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Defence and Fair Trial Rights at the African Court of Justice and Human and Peoples' Rights

MELINDA TAYLOR

1. INTRODUCTION

The right to a fair trial is rooted in the African Charter of Human and Peoples' Rights,[1] and firmly entrenched in the legal frameworks and case law of the various international and hybrid criminal courts.[2] The inclusion of a separate provision on fair trial rights in the Malabo Protocol thus provides welcome clarity and detail on what is recognised to be an essential component of the criminal process.

At first glance, the provision (Article 46A – Rights of Accused) appears to be virtually identical to the equivalent fair trial provision at the International Criminal Court (Article 67(1) of the Rome Statute). There are, however, both key lacuna and important innovations, which differentiate the Malabo Protocol from the Rome Statute. Of particular relevance to the right to a fair trial, the Protocol envisages the establishment of a 'Defence Office', the head of which shall enjoy 'equal status' as concerns rights of audience and negotiation *inter partes*.[3] This recognition of the right to structural equality of arms between the Defence and the Prosecution builds on the positive developments at earlier hybrid tribunals, such as the Special Court for Sierra Leone, and the Special Tribunal for Lebanon, which also recognised the need for internal representation of the interests of the Defence through the establishment of independent 'defence offices'. In contrast, the ICC equivalent, which lacks institutional or legal parity with the Prosecution and falls administratively

[1] Article 7 of the African Charter on Human and Peoples' Rights

[2] See for example, Article 20 of the ICTY, Article 67(1) of the ICC Statute, Article 17 of the Statute for the SCSL

[3] Article 22(c)(7) of the Protocol.

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under the authority of the Registrar, appears retrograde, and offers less structural protection for the rights of the Defence.[4]

Although the Malabo Protocol delineates the core rights of the accused in Article 46(a), the text of the Protocol is remarkably sparse as concerns key procedural rights pertaining to a range of important issues, such as disclosure, the framework for amending the charges, and legal representation. Whereas the ICC Statute includes much greater detail on such issues, this bare bones structure is more in line with the Statutes of the ICTY and ICTR, which eschewed specific procedural details, addressing such issues instead through rules adopted and promulgated by the judges.

Given that the African Court is, like the ICC, a treaty based judicial entity, it is arguable that States should have a clear idea of the procedural rights that might apply to their nationals, before they decide whether to accept the Court's criminal jurisdiction. It may be too cumbersome to amend the Malabo Protocol to include such detail, but an alternative approach might be to submit proposed Rules of Procedure and Evidence to the State Parties for ratification, which is the procedure employed at the ICC.[5] Although the ICTY and ICTR imbued the judges with the power to adopt and amend the rules, these Tribunals were established by the Security Counsel, and did not, therefore, depend on State consent. In contrast, if the Judges at the African Court were to engage in substantive law making to such an extent that the applicable law differs fundamentally from the terms of the Protocol, State Parties could argue that such a radical transformation of the Court constitutes a material breach of the founding treaty (i.e. the Malabo Protocol), which in turn, allows them to suspend their obligation to be bound by it, in whole or in part.[6]

The structure of the African Court of Justice itself and its close connection to its human rights counterpart also offers unique protections which have been absent so far, in other international criminal courts and tribunals. Although the Protocol does not spell out the nature of the intersection between the Court's human rights jurisdiction and its criminal jurisdiction in detail,[7] the approach adopted by the European Court of Human Rights (ECHR) offers a possible parallel. The ECHR has found that although the Convention permits member states to transfer powers to an international organisation, States must ensure

[4] X. Keïta, M. Taylor, 'The Office of Public Counsel for the Defence', Behind the Scenes, the Registry of the International Criminal Court 2010 (ICC Publication) pp. 69–71, at 71.

[5] Article 51(2), ICC Statute.

[6] Article 60(2) of the Vienna Convention on the Law of Treaties.

[7] Article 4 of the Protocol specifies that the mandate of the criminal division shall 'complement' the human rights Court.

that the organisation in question 'is considered to protect fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.'[8]

If the same, or a similar test were to be employed by the African Court of Human Rights, it follows that the Criminal jurisdiction of the Court would be obliged to offer 'equivalent' deference and respect for the provisions of the African Charter on Human and Peoples' Rights as would exist in State parties. It also follows that since a defendant can bring a complaint before the African Commission or even the same Court in connection with alleged violations of domestic criminal procedures, where in the latter case that State has entered the special declaration required to entertain individual complaints, an 'equivalent' remedy must also exist in relation to proceedings that are before the Court's criminal jurisdiction. A key question that arises in this regard would be whether a defendant, before the Court, could invoke fair trial concerns not just before the Criminal Law Section both also at the same time, or subsequently, before the Human Rights Section.

The intersection between the Court's human right and criminal divisions also has interesting implications for the relationship between State parties and the ICC. Since the ICC is a 'court of last resort', it only exercises competence over cases where national States are unwilling or unable to do so.[9] If it is assumed that a State party can delegate this power to the African Court, this will raise issues as to whether the ICC's determination that it possesses the ultimate competence to determine questions of admissibility (that is, whether the case should be tried before national courts or before the ICC) is tenable.[10] Although the Malabo Protocol does not regulate such matters,[11] if there is a dispute between the competence of the ICC and that of the African Court to prosecute an individual, the human rights division could find that the defendant cannot be transferred to the ICC, unless the ICC offers an equivalent level of protection as concerns the protection of the defendant's rights under the African Charter. This possibility might, in turn, incentivise the ICC to apply article 21(3) of its own Statute to fill in any gaps concerning effective fair trial

[8] *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi V. Ireland*, Application no. 45036/98, para. 155.

[9] Article 17, ICC Statute.

[10] *Prosecutor v. Kony et al.*, 'Decision on the admissibility of the case under article 19(1) of the Statute', ICC-02/04–01/05–377, 10 March 2009, para. 46.

[11] Article 30(3) of the Vienna Convention on the Law of Treaties suggests that if a State ratifies the Malabo Protocol after ratifying the ICC, it would be obliged to implement its obligations to the ICC in a manner which is consistent with its obligations under the Malabo Protocol.

protection at the ICC.[12] From this perspective, the Malabo Protocol should be viewed as an extremely positive development as concerns the effective implementation of fair trial safeguards within the sphere of international criminal law.

This chapter will analyse the individual rights set out in Article 46(A) of the Protocol, with reference to case law from other internationalised criminal courts and human rights court, which might shed light on the future case law and practice of the Court.

2. ANALYSIS OF INDIVIDUAL RIGHTS

A. *Article 46(A)(I) All Accused Shall be Equal before the Court*

At first glance, there appears to be an inherent tension between the supposed equality of accused, and the existence of immunity provisions in the Protocol, which afford specific protection from legal process to certain defendants, that is, sitting Heads of States, and not others, for example, their political opponents. It could, nonetheless, be argued that this notion of equality only governs the legal regime that applies to the investigation and prosecution of different defendants, and not, the preliminary question as to who should and should not be prosecuted.

The precise ambit of the right to equality under the law has arisen in connection with the application of amnesties for war crimes, which are considered to be legitimate, when issued as part of a negotiated peace settlement in internal conflicts.[13] Whereas the Ugandan Supreme Court found, in the Kwoyelo case, that the defendant could not invoke the right to equality, and the protection against discrimination in order to claim an entitlement to an amnesty that had been granted to defendants in similar circumstances,[14] the ACHPR reached the opposite conclusion. In so doing, the ACHPR distinguished between laws, which were discriminatory in their content, and laws, which were applied in a discriminatory manner.[15] Both types of discrimination could constitute a violation of the right to equality before the law, although the ACHR acknowledged that some types of positive discrimination are permissible if:

[12] Article 21(3) of the Statute specifies that the State must be applied in a manner which is consistent with internationally recognised principles of human rights law.

[13] Article 6(5) of Additional Protocol II

[14] *Uganda v. Kwoyelo*, Constitutional Appeal no. 1 of 2012, www.right2info.org/resources/publications/uganda-v.-kwoyelo-judgment.

[15] Communication 431/12 – *Thomas Kwoyelo v. Uganda*.

- The discrimination is objectively justifiable/reasonable;
- It is a proportionate means for achieving the objective in question.[16]

In assessing the case before it, the ACHPR found that the right to equality before the law had been violated due to the fact that Uganda had failed to sufficiently justify its decision to withhold the right to an amnesty to Kwoyelo, whilst granting it to other individuals in similar circumstances. This case law suggests that if the immunities under the Malabo Protocol are challenged on the basis of discrimination, it will fall to the Court to demonstrate that the inclusion of a Head of State immunity serves an objectively justifiable need, that it is a proportionate means to achieve this need, and that it has been applied in a uniform manner as concerns individuals, who fulfil its criteria.

Issues of equality are also likely to arise in connection with State cooperation, and the impact that this will have on the ability of the Defence to investigate in an effective manner. Clearly, Defence Counsel tasked with representing politically unpopular defendants are likely to face significant issues as concerns their ability to access Government controlled documents or sources. Unless the Court determines that it possesses the power to subpoena witnesses or documents, the Defence will be seriously disadvantaged not just vis-à-vis the Prosecution, but also as concerns defendants who are aligned to the Government rather than the opposition.

In order to address comparable situations and ensure equality of arms between the parties,[17] the drafters of the ICC Statute vested the Prosecutor with the explicit duty to search for, collect, and disclose all information that might be relevant to the establishment of the truth, including both incriminating and exculpatory information.[18] The Malabo Protocol does not, however, include an equivalent duty on the part of the Prosecutor to search for both incriminating and exculpatory elements. Indeed, the Protocol is completely silent as concerns the nature and scope of the Prosecutor's disclosure duties.

