The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective

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1. INTRODUCTION: CONVERGING OBJECTIVES BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

The preservation of the principle of equality of arms is critical for the rule of law and indispensable for a law-based society. Nowadays, this principle, as derivative of the overarching right to a fair trial has attained the status of a fundamental human rights notion. On the international plane, the legal-political environment in which international and internationalized criminal courts function, brings greater attention to the credibility of these institutions. To maintain this credibility and integrity, these institutions should endorse several procedural mechanisms to ensure that trials are conducted in accordance with the principle of equality of arms. Because the prevalence of the principle of equality of arms is instrumental in the

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protection of individual rights of accused persons, it is an indispensable safeguard against abuse of powers as well as for the maintenance of separation of powers. International and internationalized criminal courts are comprised of organs and parties with competing interests. At the same time, several principles applicable before these institutions can result in antagonistic positions and situations from the perspective of the defense acting before these fora.

Recent practice before the ICTY displays a tension between the principle of equality of arms and that of judicial economy. Although the latter does not have the same human rights standards as that of equality of arms, it is rooted in the Rules of Procedure and Evidence (RPE) of international and internationalized criminal courts. For instance, Rule 73*ter* of the ICTY RPE, endows the Trial Chambers of this *ad hoc* international criminal tribunal with the authority to limit the length of time and number of witnesses allocated to the defense case.(1)

This article considers the trend to effectuate judicial economy within international criminal trials juxtaposed to the principle of equality of arms from the standpoint of the defense. It focuses on this juxtaposition as exemplified in contemporary case law of the ICTY. In addressing this position, the analysis in this article will build on the assumption that the interrelationship between these two notions must be interpreted in the light of two cardinal parameters. First, the protection of the interests of the defense and second the principle of independence and non-political use of the notion of judicial economy.

2. ENSURING EQUALITY OF ARMS ON THE INTERNATIONAL PLANE: DEFENSE SCOPE AND LIMITATIONS

On the international plane, the synergy between judicial economy and equality of arms is of perennial importance to ensure a fair trial. Central to the principle of equality of arms is that the defense in criminal cases is not unjustly put at a disadvantage compared to the position of the prosecution in terms of time and facilities to prepare its defense case as well as having

access to information which is material to the case. The European Court on Human Rights has repeatedly stressed that the basis of a fair trial as enshrined by Article 6(1) of the European Convention is that criminal proceedings should be adversarial and that there should be equality of arms between the defense and the prosecution.(2) The ECHR has interpreted the latter element as encompassing the requirement that both parties must be given the opportunity to have knowledge of, and to comment on, the observations filed and the evidence adduced by the other opponent.(3)

In the context of the ICTY, on the issue of equality of arms, the Appeals Chamber has accepted that "the principle of equality of arms between the prosecutor and the accused in a criminal trial goes to the heart of the fair trial guarantee."(4) The ICTY Appeals Chamber judges have held that at a minimum "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case," particularly when it concerns procedural equity.(5) International criminal tribunals have, until so far, not accepted the thesis that equality of arms should also extend to financial resources. This principle was therefore not interpreted as encompassing the approach that prosecution and defense should have equal access to financial means to prepare and present their case.(5) The question is whether such approach complies fully with human rights norms. The ECHR in the case of *Steel and Morris v. U.K.* was confronted with a denial by the British authorities of free legal assistance to two "London Greenpeace" associates who accused McDonalds of "economic imperialism," i.e., destruction of rainforests and exploitation of children. Charged with a libel suit (instigated by McDonald's) Ms Steel and Mr. Morris petitioned for free legal assistance. This request was rejected since at that time such assistance was not provided for in libel cases within the U.K. system. As a consequence, the two defendants were forced to represent themselves in a procedure which took 313 daily court sessions during which 130 witnesses were heard and 40.000 pages of evidence were adduced. Following their conviction by U.K. judges, Ms Steel and Mr. Morris appealed to the ECHR saying that the U.K. proceedings were conducted in contravention to the principle of equality of arms relative to the absence of free legal assistance.

In its judgment of 15 February 2005, the ECHR upheld this complaint saying that there was an unacceptable "inequality of arms" now that the underlying procedure was complex and a considerable imbalance existed between the defense possibilities of Steel and Morris on the one hand and McDonald's on the other.(6) Accordingly, the ECHR held that Article 6 of the European Convention on Human Rights was violated.

The above considerations are relevant not only to equality of arms on the procedural level, but also with respect to equality in financial terms. An application for free legal assistance implies the absence of financial resources to pay one's defense. Such absence would be incompatible with the fair trial requirement of (international) criminal trials, particularly the rationale of the principle of equality of arms, in so far that it would undermine the effectiveness of the defense.(7)

These developments make it both important and timely to take a closer look at the impact of the notion of judicial economy on the fair trial rights of accused's within international and internationalized criminal proceedings.

