preparing and conducting their own defense. The involvement of the accused is often the best check against unfair or suspect convictions. Limitations on the accused's right to be present in the form of evidentiary rules that constrain his or her ability to examine the evidence can pose a serious threat to the right to be present. However, the right to be present is also a qualified right and must give way in certain situations. A balance must be struck between respecting the accused's right to be present and admitting truthful evidence that will assist the trial court in reaching a proper determination about the guilt or innocence of the accused. That being said, basic principles of fairness must always be maintained or the accused's right to be present will cease to have any practical meaning and will become nothing more than something to which courts pay lip service. At that point, trials will cease being fair and international criminal proceedings will become little more than show trials.