This lacuna can be addressed through the promulgation of rules of procedure and evidence, which is the means by which disclosure obligations were

[16] Paras. 161–4.

[17] M. Bergsmo and P. Kruger, 'Article 54 Duties and powers of the Prosecutor with respect to investigations', in Commentary on the Rome Statute of the International Criminal Court, (O. Triffterer (ed.), 2nd ed., 2008) p. 1078. See also United Nations General Assembly, 'Draft Report of the Preparatory Committee', 23 August 1996, A/AC.249/L.15, p. 14, cited by the Appeals Chamber in its 'Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"', ICC-01/04–01/07–2288, 16 July 2010, at footnote 125.

[18] Article 54(1)(a) of the ICC Statute, read in conjunction with the disclosure obligations set out in Article 67(2) of the Statute, and Rule 77 of the Rules of Procedure and Evidence.

regulated at the *ad hoc* Tribunals, or through judicial interpretation of the defendant's right to a fair and impartial trial. The Defence Office can also play an important role in eliminating or mitigating inequalities, by entering into generic cooperation agreements with various State parties in a proactive manner.[19] This possibility is supported by firstly, the Defence Office's right, as an independent organ of the Court, to enter into such arrangements, and secondly, the fact that Article 22(C)(2) of the Protocol specifically vests the Office with the power to collect evidence, and Article 22(C)(3) imposes a corresponding duty to provide necessary support and facilities to individual Defence teams. In contrast, if the Court waits for specific cooperation issues to arise in specific cases, it is more likely that political considerations will influence the outcome.

B. *Article 46(A)(2) The Accused Shall Be Entitled to a Fair and Public Hearing, Subject to Measures Ordered by the Court to Protect Victims and Witnesses*

This provision raises two separate elements: firstly, the relationship between the right to public hearings and protective measures, and secondly, the relationship between the right to a fair hearing and protective measures.

As concerns the first element, it is relatively uncontroversial that the right to a public hearing is subject to the Court's duty to impose protective measures. Nonetheless, even though it might seem, at first blush, less harmful to curtail the right to public hearings in order to ensure protection measures, overuse of such measures can render the Court vulnerable to claims that it lacks transparency. Closed hearings can impede the ability of external organisations to monitor the extent to which the Court implements fair trial rights.[20]

[19] The Defence Office at the Special Tribunal for Lebanon has played this role, and the International Bar Association (IBA) recommended that consideration should be given to the adoption of a similar system should be implemented at the ICC: 'Fairness at the International Criminal Court' IBA Report of August 2011, pp. 34–5.

[20] As underlined by the ECtHR, the public character of proceedings 'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.' *Werner v. Austria*, Judgment of 24 November 1997, para. 45 The former Vice-President of the ICTY, Judge Florence Mumba, has also observed that public hearing 'serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on "framed" trials, and giving the public a chance to suggest changes to the law or justice system'. Florence Mumba, Ensuring a Fair Trial Whilst Protecting Victims and Witnesses – Balancing of Interests, in Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (Richard May et al. eds., 2001), p. 365.

Over-extensive and vigorous protective measures vis-à-vis the public can also render it difficult for Defence teams to conduct specific inquiries that might be required to investigate the credibility of witnesses called by the Prosecution.[21] Finally, extensive reliance on closed sessions potentially dilutes the deterrent effect of the Court's proceedings. The above considerations dictate that the Court should only have recourse to confidential hearings when it is strictly necessary to do so.[22]

In terms of pragmatic solutions for achieving a fair balance between the competing aims of publicity and protection, the ICC Trial Chamber in the *Katanga* case attempted to provide, where possible, public summaries of any developments that occurred in closed session, and further issued a series of recommendations, designed to limit the need to have recourse to confidential sessions: this included framing questions in such a way as to avoid the need to mention confidential matters, and reviewing confidential transcripts in order to identify whether public redacted versions could be issued.[23] Chambers have also required the parties to review all past confidential filings, and either prepare a public redacted version, or explain why it is not possible to do so.[24]

Regarding the second element, that is, the relationship between fair trial rights and the duty to impose protective measures, Article 46(A)(2) is worded ambiguously; the placement of the comma leaves it open to judicial interpretation as to whether both the right to fair hearing and the right to a public hearing are subject to measures ordered by the Court to protect victims and witnesses, or whether it is only the right to a public hearing which must defer to victims' rights. As a result, the hierarchy between the right to a fair trial, and the duty of the Court to implement protective measures is uncertain.

In terms of the practice of the *ad hoc* Tribunals, this issue of hierarchy first arose in an ICTY decision, which considered the possibility of hearing 'anonymous' witnesses. In a dissenting Opinion, Judge Stephen noted that

[21] 'A disproportionate number of closed sessions can affect public perception of the accused's responsibility and may prevent potential witnesses from viewing the proceedings and coming forward with new and relevant information.' 'Witnesses before the International Criminal Court' IBA Report of July 2013, p. 32.

[22] This would be consistent with principle 3(f) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, www.achpr.org/instruments/principles-guidelines-right-fair-trial/

[23] *Prosecutor v. Katanga & Ngudjolo*, Oral decision, Transcript of 7 September 2010, ICC-01/04–01/07-T-184-Red-ENG, pp. 72–5; Oral decision transcript of 20 September 2010, ICC-01/04–01/07-T-189-ENG, pp. 10–16.

[24] *Prosecutor v. Bemba et al.*, 'Decision Closing the Submission of Evidence and Further Directions', ICC-01/05–01/13–1859, 29 April 2016, para. 8.

the equivalent legal text of the ICTY, Article 20(1), stipulated that the Court shall ensure that 'proceedings are conducted. . .with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[25] To Judge Stephen, this contrast between full respect and due regard underscored the drafters intention to create a legal scheme in which protective measures should not override the specific rights of the accused. This distinction between the obligation to respect the rights of the accused, and the duty to give due regard to witness protection was accepted, and applied in subsequent case law of the *ad hoc* Tribunals.[26] Nonetheless, in the recent ICTY *Haradinaj* judgment, the Appeals Chamber obliterated this distinction through its determination that effective witness protection was itself, a core requirement of fair and impartial proceeding. The Appeals Chamber further concluded that a failure to secure effective protection could undermine the Prosecution's right to a fair trial.[27]

In line with this evolution, the current approach at the ICC appears to favour a balancing test, which requires the Court to ensure that any protective measures do not compromise the overarching right to a fair and impartial trial.[28] It would seem that this approach is more in line with the wording of the Malabo Protocol, and it will ultimately fall to the Chamber to exercise effective oversight over protective measures in order to ensure that they promote, rather than undermine the right to fair and impartial proceedings.

The potential for conflict between the two competing duties is most likely to arise in relation to requests to withhold the identity of witnesses and victims from the Defence, and requests to redact or withhold the disclosure of information on the grounds of witness protection.

The Malabo Protocol neither permits nor prevents witness anonymity. Whilst underscoring the duty to ensure effective protective measures, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also emphasise that '[n]othing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at trial'. This wording does not prohibit anonymous

[25] *Prosecutor v. Tadic*, 'Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', 10 August 1995.

[26] See for example, *Prosecutor v. Brdjanin & Talic*, 'Decision on Motion by the Prosecution for Protective Measures', 3 July 2000, para. 31.

[27] *Prosecutor v. Haradinaj et al.*, Judgment on Appeal, 19 July 2010, paras. 35, 46.

[28] 'The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests', *Prosecutor v. Lubanga*,' Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters', 24 April 2008, ICC-01/04–01/06–1311-Anx2, para. 94.

witnesses, but the express inclusion of this caveat reflects awareness of the tension between witness anonymity and rights of the accused.

There is no uniform position amongst international and hybrid courts on the question of witness anonymity, although the overall trend appears to be opposed to its use. In the first ICTY case, although the Trial Chamber authorised a small handful of Prosecution witnesses to testify on an anonymous basis due to protection concerns, it was subsequently discovered by chance that one of the witnesses (witness 'L') had fabricated his testimony at the behest of a State security agency.[29] Consequently, neither the ICTY, ICTR or SCSL heard witnesses on an anonymous basis after this point. This incident coincided with the finalisation of the ICC Rules of Procedure and Evidence, and appears to have informed the decision to exclude the possibility of hearing anonymous witnesses at trial from the ICC legal framework.[30]

Conversely, the rules of the STL allow for witness anonymity,[31] although the rule has never been invoked in practice. In deciding which path to go down, it will be important for the Court to consider the normative impact of its decision on domestic case law in member States, and the potential, demonstrated by the *Tadic* case, that anonymity can be misused to prevent the Defence from challenging the accuracy or credibility of false allegations.

In terms of the use of redactions and delayed disclosure, this involves redacting certain information during the pre-trial stage, including identifying features such as the witness's name and address, which will then be disclosed at a pre-determined point prior to the witness's testimony. The logic underpinning this scheme is that the less time between disclosure and the date on which the witness testifies, the less risk that disclosure will result in possible witness interference or otherwise endanger the witness,[32] although no empirical research supports the assumption that this measure effectively curtails potential witness inference.

[29] *Prosecutor v. Tadic*, 'Trial Chamber's Decision on Prosecution Motion to Withdraw Protective Measures for Witness L', dated 5 December 1996, para. 4.

[30] C. Hall, 'The First Five Sessions of the Un Preparatory Commission for the International Criminal Court', 94 *Am. J. Int'l L.* 773 at 784; D. Lusty, 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials' 24 *Sydney L. Rev.* (2002) 361, at 421–3.