3. CONCURRENCE OF EQUALITY OF ARMS AND JUDICIAL ECONOMY IN THE LAW PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS

3-1. THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS: A SHIFT TO CONTROLLING THE EFFECTIVENESS OF THE PROCEEDINGS

Before looking into the emerging concurrence between the notion of judicial economy and that of equality of arms, this paragraph will detect the contents of the former principle. Both before the international and international criminal tribunals, particularly before ICTY, ICTR and SCSL, a discernible shift in the trial practice is visible, resulting in a more prominent emphasis on the supervisory role that the trial judges may play in controlling the proceedings.(8) It can be observed that whilst the first trials before the ICTY were mainly dominated by common law principles, more recent practice portrays a more intense level of control on the proceedings by the Trial Chambers comparable to the level of judicial control during the criminal proceedings in the civil law traditions.(9) It is clear that this shift and process

results from the perception of the international community that trials at the ICTY and ICTR are too lengthy. Consequently, it is felt that a mechanism to redress this situation is attributing the Trial Chambers more authority to control the proceedings.(10) As observed by Daryl Mundis, this development has been on-going, under the rubric of improving case management, for at least since the 18th plenary of the ICTY judges in July 1998.(11) As a result, both the amendments of the Rules of Procedures and Evidence (RPE) and the trial practice before the ICTY and ICTR endorse no longer a system primarily driven by the parties, typical for common law jurisdictions, but rather one in which the (pre-)Trial judges feature in a more dominant and active role, comparable to the *juge d'instruction* in civil law jurisdictions.(12)

Several examples of this development arise. In the context of this article, the following two are mentioned:

> (i) Two amendments were made to rule 90 of the ICTY RPE, which governs witness testimony, in order to enable the Trial Chamber to exercise more control over the mode and order of examining witnesses and presenting evidence. Particularly sub-Rule 90(G) was added, empowering the Trial Chamber with this control in order to ascertain the truth and "avoid needless consumption of time." Sub-Rule 90(H)(i) was added in order to enable the judges to restrict cross-examination to subjects covered in the opposing party's direct examination, unless the Trial Chamber extends the scope of the cross-examination. Finally, Rule 90(H)(ii) was enacted in order to avoid the necessity of recalling witnesses who can provide evidence relevant to the case for the cross-examining party.(13)
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> (ii) A second example of this tendency towards a civil law oriented form of judicial control and economy, are the promulgated Rules 73 *bis* and 73 *ter* which rules clearly envision pre-trial case management.(14) Sub-paragraphs (C) of these Rules enable the Trial Chamber to reduce the number of witnesses if the Trial Chamber considers the expected testimony to be cumulative. In effect, these sub-rules attribute to the Trial Chambers wide powers as to how the

parties decide to present and prove their cases. These mechanisms clearly represent a form of judicial control in order to "economize" the trials similar to civil law traditions.(15)

In this context, it is worth noting that similar considerations on effective case management and judicial economy have been promulgated by the judges of the ICC. Pursuant to Article 52 of the ICC Statute, the eighteen ICC Judges have drawn up regulations in order to implement the ICC Statute and the RPE of the ICC. These regulations will be crucial to the "routine functioning" of the ICC and the conduct of trials.(16) Even more than the Judges of the ICTY and ICTR, the ICC Judges are endowed with considerable (investigative) autonomy and power to control the proceedings.(17) In line with the notion that the ICC judges will play an active role in running the trials, is their incentive to also intensively manage the cases which are before the Court. An example of this judicial role as to the case management of ICC trials can be found in Regulation No. 54 of the ICC Regulations. This Regulation entails an exemplary list of orders the ICC Trial Chamber may issue while organizing the trials. Such orders, which clearly focus also on endorsement of judicial economy can extent to:

(a) The length and content of legal arguments and the opening and closing statements;
(b) A summary of the evidence the participants intend to rely on;
(c) The length of the evidence to be relied on;
(d) The length of questioning of the witnesses;
(e) The number and identity (including any pseudonym) of the witnesses to be called;
(f) The production and disclosure of the statements of the witnesses on which the participants propose to rely;
(g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;
(h) The issues the participants propose to raise during the trial;

(i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio-record of evidence previously given;
(j) The presentation of evidence in summary form;
(k) The extent to which evidence is to be given by an audio- or video-link;
(l) The disclosure of evidence;
(m) The joint or separate instruction by the participants of expert witnesses;
(n) Evidence to be introduced under rule 69 as regards agreed facts;
(o) The conditions under which victims shall participate in the proceedings;
(p) The defences, if any, to be advanced by the accused.

Especially, the items under (a), (c), (d) and (g) directly relate to "economizing" the Trials. Judicial economy was clearly one of the parameters in the drafting process of the ICC Regulations. In doing so, the ICC Judges, while implementing the practical experiences of the ICTY and ICTR, were led by the following objectives:

(1) to streamline trials as far as possible;
(2) to avoid, as much as possible, long and detailed, and possibly insufficiently substantiated, indictments with a multitude of alternative or cumulative charges that would have to be decided on separately in the course of the trial;
(3) to limit the average length of trials as far as possible;
(4) to avoid crafting endless judgments extending to hundreds of papers;
(5) to prevent, where possible, trials from being hijacked by the defendant, for example through the option of judicial appointment of defense counsel; and
(6) to protect, above all, the rights of the accused and the defense, including the accused's right to trial without undue delay in accordance with Article 67, paragraph 1(c).[18]

These developments make it clear that judicial case management of international and internationalized criminal trials, fueled by judicial economy motives, is becoming an ever important objective of the judges of these courts. A difficulty that may arise, however, concerns the way this development restricts fair trial rights, particularly constraining the principle of equality of arms.