[31] Rule 93 of the STL Rules of Procedure and Evidence.

[32] The proposition was first adopted by the Trial Chamber in the *Prosecutor v. Brjanin and Talic*, on the basic of arguments from the Prosecution based on examples where witnesses had been intimidated after the Defence started its investigations; there was, however, evidence submitted in support of the proposition that delayed disclosure would eliminate this risk: 'Decision on Motion for Protective Measures', 3 July 2000.

Moreover, the converse to this logic is that the less time there is between disclosure and the testimony of the witness, the less time there is for the opposing party to investigate the credibility of the witness or verify the accuracy of the witness's proposed testimony. Delayed disclosure is also resource intensive, as it requires the parties to disclose and review the same materials on multiple occasions. The assumption that delayed disclosure is necessary to ensure witness protection is also undercut by the fact that many civil-law countries employ a dossier system, whereby the 'case file' is provided to the Defence during the preliminary phase, rather than being dolled at in a piecemeal fashion. Given that sufficiency of resources, and the length of proceedings are likely to be at the forefront of issues experienced by the ACJ, there might be good cause for the Court to consider afresh the utility and viability of adopting measures, such as delayed disclosure.

C. *Article 46(A)(3) The Accused Shall Be Presumed Innocent until Proven Guilty in Accordance with the Provisions of this Statute*

The presumption of innocence is considered to be of such paramount importance that the United Nations Human Rights Committee has found that States can never derogate from the duty to respect and apply this principle in criminal proceedings.[33] Even in times of warfare or states of emergency, it would be completely impermissible to prejudge the guilt of suspects, or otherwise assume guilt by association. This golden rule is, nonetheless, often honoured more in the breach, as reflected by the extent to which individuals, who have yet to stand trial, are described as warlords, or similar terms steeped in assumed guilt.

The Principles and Guidelines for the Right to a Fair Trial in Africa elaborate the following three key elements of the presumption:

1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.
2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.
3. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

[33] UN Human Rights Committee, CCPR General Comment 32 (2007), paras. 6, 11, 16.

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Regarding the first aspect, although the Protocol does not specify the standard of proof, the African Commission has elaborated that,[34]

'For purposes of criminal guilt, "proof beyond reasonable" means the totality of evidence must push the allegation past the point below which it would reasonably be doubted if the accused is indeed guilty. Once the evidence surpasses that point, guilt will have been established.'

In terms of the second aspect, the presumption of innocence acts as an important constraining factor as concerns information or comment provided by court officials pending the issuance of a judgment. In line with this requirement, ICC Chambers have publicly deprecated certain statements from the Prosecutor which implied that the accused was guilty or which improperly influenced public perceptions of the proceedings.[35] Human Rights courts have also emphasised that the public appearance of the defendant should not prejudge issues of guilt or innocence,[36] and for this reason, have condemned the placement of defendants in cages during public proceedings.[37]

The third point concerning presumptions of fact or law, although simple in its formulation, enters into complex territory in circumstances in which the court is addressing multiple cases arising from the same set of facts, as was the case at the ICTR and ICTY. Both Tribunals allow the judges to base the judgment on facts which are 'common knowledge',[38] and 'adjudicated facts'.[39] The former, are 'facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute'.[40] This definition has been construed broadly to include objective background facts, such as the status of ratification of treaties by the country in question, but also 'facts' that form part of the elements of the offence, such as the existence of a non-international armed conflict, or the existence of a widespread and systematic attack against a civilian population.[41]

[34] Communication 322/2006 – *Tsatsu Tsikata v. Republic of Ghana*, para. 124.
[35] *Prosecutor v. Lubanga*, Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04–01/06–2433, 12 May 2010, paras. 37–9,
[36] *Rushiti v. Austria*, App. No. 28389/95, para.31; *O. v. Norway*, App. No. 29327/95, para. 39; *Zollmann v. United Kingdom*, App. No. 62902/00.
[37] *Polay Campos v. Peru*, Communication No. 577/1994, para. 8.5.
[38] Rule 94(A) of the ICTR RPE; Rule 94(A) of the ICTY RPE.
[39] Rule 94(B) of the ICTR RPE; Rule 94(B) of the ICTR RPE.
[40] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98–44-AR73(C), 16 June 2006, para. 22.
[41] *Semanza v. Prosecutor*, Appeals Judgment, ICTR-97–20-A, 20 May 2005, para. 192.

In 2006, the notion reached its apogee when the ICTR Appeals Chamber determined that henceforth, the ICTR would consider that '[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group' as a fact of common knowledge.[42] The ICTR Appeals Chamber claimed that taking 'judicial notice' of such facts did not infringe the presumption of innocence or in any way shift the burden of proof, because firstly, the facts in question did not concern the individual role of the defendant, and secondly, the judges could not take 'judicial notice' of inferences based on such facts.[43] These caveats seem to rest on a distinction without a difference: in a simple murder case, if the judges assume that the person has been intentionally killed, this assumption will still shift the burden of proof as concerns the establishment of a fundamental component of the allegations, even if the assumption does not touch on the role of the defendant in the alleged murder. Similarly, if the judges can rely on these facts as part of the judgment, their inability to take judicial notice of 'inferences' based on these facts is of little import, and does not preclude them from drawing inferences or conclusions in the ordinary manner. Of further concern, the relevant wording of the ICTY and ICTR Rules 'commanded' the judges to take judicial notice of such facts; the judges had no discretion to put the issue to proof if the criteria for judicial notice was met.[44]

This mandatory assumption of facts cannot be reconciled with the 'Principles and Guidelines for the Right to a Fair Trial in Africa', which proscribes presumptions of fact, that are not rebuttable. It is notable in this regard that Article 46(c)(3) of the Protocol provides that a policy may be attributed to a corporation where it provides the most reasonable explanation of its conduct. If it is assumed that 'corporations' enjoy a right to a fair trial, then the wording of this provision is problematic. Specifically, it has been accepted at both the *ad hoc* Tribunals and the ICC that in order to satisfy the standard of beyond reasonable doubt, a particular finding concerning an element of the offence must be the 'only reasonable' conclusion,[45] whereas the phrase 'most reasonable' implies that other reasonable explanations exist. Although it might be

[42] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Case No. ICTR-98–44-AR73(C)*, 16 June 2006, paras. 35–6.

[43] *Semanza v. Prosecutor*, Appeals Judgment, ICTR-97–20-A, 20 May 2005, para. 192.

[44] *Prosecutor v. Milosevic*, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No.: IT-02–54-AR73.5, 28 October 2003.

[45] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"', ICC-02/05–01/09–73, 03 February 2010, paras. 32–3; *Prosecutor v. Stakić*, 'Judgment', 22 March 2006, IT-97–24-A, para. 219; *Prosecutor v. Bagosora and Nsengiyumva*, 'Judgment' (Appeals Chamber), 14 December 2011, ICTR-98–41-A, para. 515.

acceptable to imply a lower standard of proof to corporations, the use of this threshold might have troubling implications for individuals who might be prosecuted in tandem with corporations. The word 'may' makes clear that unlike the *ad hoc* Tribunals, the judges have the discretion not to employ this assumption, and findings concerning corporations should not, in any case, be incorporated in cases involving individual responsibility (that is, through the notion of 'adjudicated facts').

Adjudicated facts are those that have been determined by the Tribunal in a different case, and, either the parties did not appeal the finding or the 'fact' was affirmed at the appellate level. Unlike facts of common knowledge, the Chamber has the discretion to decide whether to accept the adjudicated facts in question,[46] and must, in any case, hear first from the parties. The ICTR Appeals Chamber explained that the rationale underpinning adjudicated facts was that they are 'a method of achieving judicial economy and harmonising judgments of the Tribunal while ensuring the right of the accused to a fair, public, and expeditious trial.'[47] The facts in question must be relevant to the criminal responsibility of the accused, but they cannot touch on the acts, conduct, and mental state of the accused.[48] Notwithstanding this narrow category of exceptions, it is difficult to accept that the admission of key facts, that have been litigated in an entirely different case, which may have been defended by lawyers who did not contest certain facts for strategic reasons, does not impact on the presumption of innocence and burden of proof. The ICTR Appeals Chamber's claim that the presumption of innocence remains intact because this approach only affects the burden of production of evidence, and not the burden of persuasion, appears entirely unconvincing, particularly if one steps back from the pressure faced by the ICTY and ICTR to clear their backlog of cases with minimal resources.

In any case, it is unlikely that the African Court will face the same situation of hearing multiple cases based on the same sub-set of facts. This minimises the need to 'harmonise judgments', and the expediency of doing so, at the expense of the rights of the accused. It is telling in this regard that whilst the ICC Rules of Procedure and Evidence permits the Court to take judicial notice of facts of common knowledge,[49] the Judges cannot take 'judicial

[46] *Prosecutor v. Milosevic*, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No.: IT-02–54-AR73.5, 28 October 2003.

[47] *Setako v. Prosecutor*, Appeals Judgment, Case No. ICTR-04–81-A, 28 September 2011, para. 200.

[48] *Prosecutor v. Karemera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98–44-AR73(C), 16 June 2006, para. 50.

[49] Article 69(6) of the ICC Statute.

notice' of facts that concern the criminal responsibility of the defendant or the elements of the offence, or consider facts that have been adjudicated in another case as being established for the purposes of the case at hand.

Apart from the issue of the burden of proof, the presumption of innocence also has important connotations for the expeditiousness of the proceedings, and the use of pre-trial detention. In particular, the presumption of innocence mandates a presumption of liberty.[50] Accordingly, although the Malabo Protocol does not regulate the issue of provisional release (and the related standards), it would be incompatible with the presumption of innocence to impose a system of mandatory pre-trial detention. Similarly, the UN Human Rights Commission has observed that lengthy pre-trial detention is incompatible with the presumption of innocence,[51] for example, if a detainee has already been detained for 8 years, this creates both a public perception that the defendant must be guilty, and an incentive to issue a conviction, and sentence which is equal to or greater than 8 years in order to avoid possible claims for compensation, or an appearance of injustice.

The experience of the ICTR and ICC has nonetheless demonstrated that the right to provisional release will be meaningless in practice if the Court does not possess the means to release the detainee. At least some defendants are likely to be political or military opponents, who will be unwilling or unable to return to their country of origin. This means that unless States are willing to allow such defendants to be released to their territory (either on a provisional basis or if the defendant is acquitted), then it is possible that the defendants will be forced to remain in detention, due to the lack of practical possibilities for ensuring their release. One solution would be to follow the ICC example of encouraging State parties to enter into proactive agreements with the Court concerning the potential release of detainees onto their territory, which can then be invoked in specific cases, if required.[52]

[50] Section M(1)(e), Principles on Fair Trial in Africa; Paragraphs 1(b), 7, 10–11, 31, 32(a) of Guidelines on Arrest, Police Custody and Pre-Trial Detention in Africa.

[51] 'The holding in detention of accused persons pending trial for a maximum duration of a third of the possible sentence facing them, irrespective of the risk that they may fail to appear for trial is incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail.' Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286. See also CCPR/C/GC/32, para. 30, citing concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10

[52] The Court has entered into such agreements with Belgium and Argentina: 'Belgium and ICC sign agreement on interim release of detainees', 10 April 2014, ICC-CPI-20140410-PR993
'Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina's commitment to accountability and fair trial', 28 February 208, ICC-CPI-20180228-PR1360

In line with this approach, the presumption of innocence further mandates that the Court should have legal framework in place to address the scenarios which might arise in the event that defendants are acquitted. This includes the need to negotiate agreements to accept acquitted persons, who are unable to return to their country of nationality, due to a well-founded fear of persecution or risk of death, torture or cruel treatment. The ICC has finalised one such agreement,[53] which could operate as model for the Court to adapt for its own proceedings.[54]

D. *Article 46(A)(4) The Minimum Guarantees*

1. The Right to Be Informed Promptly in Detail, and in a Language He Understands, of the Nature, Cause and Content of the Charges

There are three elements folded within this right:

First, the right to be informed promptly of the legal and factual nature of the accusations (the 'nature and cause');
Secondly, the right to receive the disclosure of evidence underpinning these accusations in a prompt manner ('the content element'); and
Thirdly, the right to have such information communicated in a language which the defendant understands ('the language element').

2. The Right to Be Informed Promptly of the Legal and Factual Nature of the Accusations

The first element derives from the right of '*habeaus corpus*', which provides that anyone deprived of his or her liberty has the right to be informed immediately of the factual and legal basis for such detention. This right, which is a bulwark against illegal and arbitrary detention, is 'non-derogable under both treaty law and customary international law'.[55] It is also a 'self-standing human right, the absence of which constitutes a human rights

[53] Ibid.
[54] The model text is set out, as annexes, in 'Cooperation Agreements' (an ICC Booklet, www.icc-cpi.int/news/seminarBooks/Cooperation_Agreements_Eng.pdf)
[55] UN Working Group on Arbitrary Detention, Compilation of Deliberations: Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law ('WGAD, Compilation of Deliberations: Deliberation No. 9'), para. 47.

violation *per se*.'[56] The International Court of Justice has further affirmed that Article 6 of the African Charter (the prohibition of arbitrary detention), applies to all forms of detention, 'whatever its legal basis and the objective being pursued'.[57]

Out of recognition for the importance of this right, the ICTR Appeals Chamber has clarified that even if the suspect is detained by national authorities and not under the authority of the Tribunal itself, the relevant organs of the Tribunal have a positive obligation to take such steps as are within their control, to ensure that the suspect's rights are fully respected.[58] The need for this clarification arose due to the many instances in which the Tribunal was compelled to address the situation of defendants, who had been arrested and detained by national authorities without charge, sometimes for years, whilst the ICTR Prosecutor decided if and when it wished to request the Tribunal to issue an arrest warrant for the person concerned.[59]

Given that the Prosecutor at the African Court will also depend on national authorities for the arrest and extradition of suspects, it is highly likely that this situation will also arise at the African Court. But, bearing in mind that the African Court seeks to establish a complementary system of criminal justice and human rights law,[60] there are even more cogent reasons for the African Court to interpret the relevant provisions in such a way as to ensure that 'the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person.'[61] Since immediate release is, in principle, the appropriate remedy for arbitrary detention,[62] the African Court must be willing to either implement or respect this remedy (if awarded at a national level), notwithstanding the fact that the Prosecutor at the African Court has decided to pursue a suspect, who has already been detained at a national level for an unreasonable length of time.

[56] A/HRC/19/57, para. 61, cited in Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 13

[57] Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of Congo*), Merits, Judgment, I.C.J. Reports 2010, para. 77.

[58] *Prosecutor c. emanzaf Guinea v. Democratic Republic of Congo), Merits, Judgment, I.C.J. Reports 2010, para. 77. f arbitrary det Prosecutor v. Kajelijeli* Appeals Judgment, dated 23 May 2005, paras. 219–22.

[59] Melinda Taylor and Charles Chernor Jalloh, 'Provisional Arrest and Incarceration in the International Criminal Tribunals' 11 Santa Clara J. Int'l L. i (2012–2013) , p. 303.

[60] Article 4 of the Malabo Protocol.

[61] *Prosecutor v. Kajelijeli* Appeals Judgment, dated 23 May 2005, at para. 220.

[62] Report of the Working Group on Arbitrary Detention, A/HRC/30/36, 10 July 2015, para. 64, and recommendations set out at p. 22.

In terms of the particular implications of this right, 'the nature, cause and content of the charges' extend to firstly, the evidence, which the Prosecution relied upon to obtain the arrest warrant, and secondly, the evidence upon which the Prosecution intends to rely at trial. Even if the matter is not regulated explicitly by the Protocol or rules, human rights law dictates that the first *tranche* of evidence, that is, the evidence relied upon to obtain the arrest warrant, should be disclosed as soon as possible, so that the defendant can exercise his or her right to challenge the legality of the detention order.[63] At the ICTY and ICTR, the Rules stipulate that this must occur within 30 days after the accused is arrested,[64] whereas the deadline at the ICC falls to judicial discretion, although the Appeals Chamber has underlined that '[i]deally, the arrested person should have all such information at the time of his or her initial appearance before the Court'.[65]

3. The Right to Receive the Disclosure of Evidence Underpinning These Accusations in a Prompt Manner

In terms of the timing for the disclosure of Prosecution trial evidence, the courts differ on the question as to when disclosure should be completed. Whereas the ICTR and ICTY have, in exceptional cases, allowed the the Prosecution to disclosure witness statements after the trial has commenced,[66] the ICC require such disclosure to be completed prior to the commencement of the trial.[67]

[63] *Prosecutor v. Bemba*, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"', 16 December 2008, ICC-01/05–01/08–323, paras. 29–32, citing, *inter alia*, *Lamy v. Belgium*, no. 10444/83, 30 March 1989, para. 29 (ECHR).

[64] ICTY and ICTR: Rule 66(A)(i) of the Rules of Procedure and Evidence.

[65] *Prosecutor v. Bemba*, 'Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"', 16 December 2008, ICC-01/05–01/08–323, para. 1.

[66] As noted by the ICTR Trial Chamber in *Prosecutor v. Gatete*, 'Rule 69(C), which formerly required disclosure before the commencement of trial, was amended on 6 July 2002 to expressly permit rolling disclosure. Nevertheless, full disclosure before trial is still often required. Not only does rolling disclosure shorten the period of preparation for the Defence provided for in Rule 66(a)(ii), its effect is also that the trial will begin, and Prosecution witnesses will be heard, before the Defence knows the names of all Prosecution witnesses or is informed of the entirety of their statements.' Case No. ICTR-00–6I-I, Decision on Prosecution Request for Protection of Witnesses, 11 February 2004, para. 6. For ICTY, see, *Prosecutor v. Mrksic et al.*, 'Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses', Case No. IT-95–13/1-T, 25 October 2005.

[67] Article 64(3)(c) of the ICC Statute sets out the Trial Chamber's obligation to ensure that all documents or information is disclosed 'sufficiently in advance of the commencement of trial to enable adequate preparation of trial'.

In any case, the deadline must be determined through the lens of the defendant's right to a speedy trial, and right to adequate time and facilities to prepare the Defence. A UN Working Group established to identify the most effective means to speed up trials identified the timing of disclosure as one of the greatest causes of delays in the proceedings, and further recommended that all final versions of witness statements be made available to the Defence at an early stage of the pre-trial process.[68] This recommendation is logical: until disclosure is complete, it is difficult, if not impossible, for the Defence team to obtain instructions from the defendant, develop a strategy, and conduct their own investigation into the credibility and reliability of Prosecution evidence. Adding to the complexity of effective Defence preparations, the organization of Defence investigative missions *in situ* might depend on State cooperation, and the seat of the court and location of the defendant are likely to differ from the location of investigations, which renders it difficult, if not impossible, to conduct investigations at short notice, or whilst the trial is ongoing. These factors led the Trial Chamber in the ICC *Lubanga* case to set a deadline of three months before the commencement of the trial for the disclosure of Prosecution evidence.[69] This yardstick has been adopted in subsequent ICC cases, barring discrete exceptions which have been allowed in connection with specific items of evidence that cannot be disclosed at this point for exceptional reasons.[70] Notwithstanding these discrete exceptions, the Appeals Chamber has underscored *in obiter* that the disclosure of all incriminating prosecution evidence should be completed prior to the commencement of the trial itself.[71]

Given that the African Court, as a treaty based mechanism rather than a Security Council created Court, is likely to face many of the same logistical issues as the ICC in the area of Defence investigations, the three month disclosure deadline might be a more appropriate yardstick to adopt than the equivalent deadlines imposed at the ICTY and ICTR, although caveats will need to be built in as concerns 'exceptional' circumstances where important evidence could not be obtained, with reasonable diligence, at an earlier juncture.