3.2. CHALLENGING JUDICIAL ECONOMY AND PRIORITIZING EQUALITY OF ARMS: THE ORIC CASE

In the law practice of the international and internationalized criminal courts several situations come to mind in which competing interests emerge between equality of arms and the notion of judicial economy. In *Prosecutor v. Oric*, the Appeals Chamber of the ICTY, confronted with such a situation, gave priority to the principle of equality of arms. In the *Oric* case, after the prosecution closed its case, the defense served notice of its intention to call seventy-three witnesses while estimating that the defense examination-in-chief would take 249 hours. The prosecution in the *Oric* case has called 50 witnesses and had taken roughly 260 hours of court time. The Trial Chamber rejected Oric's proposed framework of the defense case. It held that a number of areas of evidence had been "sufficiently addressed during the prosecution case in a manner and to an extent which in the Trial Chamber's opinion does not require any further evidence on the part of the defense." In specific, it held that the following areas were sufficiently addressed:

> The historical and political background which led to the armed conflict in Bosnia-Herzegovina in April 1992;
> The large number of attacks by Bosnian Serb forces on Bosnian Muslim villages within the geographical scope of the indictment, including the wanton destruction and plunder of Bosnian Muslim villages and hamlets and the laying of mines by Bosnian Serb forces in and around destroyed Bosnian Muslim villages and hamlets;
> The killing and inhumane treatment of Bosnian Muslims, whether civilians or non-civilians, by Bosnian Serbs or Bosnian Serb forces;

The policy of 'ethnic cleansing' by Bosnian Serb political or military authorities before, during and after the crimes charged in the indictment, in and around Srebrenica;

The positive treatment of Serbs – whether civilians or non-civilians, hostages or wounded, in Bosnian Muslim hospitals – by Bosnian Muslims, unless relating to persons identified in Counts 1 and 2 of the Indictment;

The situation of Srebrenica during the period relevant to the Indictment, namely the positioning of Bosnian Serb forces in and around Srebrenica, and the isolation of Srebrenica from the rest of Bosnia and Herzegovina while being under constant siege and suffering from air and artillery bombardment;

The influx of refugees in Srebrenica and the critical condition under which the population of Srebrenica had to live during the period relevant to the Indictment, to include food and medical shortages, hygiene issues, security concerns, sporadic electricity and telecommunications shortages;

The genocide committed against Bosnian Muslims in Srebrenica in 1995;

The military superiority of the Bosnian Serbs at the time relevant to the Indictment, namely that the Bosnian Serbs were better equipped militarily than the Bosnian Muslims and that, in addition, the Bosnian Serbs benefited from the support of the former JNA and from Serbia;

The Bosnian Military capacity in Srebrenica was largely dependent on weapons that could be captured from the Bosnian Serb forces; and

The urgent necessity for Bosnian Muslims to attack villages and hamlets named in the Indictment in order to try and secure food, medicine and weapons, for the purpose of the survival of the Muslim population in Srebrenica. (This limitation does not in any way mean that the Trial Chamber does not require any further evidence that the Defence may wish to adduce in relation to the aspect of military

necessity to engage in wanton destruction as alleged in Counts 3 and 5 of the Indictment);[19]

In addition, the Trial Chamber rejected the defense proposal, saying that the defense case could be concluded with a much shorter presentation of evidence than the schedule proposed by Oric. As a result, the Trial Chamber ordered Oric to file a new witness list with no more than 30 witnesses and ordered that the defense case had to be finished within two months. Accordingly, the prosecution was enabled to hear 50 witnesses in chief over 100 days, whilst the defense was only allotted 30 witnesses over 27 days. Thus, the defense in the *Oric* case was faced with two forms of restrictions fueled by judicial economy views:

(i) a first one as to the subject matter of the scope of the defense case, and
(ii) a second one relating to the number of defense witnesses and time of the defense case.

Both restrictions were set aside by the ICTY Appeals Chamber upon an appeal by the Defense against these limitations.[20]

The next paragraph will address the reasoning of the Appeals Chamber in light of the overall consequences of its decision for the applicability of the principle of equality of arms within international criminal proceedings.

3.3. EQUALITY OF ARMS AS A HUMAN RIGHTS PROTECTION AGAINST JUDICIAL ECONOMY BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

Both Articles 6(1) and 14(1) of the ECHR and ICC PR respectively delineate the right to a fair trial, without explicitly mentioning the principle of equality of arms. Yet, according to case law of the ECHR, this principle forms part and parcel of the overarching notion of a fair trial.[21] As mentioned before, he ICTY Appeals Chamber in *Prosecution v. Tadic* adopted this view holding that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee."[22] Although no overall definition is to be found on any of the mentioned human

rights instruments, it is accepted that at a minimum "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."(23) Within the case law of the international criminal tribunals, it seems also accepted that the principle of equality of arms only encompasses procedural equity, rather than equity in financial resources between prosecution and defense.(24) Yet, the seriousness of the charges and complexity of the criminal case are important elements to determine the extent to which the principle of equality of arms may apply in a certain case.(25) Now that proceedings before international criminal tribunals involve the most serious crimes as well as most complex criminal cases when compared to domestic criminal cases, equality of arms is of perennial importance to ensure the fairness of international proceedings. The ICTY Appeals Chamber in the *Tadic* case acknowledged this, holding that "under the Statute of the International Tribunal, the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts."(26)

This implies that the principle of equality of arms should be subjected to teleological interpretation depending on the nature of the criminal proceedings at hand rather than as construed on a rigid and prefabricated notion, such as on a presumption that *ab initio* it would extend to equity in financial resources. Accordingly, its human rights protection underlies a flexible and nuanced approach, balancing the accused's position against the prosecution interests and those of judicial economy on a case-by-case basis.

3.4. EQUALITY OF ARMS: PRACTICAL CONSEQUENCES FOR THE POSITION OF DEFENSE BEFORE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

As to the practical implications of the human rights dimension of the principle of equality of arms, the ICTY Appeals Chamber has set forth some guidelines which are also of importance for future cases before international and internationalized criminal tribunals.