[68] Report of the ICTY Working Group on Speeding Up Trials, S/2006/353, 31 May 2006, para. 21.

[69] *Prosecutor v. Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 10 November 2007, ICC-01/04–01/06–1019.

[70] See most recently, *Prosecutor v. Ongwen*, 'Decision on the Prosecution request for variation of the time limit to provide its provisional list of witnesses and summaries of their anticipated testimony', ICC-02/04–01/15–453, 6 June 2016.

[71] *Prosecutor v. Katanga and Ngudjolo* Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', 16 July 2010, ICC-01/04–01/07–2288, para. 43.

An issue which is linked to the right to be informed promptly of the charges is the question as to whether the charges can be supplemented or recharacterised throughout the trial proceedings. The *ad hoc* Tribunals permit the Prosecution to apply to amend and add additional charges throughout the trial proceedings, but do not permit the Judges to change the legal qualification of the charges themselves, whereas the ICC Statute does not allow the charges to amended after the trial has commenced, but does permit the Judge to recharacterise the legal qualification of the charges.

In terms of the position at the *ad hoc* Tribunals, in the ICTY *Kupreskic* case, in relation to the situation where the Prosecution case fails to establish the specific elements of the charges, but may nonetheless establish other offences (i.e. lesser included offences) which was not charged, the Trial Chamber determined that,[72]

it is questionable that the *iura novit curia* principle (whereby it is for a court of law to determine what relevant legal provisions are applicable and how facts should be legally classified) fully applies in international criminal proceedings.

After examining whether different national law jurisdictions permitted the judges to recharacterise the legal nature of the charges, the Chamber further opined that 'no general principle of criminal law common to all major legal systems of the world may be found'.[73] The Chamber also underlined that from a human rights perspective, the accused's right to be informed promptly of the charges might need to be protected more rigidly at an international court than in a domestic environment, so as to accommodate the uncertainty generated by the new and evolving notions of international crimes and international criminal procedural rules.[74]

In light of these considerations, the Chamber concluded that the most appropriate approach to firstly, avoid the situation in which an accused is acquitted due to the fact that the evidence proves different crimes, and secondly, preserve the accused's right to be informed promptly of the charges (including the legal qualification of those charges), would be to allow the Prosecution to rely fully on cumulative and alternative charges in the indictment,[75] and to

[72] *Prosecutor v. Kupreskic et al.*, Trial Judgment, para. 723.

[73] Id., para. 738.

[74] Id., para. 740.

[75] Id., para. 727. As explained by the Trial Chamber, cumulative charges concern the scenario in which the Prosecution contends that the facts – if established- would violated two or more different provisions of the Statute, and alternative charges concern the scenario in which the facts may violate either a general or a specific legal provision, depending on whether the Prosecution is able to establish all the relevant facts: i.e. aiding and abetting *versus* commission as a perpetrator.

consider amending the indictment to vary or include new charges, after the trial has commenced.[76] Nonetheless, the Chamber cautioned that before granting a request to amend the indictment, the Chamber should first establish that the proposed amendment, if granted, would not occasion undue prejudice to the accused's right to a fair trial: this assessment includes the impact on the accused's right to be promptly notified of the charges, the related right to have adequate time and facilities to prepare the Defence, and the right to be tried without undue delay.[77]

In contrast to the above approach, the ICC legal texts do not allow the Prosecution to amend or add additional charges *after* the trial has commenced,[78] but do allow the Judges to recharacterise the legal qualification of the charges, provided firstly, that the accused is given adequate notice of this possibility and afforded an opportunity to be heard and to adduce evidence, and secondly, that the recharacterisation does not exceed the facts and circumstances set out in the charges.[79]

Notwithstanding the reservations expressed by the ICTY Trial Chamber in the aforementioned *Kupreskic* case, the ICC Appeals Chamber affirmed the validity of the *iura novit curia* principle at the ICC, as embodied by Regulation 55 of the Regulations of the Court. The Appeals Chamber found, in particular, that the purpose of this provision, which was to 'close accountability gaps', was fully consistent with the objectives underpinning the ICC Statute.[80] The Appeals Chamber further concluded that requalifying the legal nature of the charges, after the commencement of the trial, was not itself incompatible with human rights law, provided that the requalification was consistent with the rights of the accused, and did not render the trial unfair.[81] The Appeals Chamber was nonetheless reluctant to provide any clear guidance as to the specific circumstances in which a requalification would

[76] Id., para. 742.

[77] *Prosecutor v. Karemera et al.*, Case No. ICTR-98–44-AR73, 'Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment', 19 December 2003 at para. 13; P*rosecutor v. Brdjanin and Talic*, Case No. IT-99–36-PT, 'Decision on Objections by Momir Talic to the Form of the Amended Indictment', 20 February 2001, para. 17.

[78] Article 61(9) of the ICC Statute.

[79] Regulation 55 of the ICC Regulations of the Court.

[80] *Prosecutor v. Lubanga*, 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', 17 December 2009, ICC-01/04–01/06–2205, para. 77.

[81] Ibid., paras. 84, 85.

render the trial unfair, stating that such a determination would need to be made on a case-by-case basis.[82]

Since the issuance of the Lubanga judgment, this 'option' was exercised in almost every case completed thus far. In *Lubanga*, the Trial Chamber recharacterised the nature of the armed conflict from an international armed conflict, to an internal armed conflict.[83] In Bemba, the Trial Chamber gave the Defence notice that the defendant could be convicted under the 'should have known' form of command responsibility, but ultimately relied on the actual knowledge threshold in the judgment itself.[84]

In *Katanga*, the Trial Chamber recharacterised the nature of the armed conflict, and the mode of liability from indirect co-perpetration (Article 25(3)(a)), to liability as a person who contributed to a group of persons acting with a common purpose (Article 25(3)(d)).[85] The notice of the latter requalification was only provided *after* the close of the Defence case, which was, in turn, after the accused decided to waive his right of silence, and testify in his own defence. As observed in a strongly worded dissenting opinion from Judge Van den Wyngaert, given that Mr. Katanga's co-accused was simultaneously acquitted, there is an ineluctable appearance that Mr. Katanga might also been acquitted, if not for the proposed requalification.[86] The timing of the notice of the proposed requalification was upheld on appeal,[87] but with a caution that it 'is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible'.[88] In line with this guidance, in the *Ruto & Sang* case, the Chamber invited submissions on the possibility of Regulation 55 being invoked, *prior* to the commencement of the trial.[89] Notably, during the course of this litigation, the Prosecution also advanced the position that notice as to a potential recharacterisation should be

[82] Ibid., paras. 85 and 86.

[83] *Prosecutor v. Lubanga*, 'Judgment Pursuant to Article 74 of the Statute', ICC-01/04–01/06–2842, 5 April 2012, paras. 531–65.

[84] *Prosecutor v. Bemba*, 'Judgment Pursuant to Article 74 of the Statute', ICC-01/05–01/08–3343, 21 March 2016, para. 57.

[85] *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04–01/07–3436-tENG, 7 March 2014, paras. 30, 1170, 1230, 1235, 1441–84.

[86] *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04–01/07–3436-AnxI, 10 March 2014, para. 132.

[87] *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', 27 March 2013, ICC-01/04–01/07–3363.

[88] Ibid. para. 24.

[89] *Prosecutor v. Ruto and Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, ICC-01/09–01/11–1122, para. 27.

given 'on or before the first day of trial'.[90] A similar approach to timing was also adopted in the subsequent *Gbagbo & Blé Goudé* Case.[91]

The ICC's heavy reliance on recharacterisation in its first cases should also be viewed in conjunction with the fact that ICC judges viewed recharacterisation as the 'lesser evil' compared to the possibility of relying extensively on cumulative charging.[92] As explained by Pre-Trial Chamber II in the *Bemba* case, cumulatively charging different crimes or modes of liability based on the same facts risked 'subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings'.[93]

But, whereas the respective Pre-Trial Chambers refused to to confirm cumulative or alternative charges in the first ICC cases,[94] later Pre-Trial Chambers adopted a more relaxed position. Thus, in the *Gbagbo* case, the Pre-Trial Chamber underlined that,[95]

Taking stock of past experience of the Court, the Chamber is also of the view that confirming all applicable alternative legal characterisations on the basis of the same facts is a desirable approach as it may reduce future delays at trial, and provides early notice to the defence of the different legal characterisations that may be considered by the trial judges.

Similarly, in the *Ntaganda* case, the Chamber affirmed that it could confirm alternative charges, based on the same facts, provided that each charge was supported by sufficient evidence to satisfy the evidential threshold for this stage of the proceedings.[96]

The pendulum at the ICC therefore seems to have swung towards the use of alternative charges, as the primary means for eliminating impunity gaps,

[90] *Prosecutor v. Ruto and Sang*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/09–01/11–433, para. 24.

[91] *Prosecutor v. Gbagbo & Blé Goudé*, Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court, 19 August 2015, ICC-02/11–01/15–185, 20 August 2015, para.11.

[92] C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', *Criminal Law Forum* (2005) 16: 1–31 at 3.

[93] Prosecutor v. Bemba, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', ICC-01/05–01/08–424, 3 July 2009, para. 201

[94] *Prosecutor v. Bemba*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', ICC-01/05–01/08–424, 3 July 2009, paras. 190–205.

[95] *Prosecutor v. Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11–01/11–656-Red, para. 228.

[96] *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 14 June 2014, ICC-01/04–02/06–309, paras. 99–100.

combined with early notice of potential Regulation 55 recharacterisations, in order to address the possibility that the Trial Chamber might view the appropriate legal qualification in a different manner from the Pre-Trial Chamber or Prosecutor. In any case, there is growing consensus that the Chamber and the Prosecutor have a combined duty to resolve and settle the exact nature of the charges (in terms of both the facts, and and the legal qualification of these facts) as soon as possible, and preferably before the commencement of the trial.

This approach would be consistent with the case law of the ECCC. Although the civil-law oriented Statute allows judges to recharacterise the legal nature of the charges, in the *Duch* case, the Pre-Trial Chamber reviewed international standards concerning the right to be informed of the charges, and noted that these standards require that the 'indictment set out the material facts of the case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence. The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner. If an accused is charged with alternative forms of participation, the indictment should set out each form charged'.[97] The Chamber therefore ruled that '[c]onsidering that international standards require specificity in the indictment and Article 35 (new) of the ECCC Law provides that the accused should be informed in detail of the nature and cause of the charges', the legal qualification of the charges should be decided before the commencement of the trial stage, and not during the trial itself.[98]

The standards set out in international human rights judgments also militate in favour of early notification of any changes (factual or legal) in the nature of the charges. The ECHR has held in this regard that the power of a Chamber to recharacterise the legal qualification of the facts is subject to the defendant's right to be informed promptly of the charges, and to have adequate time and facilities to prepare his or her defence. The latter right must be implemented in a 'practical and effective manner and, in particular, in good time'.[99]

The Malabo Protocol is silent on the questions as to whether the indictment can be amended after the commencement of the trial, and whether the Judges can requalify the legal characterisation of the charges, at any point in the proceedings. This silence does not, however, resolve the issue as it is possible that the Judges might follow in the footsteps of the ICC judges, who

[97] *Prosecutor v. Kaing Guek Eav* ('Duch'), 'Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch"', 5 December 2008, at para 47.
[98] At paras. 50, 106.
[99] *Pélissier and Sassi v. France* (Application no. 25444/94), Judgment 25 March 1999, at para 62.

adopted an extremely significant legal provision on this point as part of the Court's internal 'routine' regulations. The ICC Appeals Chamber sought to enhance the legitimacy of the regulation by citing the fact that the regulations had been circulated to the State Parties for comment prior to their adoption, and no States had objected.[100] Although it is questionable as to whether the mere circulation of the regulations provided a sufficient safeguards as concerns the adoption of such a significant legal provision, the fact that the Chamber felt impelled to mention the role of the State parties suggests that the judicial promulgation of such a regulation – on its own – would not be an appropriate avenue for the adoption of a legal provision of this kind. Indeed, given the challenge of squaring such an approach with the rights of the suspect and defendant, it remains highly questionable as to whether the African Court should follow this approach. The better practice may well be to allow for alternative charges, in the indictment before commencement of the trial, but not recharacterisation of the charges once the trial has begun.

Clarity in the wording of the charges has also been a key problem at international courts, with vague language giving rise to disputes as to what is actually encompassed by the charges. This has triggered a rich vein of case law concerning the appropriate language which should be employed in indictments or charges, and the specific detail that should be provided, such as the identity of co-perpetrators by name or organisation, and the dates and locations of key events.[101] Given that some defendants were acquitted of charges on this basis,[102] it would be advisable for this issue to be addressed proactively, for example, any rules promulgated by the Court should specify firstly, which document is the primary accusatory instrument, secondly, the minimum

[100] *Prosecutor v. Lubanga*, 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change', 17 December 2009, ICC-01/04–01/06–2205, ICC-01/04–01/06–2205, para. 71.

[101] See for example, ICTY: *Prosecutor v. Pavković et al.* case, Case No. IT-03–70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para. 12; ICTR: ICC: *Prosecutor v. Ruto, Kosgey & Sang*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 23 January 2012, ICC-01/09–01/11–373, paras. 93–104

[102] The ICTY Appeals Chamber set aside Blagoje Simic's convictions relating to his alleged membership of a joint criminal enterprise on the basis that this form of liability had not been pleaded clearly in the indictment or other ancillary documents: *Prosecutor v. Blagoje Simic*, Appeals Judgment, 28 November 2006, Case No.: IT-95–9-A, paras. 20–74. In the Kupreskic case, the Appeals Chamber acquitted Mirjan and Zoran Kupreskic due to the fact that the case against them had radically transformed during the trial process, as compared to the allegations in the indictment: *Prosecutor v. Kupreskic et al.*, Appeal Judgment, Case No.: IT-95–16-A, 23 October 2001, paras. 88–125.

content of such a document,[103] and thirdly, the means by which a defendant can challenge overly vague or defectively worded charges and the timing for such challenges. Challenges to the form of the indictment, when they could affect the fairness of the trial, imply that the nature of the rules in the ICTY and ICTR context could be more appropriate than the standard in the SCSL which denied the right of appeal to defendants by directing that all such challenge to the indictment motions be forwarded directly to the Appeals Chamber. In the context of the Malabo Protocol which has a pre-trial judge, this might not be as much of an issue if the matter is decided by the Trial Chamber with the possibility that the decision in question could be appealed to the Appeals Chamber.

4. The Right to Have Such Information Communicated in a Language Which the Defendant Understands

Translation and interpretation issues have bedevilled international and hybrid courts, both lengthening and increasing the costs of the proceedings. That being said, without either understanding or translation, an accused cannot effectively participate in the proceedings and instruct his defence. The right to defence therefore loses much of its utility.

In terms of the scope of the obligation to provide translations and interpretation, the text of the Malabo Protocol provides that the accused should be notified of the nature and cause of the charges in a 'language he understands'. As a first point, this formulation – whilst consistent with human rights law - waters down the equivalent right at the ICC, in the sense that the ICC text (and case law) stipulates that the relevant information must be provided in a language which the accused understands fully (*parfaitement* in French, which translates to 'perfectly'): this standard is met when the accused 'is completely fluent in the language in ordinary, non-technical conversation: it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer.'[104]

Given that the standard employed at the ICC turns on the inclusion of the word 'fully' in the Statute,[105] which is absent from the equivalent provision in

[103] See for example, Regulation 52 of the ICC Regulations of the Court.

[104] *Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', 28 May 2008, ICC-01/04–01/07–522, para. 3.

[105] *Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages', 28 May 2008, ICC-01/04–01/07–522, paras. 2, 3, 40.

the Malabo Protocol, the African Court is free to depart from ICC legal precedent on this point. But, from a human rights perspective, the ultimate threshold that is adopted by the Court should take into account the complexity of the proceedings, and the right of the accused to effectively participate in such proceedings. When considered from the perspective of a defendant, who is appearing before a Court in a foreign country with foreign law and procedures, the added burden of attempting to divine witness testimony or the specific meaning of complicated international legal precepts in a foreign language that is only imperfectly understood can tip the scales towards an unfair trial. It is thus notable that although the ICTY and ICTR have a lower legal standard in their respective Statutes, the practice has been to arrange interpretation in the language in which the accused is fully conversant, even if the accused might be objectively conversant in the working languages of the Court. Thus, the accused Vojislav Seselj was permitted to utilise his preferred language of Bosnian/Croat/Serbian, notwithstanding the fact that he had taught in English as a professor in law at the University of Michigan in the United States of America.[106] In the *Milosevic* case, the Trial Chamber further underscored that,[107]

> Article 21, paragraph 4, of the Statute of the International Tribunal guarantees to the accused certain minimum rights, one of which is to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,[. . .] in the opinion of the Trial Chamber and in the circumstances of this particular case, these guarantees are so fundamental as to outweigh considerations of judicial economy.

Apart from the question as to whether the accused has a right to receive translations and interpretations in a particular language, a further issues concerns the *scope* of this right i.e. does it extend to a right to receive the translation of the entire case file, or only selected documents that concern the charges.

The ICTY has distinguished between the circumstances of a self-representing defendant, and those of an accused represented by counsel. In the former scenario, the ICTY recognised in the Seselj case that the right to effectively participate in the proceedings requires that the defendant be provided all court filings, prosecution evidence, and exculpatory materials in a language which the defendant understands,[108] whereas in the later Karadzic

[106] *Prosecutor v. Seselj*, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence, 9 May 2003.

[107] *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Permission to Disclose Witness Statements in English, 19 September 2001.

[108] See for example, *Prosecutor v. Seselj*, Decision on Vojislav Seselj's Interlocutory Appeal against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para 9,

case, the ICTY denied his request for a similar range of translations, citing firstly, the fact that one of his legal advisors had publicly stated that the accused was proficient in English, and secondly, the fact that the accused benefitted from a significant number of legal associates who were proficient in English.[109]

In circumstances in which an accused is represented by Counsel, the accused has the right to receive the following materials in a language which the accused fully understands:[110]

> The material submitted by the Prosecution in support of the indictment;
> Prosecution witness statements and any statements taken from the accused;
> Exhibits, which the Prosecution tends to tender at trial; and
> Key documents such as the judgment.