1. Equality of arms in terms of time and witness allocation to the defense does, according to the interpretation of the ICTY Appeals Chamber judges,

not imply that an accused "is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution."[27] The principle of equality of arms is functionally interpreted by the ICTY Appeals Chamber in view of the specific tasks and functions of the parties within an international criminal trial. This is expressed in the following way: "The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt."[28] Yet, functionally seen, the defense position and defense strategy in (international) criminal cases concentrates "on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses."[29]

2. Hence, a second guideline thereto emerges, namely that of the principle of proportionality which govern the interpretative scope of the principle of equality of arms as to both the Defense and Prosecutions position. In paragraph 7 of the *Oric* case, it is said that "a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides." The criterion here is that of the "reasonably proportionality."[30]

3. The Appeals Chamber promulgates a teleological interpretation of those procedural rules which are meant to endorse judicial economy within international criminal trials. Particularly, in the context of Rule 73 *ter* of the ICTY RPE which gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense,[31] the Appeals Chamber held that "such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal[32] be respected."[33] The teleological element in this interpretation being that in assessing the reasonableness of the time and facilities allocated to the defense in preparing its case – in terms of "reasonably proportional" – an objective standard or test has to be applied by the Trial Chambers. In paragraph 8 of the *Oric* decision it is said that, when determining this reasonableness, "a Trial Chamber must also consider whether the amount of time is *objectively* adequate [emphasis added: GJK]

to permit the accused to set forth his case in a manner consistent with his rights."

4. As to the question what "reasonably proportional" implies, the Appeals Chamber interprets this criterion on the basis of the subject matter of the particular case and thus seems to combine the elements under (i) and (ii) mentioned at the end of paragraph 3.2 of this article. In paragraph 9 of the *Oric* decision, the Appeals Chamber judges require that in this regard the Trial judges take into account the complexity of the remaining issues" as to the subject matter of the (defense) case in order to permit the defense "a fair opportunity to present (its) case."

5. The element of the complexity of the subject matter of the case, as an argument that triggers equality of arms more predominantly, seems especially to arise when specific defenses are at stake. In the *Oric* case, the defense intended to hear witnesses pertaining to the defense of military necessity. This means that an inherent disproportion between the prosecution and defense in terms of allocation of time and witnesses can become unreasonable when a rather complex defense is to be raised by the accused. In the *Oric* case, the accused was only allotted by the Trial Chamber 30 witnesses and 27 days of testimony, whereas the prosecution was allocated time to hear 50 witnesses over 100 days of testimony. The Appeals Chamber concluded that this allotment to the defense is "not remotely proportional to the time that was allotted to the prosecution." This disparity is especially flagrant "given the complexity of the issues at stake, particularly regarding military necessity" so that "such disproportion cannot be justified."(34)

6. In line with the above mentioned guideline, restrictions based upon the Trial Chamber of judicial economy as to the subject matter the defense wishes to address in its defense case, should also be extensively interpreted and assessed in light of the "reasonableness" of the defense case. Although the Trial judges, under Rule 73 *ter*, have discretionary power to restrict the subject matter scope of the defense case, such restrictions should be limited in the event the defense has unsuccessfully applied for an acquittal under Rule 98 *bis* of the ICTY RPE(35) based on a certain substantive argument or defense. In paragraph 6 of the *Oric* decision, the Appeals Chamber holds

that (judicial economy) limitations of the subject matter of the defense case, imposed by the Trial Chamber, in the *Oric* case, "(were) unreasonable in light of the fact that the defense of military necessity may play a central role in Oric's defense on counts 3 and 5 of the indictment." As to the relevance of Rule 98 *bis* in this context, the Appeals judges opined that:

> - unless the Trial Chamber decides in his favor on those counts and issues a formal acquittal under Rule 98 *bis*, there is simply no way to justify restricting Oric from presenting information regarding, at a minimum:
> - the military situation, broadly construed, throughout the Srebrenica region, including the placement of Bosnian Serb forces, equipment, and artillery; the isolation of Bosnian Muslim forces; and the alleged military superiority of Bosnian Serbs at the time relevant to the indictment
> - The allegedly desperate situation of the region's Bosnian Muslim population
> - The alleged reliance of Bosnian Muslims on weapons that could be captured from Bosnian Serb forces
> - Any facts that could cast non-trivial doubt on the credibility of prosecution witnesses

Overviewing the Oric Decision, one can say that in this way, Rule 98 *bis* may provide the defense an important procedural mechanism to limit the exercise and applicability of judicial economy pursuant to Rule 73*ter*.

4. EQUALITY OF ARMS VIS-À-VIS INVESTIGATION AND DOCUMENTARY EVIDENCE.

4.1. EQUALITY IN RESOURCES, LOGISTICS AND INVESTIGATIONS: PRACTICAL CONSEQUENCES FOR DEFENCE BEFORE INTERNATIONAL CRIMINAL TRIBUNAL

Equality of arms in financial terms, i.e., the ability for defense lawyers to have access to sufficient funds, was addressed in *Prosecutor v. Milutinovic*

et al. In that case, the defense was seized of a confidential "motion for additional funds" filed by the defense of Dragoljub Ojdanic seeking an order directing the registrar to allocate additional funds for pre-trial preparation. The defence canvassed that several particularities justified such additional funding: the scope of the case, the nature of the accused's defense, and the extended and complex legal issues involved. The Trial Chamber of the ICTY in its "Decision on Motion for Additional Funds" of 8 July 2003 denied this motion, saying that, while accepting the Registrar's position that it is open to a certain flexibility in considering requests for additional resources, the defense "(..) should demonstrate exceptional circumstances or circumstances beyond its control if such requests are to be granted." The judges held that no such circumstances were ascertained. In particular, two arguments were advanced by the Trial Chamber for this ruling:

> (i) First, it reasoned that the current legal aid system of the ICTY provides for a flat fee (lump sum) for the pre-trial stage for all indigent accused before the ICTY, taking into account the complexitity of the cases, should be interpreted in light of both the need to ensure full respect for the rights of all indigent accused and the efficient use of the limited resources of the ICTY's legal aid system.
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> (ii) Second, the Tribunal held that counsel who have agreed to represent indigent accused before the ICTY "(..) are fully aware of the system of remuneration for assigned counsel, including the basis for calculating the costs of legal representation (…) and the maximum allotment for the pre-trial stage according to the particular circumstances of the case!

Therefore, within the system of the ICTY and ICTR, the principle of equality of arms apparently has a different connotation and meaning when it comes to equality of means and resources. The ICTR even went further when saying that equality between the parties as a fundamental right "(…) shall in no way be interpreted to mean that the Defence is entitled to the same means and resources as available to the Prosecution."(36)

The practical consequences of this approach were envisioned by the "Interim Report on the SCSL" of April 2005 issued by the U.C. Berkeley War Crimes Studies Center. On page 14 the following two paragraphs (subheaded "Defence, Equality of Arms") draw the attention:

> The court's own website defines equality of arms as a "reasonable equivalence in ability and resources of Prosecution and Defence." In practice, these two branches of the court are quite different in terms of their administrative structures and available resources: unlike the independent OTP [Office of the Prosecution], the Defence Office falls under the umbrella of the Court Registry. Employees of the OTP are salaried employees of the Court, whereas defence teams are independent contractors who bill hourly, subject to the oversight of the Principal Defender. Although the Prosecutor stated that he does not believe the resource allocation between the prosecution and the defence is unfair, some members of the defence have questioned whether the principle of "equality of arms" is being meaningfully upheld at the Special Court.
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> In light of the prosecution's burden of proof, it would be inappropriate to make direct comparisons in all instances to determine the adequacy of funds afforded the Defence Office and the individual defence teams. While the Special Court is not strictly bound by the precedents of the *ad hoc* tribunals, it frequently takes guidance from judgments and rulings from the ICTY and ICTR, and the ICTR has established that "equality of arms …does not necessarily amount to the material equality of possessing the same financial and/or personal resources." Even when applying the standard of "reasonable equivalence" adopted by the court, however, the Principal Defender and members of some defence teams were able to give examples of where they felt the defence was clearly prejudiced: areas of particular concern included disparities in logistical support, such as transport and office resources, as well as discrepancies in investigation and expert witness budgets.

As to the question whether equality is ensured with respect to logistical support and investigations, the mentioned Berkeley report contains the following references:

> (i) logistical support.
> While the Principle Defender noted that some conditions for defence counsels had improved fairly consistently during her time in office, the current conditions under which the Defence Office and the defence teams operated were still thought to be less than adequate. Some defence teams alleged that the office resources afforded to the defence were minimal when compared with the OTP; which in some cases hampered the ability of teams to effectively prepare for trial. The Registrar has noted that the defence teams at the Special Court were perceived to be comparatively as well equipped or more equipped than their counterparts at the *ad hoc* tribunals. However, the court's own benchmark of "reasonable equivalence" is not based on an inter-tribunal comparison, but on how resources are shared within the institution of the court itself. Although many of the specific needs of the defence have been and are continuing to be addressed, there is a broader perception within the defence that the prosecution has access to substantially greater material advantages.
> (ii) investigators.
> The use of investigators in international tribunals forms a pivotal part of both the prosecution and the defence cases. Investigators from the OTP's investigations section have worked closely with the OTP's legal team to refine target lists, establish leads and uncover the background to crimes committed during the Sierra Leonean conflict to provide the OTP with the information it needed to draft the first indictments and through the prosecutions phase. Some of them will continue to assist the prosecution during the defence's case and the rebuttal case at the trial stage. Investigators from the defence teams are charged with following up on the veracity of the statements and testimony of OTP witnesses, establishing leads for potential defence

witnesses, and recovering any evidence that may further support the relevant defence team's case. While it is fair to expect that the investigation resources allocated to the prosecution would exceed that of the defence, the discrepancies between the two budgets have been raised as an "equality of arms" concern by some members of the defence. The Defence Office has advocated for the addition of international investigators and lengthier contracts for national investigators.

According to information received from the Principal Defender, the Defence Office budget for investigations for fiscal year 2004/05 was less than half the amount allotted to the OTP for investigation-related travel alone. However, the Registrar has commented that as prosecution cases draw to a close, more emphasis will be placed on the defence budget. The recently released budget for fiscal year 2005/6 reflects this shift: defence travel for investigations is approaching its equivalent in the OTP budget, and the investigations budget is more than double that of the previous year. The Rgistrar seems to have adopted a pragmatic and malleable approach to defence budgeting given the constraints within which he is working, and in some instances the Principal Defender has been provided with the flexibility to shift funds from one area of the budget to another.

Although some members of the defence continue to express dissatisfaction with the way in which resources are allocated within the court, the Registry has attempted to remain in an ongoing responsive relationship to the needs of the defence. The existence of the Defence Office itself is a novel development, which, if managed effectively, could amount to a significant gain for the recognition of the rights of the accused in international criminal tribunals.(37)

These comments are reinforced by the Human Rights Watch report titled "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," published in November 2005.(38) The conclusions of this report as to the

issue of having access to resources still reveal several areas of concern from the perspective of equality of arms for defence:

> Despite these advances, funding of two areas essential to the preparation and presentation of defense cases – expert witnesses and international investigators – may prove insufficient. Defense counsel and court staff told Human Rights Watch that they believe that currently allotted amounts for the defense expert witness budget for 2005-2006 are inadequate. The Defence Office requested approximately three times what was ultimately allotted in the 2005-2006 budget for defense consultants and experts. While the notion of equality of arms between the prosecution and defense does not mean precise equality of resources, it is notable that substantial disparities exist between financial allotments for the defense and prosecution in this area.(39)