The ICTR and ICC have blurred the issue as to translations required for the defendant and those required by Counsel since the issue has arisen primarily in relation to French speaking defendants represented by French speaking counsel, who are appearing opposite an English speaking Prosecution team. In the ICC *Ngudjolo* case, the Pre-Trial Chamber addressed the Defence requests for all evidence and filings to be translated into French (the language of both Counsel and the defendant) by specifying that the Defence had an obligation to compose itself so that it was able to work in both English and French,[111] a solution which did not resolve the independent language needs of the defendant. But, at the same time, as a result of this concurrence between the language spoken by Counsel and the defendant, both the ICTR and ICC have ordered that a broader range of procedural documents should be translated into the language of the accused/Counsel.[112]

[109] *Prosecutor v. Karadzic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English 4 June 2009, paras. 15, 17.

[110] *Prosecutor v. Naletilic & Martinovic*, Decision on Defence's Motion Concerning Translation of All Documents 18 May 2001; *Prosecutor v. Delalic et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.

[111] *Prosecutor v. Katanga & Ngudjolo*, Decision on the Defence Request concerning time limits, 27 February 2008, ICC-01/04–01/07–304.

[112] See for example, *Prosecutor v. Ngdujolo*, Decision on Mr Ngudjolo's second request for translation and suspension of the time limit, ICC-01/04–02/12–130, 7 August 2013 (translation of Prosecution request to reply to Defence response to appeal brief into French); *Prosecutor v. Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of Counsel, dated 6 November 2001, Case No. ICTR-95–1B-1 at para. 32.

Notwithstanding the above legal precedents, given the potential number of countries and languages that will fall under the purview of the African Court, it is likely that the practice of other specialized courts (or courts with more secure funding) is likely to be of scant assistance to the practical difficulty that the Court will face in reconciling the defendant's right to receive necessary translations, and their right to a speedy trial. The *Banda & Jerbo* case at the ICC foreshadows these types of difficulties: the language spoken by the defendants in that case was Zaghawa, an oral language, for which there were no trained translators or interpreters at the time that the case commenced.[113] The Chamber nonetheless rejected the Prosecution request to be exempted from the obligation to disclose witness statements in the language of the accused, and instructed the Prosecution to liaise with the Registry to identify practical solutions that were consistent with the rights of the accused.[114] This approach underscores that the solution is not to curtail the rights of the accused, but rather to target other causes of delays. This can include encouraging the Prosecution to bring focused, streamlined cases, to train interpreters and translators from the earliest stage of the investigation, to identify the key statements that will require translation at the earliest possible juncture, and to encourage the parties to consult with a view to identifying practical solutions that and consistent with the rights of the accused. In the African context, where many languages may not be written and are only oral in nature, an early decision would have to be made as to how to give effect to this right keeping in mind the likely paucity of resources.

5. The Right to Adequate Time and Facilities for the Preparation of His or Her Defence, and the Right to Communicate Freely with Counsel of His or Her Own Choice

The right to adequate time and facilities underpins the right to effective legal representation, and thus ensures that the defendant can exercise all other rights in a manner that is effective, and not illusory.

Although the right to have adequate time to prepare the defence, and the right to a speedy trial are often viewed as contradictory rights, the duty falls on the Chamber, Prosecution, and Registry to ensure that these rights can be respected in a complementary fashion. For example, as set out in ICC case

[113] *Prosecutor v. Banda & Jerbo*, Order to the prosecution and the Registry on translation issues, ICC-02/05–03/09–211, 7 September 2011.

[114] *Prosecutor v. Banda & Jerbo*, Order to the prosecution and the Registry on translation issues, ICC-02/05–03/09–211, 7 September 2011.

law and related policy, in order to ensure firstly, that the Defence has sufficient time to review Prosecution evidence in advance of the trial date, and secondly, that the trial date is set within a reasonable time period after the defendant's arrest, the Prosecution should endeavour to complete its investigations and related disclosure, to the extent possible, before the trial stage commences.[115] The Prosecution should also address any protective measures issues that could delay such disclosure in a timely manner.[116]

At the level of the Registry, there is a direct nexus between the level of resources provided to the Defence, and the ability of the Defence to conduct its preparation in an expeditious manner. It can, therefore, be short-sighted to cut Defence legal aid in circumstances in which the cuts will simply lengthen the time required for effective Defence preparation, which will in turn, lengthen the overall length of the proceedings (and related costs).[117]

In terms of the specific amount of resources that should be allocated to the Defence, although the right to equality of arms is enshrined in human rights law,[118] international courts and tribunals have consistently rejected Defence requests to have equivalent resources as their Prosecution counterparts, with the mantra that equality of arms means procedural equality (that is, the right to enjoy the same procedural rights), and not equality of resources, particularly since the Prosecution carries the burden of proof.[119]

Whilst this conclusion is undoubtedly valid as concerns a comparison of the budgetary needs of the prosecution over the course of the entire case as compared to that of the Defence, if both parties are conducting the same tasks with the same deadlines and facing the same burden of persuasion

[115] *Prosecutor v. Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', ICC-01/04–01/10–514, 30 May 2012, para. 44; ICC, Pre-Trial Practice Manual, p. 7, www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf;

[116] *Prosecutor v. Katanga and Ngudjolo*, 'Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules', 26 April 2008, ICC-01/04–01/07–428-Corr, paras. 36, 60,-71, 82.

[117] *Prosecution v. Lubanga*, 'Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry', ICC-01/04–01/06–2800, 30 August 2011, paras. 45–61.

[118] General Principle 2(a), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance In Africa; HRC, General Comment 32 on Article 14, CCPR/C/GC/32, para.13.

[119] ICTY: *Prosecutor v. Prlic et al.*, 'Decision on Slobodan Praljak's Appeal against the Trial Chamber's Decision of 16 May 2008 on the Translation of Documents', 4 September 2008, IT-04–74-AR73.9, para. 29; *Prosecutor v. Orić*, Interlocutory decision on Length of Defence Case, IT-03–68-AR73.2, para. 7; ICTR: *Prosecutor v. Kayishema & Ruzindana*, Appeals Judgment, ICTR-95–1-A, 1 June 2001, para. 67.

(i.e. filing appeal briefs at the same time), then it may be unfair, and discriminatory to allocate less resources to the Defence. As found by the Human Rights Committee, discrimination arises where like things are treated in a different manner, with there being no rational basis for the difference.[120] It follows that even if equality of arms does not automatically equate to equality of resources, it *may* do so, where necessary to ensure procedural equality with the Prosecution. The resources allocated for individual cases must also take into consideration the characteristics of the case in question, for example, whether the case requires a significant amount of investigative travel or specific expertise in particular areas.[121]

Apart from the issue of *quantity* of resources, the Court also has a duty to ensure the *quality* of such resources, namely, that Counsel possess sufficient expertise in the subject matter before the Court to represent the accused in an effective manner. The ECHR has held in this regard that where States set up complex legal fora that require Counsel with specific competence, the State has a corresponding duty to ensure that the accused is in a position to exercise his or her rights before such fora, in an effective and fair manner.[122] The Malabo Protocol currently does not delineate any specific criteria that must be met by Counsel in order to appear before the Court. The African Court could, in this regard, take a leaf from the relevant regulations of other international courts, and require Counsel to possesses a minimum level of proficiency in criminal law and procedure. This requirement did not exist initially at the ICTY, but was later inserted (based on the equivalent wording of the ICC Rules) due to concerns regarding ineffective representation from Counsel, who had not practiced criminal law in a trial environment.[123] In relation to the Principal Defender who heads the Defence Office organ in the Malabo Protocol, a requirement was inserted mandating the highest level of

[120] **HRC, General Comment 18, Non-discrimination, as adopted at the Thirty-seventh session (1989), para. 13**

[121] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by General Assembly Resolution A/RES/67/187, 20 December 2012 para. 62. 'The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses.'

[122] *ECHR: Tabor v. Poland*, Application no. 12825/02, paras. 42–3 , citing *Vacher v. France*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, pp. 2148–9, §§ 24 and 28, and *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001)

[123] ICTY Manual on Developed Practices, Chapter XV Legal Aid and Defence Counsel Issues, paras. 6, 11.

professional competence and experience in the defence of criminal cases. The Principal Defender must also have at least 10 years of criminal law practise experience before a national or international court. As with the ad hoc tribunals and the ICC, which developed lists of counsel requiring certain competencies and certain years of criminal practice experience, one would expect the rules of procedure of the African Court to endorse similar standards since these form part of the best practices that may be learned from the many tribunals that preceded it.

The second limb of this sub-provision concerns the right to communicate freely, with Counsel of choice. As further elaborated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, without the expectation that such communications will not be listened to, or otherwise monitored, the right to receive legal advice becomes largely illusory; there is therefore a positive duty on States, which are party to the African Charter, to refrain from surveilling or intercepting legal communications, and to provide the necessary facilities to enable confidential communications to take place within a detention setting.[124]

Although the text refers to the right to communicate confidentially with 'Counsel of choice', it is obvious that there may be various scenarios in which a defendant will require confidential legal assistance from Counsel who have not been chosen by the defendant, for example, a duty Counsel appointed to represent a suspect during a suspect interview, Counsel appointed by the Court, or a member of the Defence office. In terms of the latter possibility, Article 22(2)(c) of the Protocol vests the 'Defence Office' with the responsibility for providing legal advice and assistance to the Defence, and defendants. This vital source of assistance would be rendered ineffective if there was a possibility that communications between the Defence Office and the defendant or Defence were not protected by privilege. It would also be consistent with the case law of the ICC and SCSL to include Defence Office advice and assistance within the framework of legal privilege.[125]

The notion of privilege under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is also drafted broadly to encompass 'all communications and consultations between lawyers and their clients

[124] Section N3(e)(i) and (ii) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

[125] SCSL: *Prosecutor v. Bangura et al.*, Decision on Prosecutor's additional statement of anticipated trial issues and request for subpoena in relation to the Principal Defender, SCSL-11–01-T-058, 3 September 2012, para. 23; ICC: *Prosecutor v. Gaddafi & Senussi*,' Decision on OPCD Requests', ICC-01/11–01/11–129, 27 April 2012, para. 12.

within their professional relationship';[126] the term 'lawyers' protects the right to communicate with all legally qualified members of a Defence team, not just the 'Counsel', and 'all communications' presumably includes not just verbal advice, but also written drafts and internal documentation prepared within the context of the professional lawyer-client relationship.