Similar concerns can be derived from this report as to the ability for defence teams to have access to defence investigators:

> Defence Office staff and defense counsel have expressed similar concern about lack of funding for investigators. Prior to its April 2005 mission, Human Rights Watch was told that access to investigators by defense teams has improved over time, with defense teams having access to the full-time assistance of national investigators plus limited access to the assistance of an international investigator. Given the importance of investigation to preparation of the defense, and ongoing demands for investigation as additional information is disclosed throughout trial, the opportunity to secure some assistance of international investigators is significant. Consistent with these developments, the Defence Office requested funds for 2005-2006 to cover the services of an international investigator for up to two months for each defense team, in addition to the full-time services of national investigators. However, the

> 2005-2006 budget allots less than half the amount the Defense Office requested for investigators.
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> When Human Rights Watch researchers raised concerns over the limited allocations for defense expert witnesses and investigators in April 2005 in Freetown, we were told that the budget does not necessarily reflect the total amount that may be made available for all areas; some areas may extend into the next budget cycle and there may also be funds remaining from the previous budget cycle, which ended on June 30, 2005. In follow-up discussions, Human Rights Watch was also told that the budget is constructed based on anticipated amounts, but that there is flexibility; funds can be found to address needed areas and there is a commitment by the court to ensuring reasonable needs by the defense. Human Rights Watch was also told that the principal defender has been invited recently to meet with Registry staff to discuss needs in these two areas so that any appropriate redeployments can be considered.
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> Detailed budgeting for all potential operational needs throughout the court is a difficult task, especially when resources are scarce. However, particularly with the departure of the court's first registrar, Robin Vincent, relying on the flexibility of the Registry to ensure adequate funding for key areas for the defense poses some concern.(40)

It is therefore that this Human Rights Watch report recommends that adequate funding on the areas of both defence investigators and expert witnesses should be endorsed.

Although it is clear that the prosecutorial burden of proof before ICTs may to some extent justify a higher budget as opposed to that of the Defence, the fundamental nature of equality of arms as a human rights principle must at least be interpreted as ensuring an approximate equality in financial terms.(41) The inference from the fact that the prosecution is required to meet the requisite burden of proof, may not amount to a substantial imbalance in financial, logistical and investigative resources between the parties.(42) After

all, putting a defence case before an international criminal tribunal, requires that the defence is able to invoke its arguments and establish criminal law defences by a "preponderance of evidence".(43)

4.2. EQUALITY OF ARMS AND ACCESS TO DOCUMENTS OF GOVERNMENTAL OR INTERNATIONAL ORGANIZATIONS

Can the principle of equality of arms be affected by the accessibility of the defence to potentially exculpatory materials in possession of governments and international organizations? Quite often, the prosecution is given access to such materials whilst the defence lacks the same powers.(44) Such a situation arose before the SCSL with respect to detention and military records of one of the accused in possession of the governmental authorities of Sierra Leone. Disclosure thereof could be decisive in establishing an alibi defense of the accused. The Trial Chamber of the SCSL confronted with absence of cooperation on part of the military authorities of the Government of Sierra Leone to disclose these documents, issued an order that the Government provide the defence with these documents. The defence in its underlying motion heavily relied on the principle of equality of arms.(45) Ultimately, access to these materials was given on the basis of Rule 54 of the RPE.(46)

In *Prosecutor v. Simic*, the ICTY preceded on this issue by granting the defence access to ICRC materials which was only disclosed to the tribunal and prosecution. The ICTY relied upon Article 21(1) of its Statute, saying that all persons shall be equal before the Tribunal.(47)

Yet, an imbalance between the parties before international criminal tribunals seems to exist. For instance, the agreement between the UN and the Government of Sierra Leone(48) provides in Article 17(1) that "The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation," yet, the fact that this agreement only provides that the Government of Sierra Leone is obliged to "facilitate access to the Prosecution to sites, persons and relevant documents required for the investigation," without including the

position of the defence, implies that the defence has no independent position equal to the Prosecution when it concerns having access to sites, persons and relevant documents required for the defence case.

Therefore, the defence before the SCSL is not entitled to directly have access to witnesses on the same footing as prosecution. Hence, in order to ensure equality of evidentiary sources and cooperation it is crucial that international criminal tribunals assume an active role in order to redress this inherent imbalance.(49)

5. PITFALLS AND DANGERS OF JUDICIAL ECONOMY WITHIN INTERNATIONAL TRIALS

Human rights courts and committees have developed a rather sophisticated view on the scope of the principle of equality of arms from the defense perspective. For international and especially internationalized or mixed criminal tribunals, the assessment of the boundaries of this principle is relatively new. In particular before the latter tribunals which have a restricted life-span, such as the SCSL and Khmer Rouge Tribunal (KRT), the occurrence of the notion of judicial economy – pressured by these time-limited mandates - and that of the principle of equality of arms for the defense, will present a dichotomy.

Internationalized criminal tribunals operate with limited budgets and low levels of commitment. Thus their effectiveness can be questioned.(50) This implies that the pressure on these tribunals will be considerable to complete their tasks within the prescribed time-limits imposed by the international community. It is observed that these tribunals require substantial commitments of funds, voluntarily donated by states, quality personnel and political will to contribute to international criminal justice.(51) Hence, the principles of judicial economy and that of equality of arms will easily collide within proceedings before internationalized courts. The question is whether the former notion should necessarily prevail over the latter due to the compliance to the time limits in the lifespan of these courts. Judicial economy is sometimes motivated by the argument that international trials

should be conducted without undue delay. This argument is, however, a moot one.

First of all, the legal status of the notion of judicial economy cannot be equated with that of equality of arms. The latter being qualified as a fundamental human rights notion enshrined by Articles 6(1) and 14(1) of the ECHR and ICCPR respectively. Secondly, pursuance of judicial economy in that defense rights are restricted in the way as displayed in the *Oric* case, can ultimately affect the legitimacy of international and internationalized criminal trials.(52) As noted by Daryl Mundis, "efforts to further limit the choices of the defense, as a means of improving effective case management, should be pursued only with great caution, since they have a potential to seriously hinder the right of the accused to a fair trial pursuant to Articles 20 and 21 of the (ICTY) Statute."(53)

6. EQUALITY OF ARMS BEFORE INTERNATIONAL AND INTERNATIONALIZED COURTS: A STRUCTURAL INEQUALITY?

It may be said that equality of arms in its full scope will probably never be achieved as the financial procedural and investigative facilities allocated to prosecution and defense are structurally and inherently unequal when it concerns trials before international and internationalized tribunals.

First, the prosecution is enabled to start its investigation and taking witness statements in most cases already one to two years prior to the issuance of an indictment. Therefore, the defense comes only into play after a considerable amount of evidence and material has been obtained. Mindful to the different responsibilities and tasks of prosecution and defense in an international criminal trial, it can not be denied that this situation amounts to a disadvantage for the defense, especially when the defense faces an accused who pleads not guilty.

Second, in particular with respect to trials before internationalized courts meant to adjudicate on region conflicts such as in Sierra Leone and East Timor, one of the fundamental problems the defense faces, forms the structural disadvantage in getting effectively access to witnesses dispersed

over the provinces. Most often in this type of conflict, the prosecution has the ability to initiate outreach programs far earlier than the defense. Outreach programs are focusing on dissemination to the wider public, especially those civilians living in the provinces of a region or country affected by a conflict, the purposes and functioning of a specific international or mixed tribunal which is established to try international crimes related to that conflict. In this way, prosecution and defense may obtain cooperation of witnesses and built their case. For instance, before the SCSL, a specific budget is allocated to prosecution and defense to conduct outreach programs throughout the whole territory of Sierra Leone. Yet, the prosecution was factually enabled to effectuate these outreach programs as of 2002 whilst the defense teams, which were only appointed as of the midst of 2003, were able to set up programs more than a year later. This means that the defense teams of the nine detainees before the SCSL were *de facto* put in a disadvantageous position when it concerns the effectiveness of outreach programs. Since the prosecution had a considerable time advantage of more than one year, considerable numbers of witnesses were already approached and enlisted for the prosecution's case.

Third, in terms of staffing and financing international and internationalized criminal courts, a structural inequality can be detected. For instance, the budget report on the registrar of the SCSL 2005-2006 comprises a staffing table for each organ of the SCSL.(54) The total number of Prosecution members is 45 including 18 investigators whereas the Defense Office is staffed with 11 individuals, excluding the defense lawyers who are contracted to represent the nine detainees. Every defense team in principle has the right to contract one investigator as opposed to the 18 investigators on which the OTP may rely. Of course, it can be argued that the OTP has to deal with the investigation in nine cases which are currently pending before the SCSL. Yet, this does not take away the imbalance with respect to the position of the defence, now that Prosecution investigators may share the information from the various cases and Prosecution trial attorneys before the SCSL repeatedly use the same witnesses in the three trials.

The responsibilities of international criminal tribunals may create conflicting pressures on both the creators and judges. This pressure may produce a stalemate. To establish such tribunals for the sake of justice on a predetermined budge risks having, in the end, no justice delivered in terms of endorsing fair trial rights. Yet, the alternative of not vesting such tribunals bears the risk of having no justice delivered at all. Thus, a formidable challenge rests on the international community, responsible for the establishment of these tribunals, to contemplate the consequences of these conflicting pressures in order to achieve a fair application of the principle of equality of arms.

7. CONCLUSIONS: SAFEGUARD AGAINST POLITICALLY MOTIVATED APPLICATION OF JUDICIAL ECONOMY

Both the notions of judicial economy and that of equality of arms are indispensable to properly conduct international and internationalized criminal trials. Yet, unlike the former notion the principle of equality of arms represents a more structural and fundamental safeguard to facilitate a fair trial at this level. Preservation of, and respect for equality of arms, at the minimum in procedural sense, does not depend on endorsement of judicial economy, at least from the perspective of defense fair trial rights. The described dichotomy between the principle of equality of arms and the notion of judicial economy remains largely undetermined by the case law of the international and internationalized criminal courts, notwithstanding the Appeals Chamber's ruling in the *Oric* case. This ruling brought some clarification as to the fair trial limitations of the "asymmetric" effect of "judicial economy" for the defense, particularly in terms of equality of arms. This clarification certainly provides important guidance regarding the interpretation of these Rules of Procedure and Evidence that are promulgated to ensure judicial economy policy.

Yet, current practice before the international and internationalized criminal courts can not take away the fear about a politicalized and non-independent application of such rules, from the perspective of the defense.

The best way to resolve this fear is to, on a case-by-case basis, review these particular rules and interpret them not in a grammatical manner but rather from the perspective of the protection of human (defense) rights. A broad interpretation of Rules of Procedure and Evidence pertaining to the concept of judicial economy, such as Rule 73ter of the ICTY RPE, carries the risk that such norms may potentially be used as a tool to prioritize these political agenda of member states or the UN as to the budgetary restraints and mandates pertaining to international and internationalized criminal tribunals. The preliminary purpose of the principle of equality of arms is therefore to reduce the risk of politically motivated applications of the concept of judicial economy. ❖

NOTES:

1. See also Rule 73*ter*(C) and (D) of the RPE of the ICTR, and Rule 73*ter*(C) and (D) of the RPE of the SCSL; see in general for judicial economy, Daryl A. Mundis, From Common Law Towards Civil Law: The Evolution of the ICTY Rules of Procedure and Evidence, in 2 Leiden Journal of International Law 367-382 (2001).

2. See Judgment of the ECHR of 24 June 2003, *Dowsett v. United Kingdom*; *Edwards and Lewis v. United Kingdom*, Judgment 22 July 2003.

3. See ECHR in *Brandstetter v. Austria*, Judgment 28 August 2001.

4. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment 15 July 1999, para. 44.

5. *Ibid.*, para. 48, 50; see also ICTY Appeal Chamber, *Prosecutor v. Oric*, Interlocutory Decision on Length of Defence Case, Case No. IT-03-68-AR73.2, para. 7.

6. See Prosecutor v. Ojdanic, Final Assessment of the Accused Ability to Remunerate Counsel, Case No. IT-99-37-PT, 23 June 2004.

7. ECHR *Steel and Morris v. U.K.*, judgment 15 February 2005, application No. 68416/01, see for this judgment and implications in further detail: Geert-Jan Alexander Knoops, Theory and Practice of International and Internationalized Criminal Proceedings, 42 – 49 (2005).

8. See further para. 4.1 below.

9. See also Mundis, *supra* note 2, at 367.

10. See also Mundis, *supra* note 2, at 368.

11. *Ibid.*

12. *Ibid.*

13. See Mundis, *supra* note 2, at 368-369.

14. Rule 90(H)(ii) reads that "(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness; see Mundis, *supra* note 2, at 372.

15. See Mundis, *supra* note 2, at 372.

16. *Ibid.*

17. See Regulations of the Court, Doc. ICC-BD/01-01-04 (May 26, 2004); see for these regulations, Hans-Peter Kaul, Construction Site for More Justice: The International Criminal Court after Two Years, 2 AJIL 3715-379 (2005).

18. See also Kaul, o.c. at 376.

19. See for these objectives, Kaul, o.c. at 376-377.

20. Trial Chamber Decision, para. 4.

21. See *Prosecutor v. Oric*, Interlocutory Decision on Length of Defense case, 20 July 2005, Case No. IT-03-68-AR73.2.

22. See *Prosecutor v. Tadic*, Appeals Chamber Judgment, 15 July 1999, Case No. IT-94-I-A, mentioned in para. 48-50.

23. See *Prosecutor v. Tadic*, Appeals Chamber Judgment, 15 July 1999, Case No. IT-94-I-A, para. 44; see also *Prosecutor v. Oric*, *supra* note 6, para. 7.

24. See *Prosecutor v. Tadic*, *supra* note 23, paras. 48, 50.

25. See generally about this interpretation, G.J. Knoops *supra* note 8, at 42 – 49.

26. See also decision Human Rights Committee in *Phillip v. Trinidad and Tobago*, Communication No 594/1992, Views of the UNHRC, 20 October 1998 [1998] IIHRL 123 (20 October 1998), in which case it was held that the ability for the defense to prepare a murder case merely during one weekend prior to the commencement of the trial amounted to a violation of the principle of equality of arms.

27. See *Prosecutor v. Tadic*, *supra* note 23, para. 52.

28. See *Prosecutor v. Tadic*, *supra* note 23, para. 7.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*

32. Rule 73*ter* reads:

(A) Prior to the commencement by the defence of its case the Trial Chamber may hold a Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber, after having heard the defence,

shall set the number of witnesses the defence may call. (Amended 17 Nov 1999, amended 12 Apr 2001)

(D) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. (Amended 12 Apr 2001)

(E) After having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence. (Amended 12 Apr 2001)

(F) During a trial, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. (Amended 12 Apr 2001)

33. Which Article virtually sets forth the fair trial guarantees of Artilce 14 of the ICCPR.

34. See *Prosecutor v. Oric*, *supra* note 6, para. 8.

35. *Ibid*, para. 9.

36. Rule 98 *bis* reads: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

37. See Prosecutor v. Kayishema and Ruzindana, ICTR Judgment 21 May, 1999, para. 60.

38. See Interim Report on the Special Court for Sierra Leone, April 2005, U.C. Berkeley War Crimes Studies Center, p. 14-15.

39. See Volume 17, nr. 14(A).

40. Chapter IV, under A of this report.

41. Chapter IV, under A of this report.

42. See also Richard May and Marieke Wierda, International Criminal Evidence 271 (2002).

43. *Ibid.*

44. See for this burden, Geert-Jan Knoops, Defenses in Contemporary International Criminal Law 225 – 228 (2001).

45. See also May and Wierda, *supra* note 43, p. 271.

46. See SCSL-2004-16-PT, Kanu – Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order under Rule 54 with Respect to Release of Exculpatory Evidence, 1 June 2004.

47. Rule 54 reads "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

48. See Prosecutor v. Simic, Decision on Application by Stevan Todorovic to Re-Open The Decision of July 27, 1999, 28 February, 2000, para. 29; see also *Prosecutor v. Kordic and Cerkez*, Order for the Production of Documents by the European Community Monitoring Mission and its Member States, applying the principle of equality of arms.

49. Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

50. See May and Wierda, *supra* note 43, at 272.

51. See Sylvia de Bertodano, Current Developments in Internationalized Courts, in 1 JICJ 244 (2003).

52. *Ibid.*

53. See also Daryl Mundis, *supra* note 2, at 370.

54. *Ibid.*

55. See SCSL budget 2005-2006, version 05/06, p. 7.