The Protocol does not address the issue as to whether there are any exceptions to the right to privileged communications. Whilst the STL incorporated an explicit exception into its Rules of Procedure and Evidence,[127] other Courts has read such an exception into the text: i.e. by concluding that any communications which fall outside the scope of a professional relationship, such as communications concerning the commission of fraud or a crime, are excluded from right to privilege.[128] In any case, in order to comport with human rights' requirements concerning the need for the legal basis for monitoring to be set out in clear and accessible legal texts,[129] it is advisable that the scope of confidentiality and its exceptions are set out in unequivocal terms in the Court's instruments, and any detention regulations. It is also necessary that there are procedures established to ensure safeguards against abuse (for example, the ability to obtain judicial review of monitoring decisions).[130]

6. The Right to a Speedy Trial

The right to expeditious proceedings is a critical aspect of the right to a fair trial: the defendant has an obvious right to clear his or her name as soon as

[126] Section N(3)(ii).

[127] For example, Rule 163(iii) of the STL Rules of Procedure and Evidence.

[128] ICC: *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', ICC-01/05–01/13–2275-Red, 8 March 2018, paras. 432–4; SCSL: *Prosecutor v. Bangura et al.*, SCSL-2011–02-T, Decision on Prosecutor's Request for Subpoena, 28 July 2012, paras. 13–14.

[129] ECHR: *Kruslin v. France*, Application no. 11801/85, paras. 32–6; *Kopp v. Switzerland*, App. No. 23224/94, para. 73. HRC: Concluding Observations on the Fifth Periodic Report of Sri Lanka, Human Rights Committee, UN Doc. CCPR/C/LKA/CO/5 (21 November 2014); Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, UN Doc. A/HRC/23/40 (17 April 2013).

[130] HRC: General Comment No. 16 on Article 17 (Right to Privacy), UN Doc. HRI/GEN/1/Rev.1 at 21 (8 April 1988), para. 10; U.N. General Assembly Resolution on the Right to Privacy in the Digital Age, UN Doc. A/RES/69/166 (18 December 2014); para. 4; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/69/397 (23 September 2014), para. 45.

possible, and to litigate disputed facts whilst memories are still fresh, and evidence is available. And yet, this right has been honoured more often in the breach than in the observance, at previous international courts and tribunals. As set out *infra*, key sources of delay have included the practice of 'delayed disclosure', and the need to translate filings and evidence into different languages (including the language of the accused). Although some delays are inevitable, key lessons learned include convening regular trial management hearings and meetings during the pre-trial phase, so that the Chamber can follow the progress of disclosure and the parties can raise practical issues that might affect their preparation, and, for long and complex trials, appointing reserve judges in order to address the possibility that a judge might be forced to withdraw due to conflicts or illness. The establishment of a permanent Defence Office, which operates as a 'collective Defence memory',[131] will also facilitate the ability of individual Defence teams to acquaint themselves with the Court's procedures and case law, and thus respond to deadlines promptly.

7. The Right to Be Tried in His or Her Presence, and to Defend Himself or Herself in Person or through Legal Assistance of His or Her Choosing; to Be Informed, if He or She Does Not Have Legal Assistance, of This Right; and to Have Legal Assistance Assigned to Him or Her, in Any Case, Where the Interests of Justice So Require, and Without Payment by Him or Her in Any Case if He or She Does Not Have Sufficient Means to Pay for It

(a) THE RIGHT TO BE TRIED IN HIS OR HER PRESENCE Since a right can only be restricted through explicit language to that effect, the fact that no caveats have been attached to this article suggests that the Court will not have the power to conduct a trial *in absentia*. This does not, however, exclude the possibility that the defendant could waive the right to be present, or that there might be other scenarios that might justify convening discrete trial sessions in the absence of the defendant. At the *ad hoc* Tribunals and the ICC, defendants were allowed to waive the right to attend discrete hearings due to illness,

[131] 'As a permanent component of the Court, the Office seeks to create a collective defence memory and resource centre; in effect, to learn from the experiences of individual defence teams and provide whatever legal resources and advice that it can to ensure that defence teams achieve their full potential before the Court': X. Keïta, M. Taylor, 'The Office of Public Counsel for the Defence', *Behind the Scenes, the Registry of the International Criminal Court* 2010 (ICC Publication) pp. 69–71, at p. 70.

and at the ICC, the President and Vice-President of Kenya also sought to waive the right to attend hearings, due to political engagements. In disposing of the request, the Appeals Chamber confirmed that although this provision is framed as a right, it also imposed a duty on the defendant to attend hearings.[132] The Appeals Chamber nonetheless underlined that it would hamper the Chamber's ability to ensure fair and expeditious proceedings to impose a rigid limit on the scenarios that might justify continuing the trial in the absence of the defendant.[133] Rather, the Chamber has the discretion to authorise the absence of a defendant, if the following criteria are met:[134]

> the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.

In the absence of a waiver, the term 'presence' has also been interpreted to mean physical presence. The ICTR Appeals Chamber thus found that a proposal to move trial hearings to the location of a protected witness, which would require the defendant to participate by video-link, would infringe the accused's separate right to be physically present during the trial, particularly if the accused did not waive the right to be present (through written waiver, or through misconduct which resulted in the accused's expulsion from the courtroom).[135] In a similar vein, the African Court of Human and Peoples' Rights found that the domestic prosecution of Saif Gaddafi, in which the hearings were either conducted in his absence or through video-link, violated the right to a fair trial under article 7 of the African Charter.[136]

[132] *Prosecutor v. Ruto & Sang*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"', para. 49.
[133] Ibid., para. 40.
[134] Ibid., para. 2.
[135] ICTR: *Prosecutor v. Zigiranyirazo*, 'Decision on Interlocutory Appeal', ICTR-2001–73-AR73, 30 October 2006, paras. 10–22.
[136] *African Commission v. Libya*, application 002/2013, para. 96.

(b) THE RIGHT TO LEGAL REPRESENTATION Article 18 of the Protocol amends Article 36(6) of the Statute of the Court to provide that an accused is entitled to represent himself, or to be represented by an agent before the Court. Irrespective as to which choice is made, it is crucial that the defendant is informed of his or her right to legal representation in a clear and unambiguous manner, which could reasonably be understood by the defendant.[137] It is important that the language used to advise the suspect or defendant of this right does not suggest that asking for a lawyer would imply consciousness of guilt.[138]

Although a suspect or accused can 'waive' the right to legal representation, such a waiver must be informed, voluntary and unequivocal. The waiver also cannot have been obtained in coercive circumstances. Coercive circumstances can range from threats to improper inducements to cooperate, which negate the person's consent.[139] The ICTR has also found that the mere fact of interviewing a suspect in detention can create a presumption of coercive circumstances. A statement taken in such circumstances should be excluded, even if the defendant waives the right to counsel, if it is not clear that the waiver was informed and voluntary.[140]

(c) SELF-REPRESENTATION The extent to which defendants should be allowed to represent themselves in complex criminal trials has remained a vexed question for international courts and tribunals: rather than the law dictating the practice adopted by these courts, practical issues have tended to influence the law. For example, although the ICTY Trial Chamber initially upheld Slobodan Milosevic's right to represent himself, the Chamber later attempted to revoke it after delays occasioned by the deterioration in the defendant's health threatened to derail the trial.[141] On appeal, the Appeals Chamber affirmed that the right to represent oneself was not unfettered, and

[137] *Prosecutor v. Bagasora*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 17.

[138] *Prosecutor v. Ruto & Sang*, 'Reasons for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014', ICC-01/09–01/11–1753-Red, 11 December 2014, para. 37.

[139] *Prosecutor v. Halilovic* 'Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table', 19 August 2005, at para 38; *Prosecutor v. Sesay*, 'Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution', 30 June 2008, para 52.

[140] *Prosecutor v. Bagasora*, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89 (C), 14 October 2004, para. 16.

[141] *Prosecutor v. Milošević*, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel', IT-02–54-AR73.7, 1 November 2004, paras. 6–7.

could be overridden if necessary to secure the overriding right to a fair trial, but only if it was both necessary and proportionate to do so.[142] At the Special Counsel for Sierra Leone, the Trial Chamber cited the fact that the defendant's attempt to exercise this right would be likely to impede his co-defendants' right to a speedy trial, as part of its justification for overriding the right to self-representation.[143]

Since a defendant clearly cannot address the rigours of a trial process without some form of assistance, various solutions have been devised to preserve the defendant's right to represent himself, whilst ensuring that the process benefits from legal submissions and questioning from a skilled practitioner. In the *Milosevic* case, the defendant was assisted by chosen 'associates', who could communicate with the defendant on a privileged basis, but did not have legal standing to address the judges or file submissions on his behalf, and *amicus curiae*, appointed by the Registry, who did have such standing, but performed their responsibilities without instructions from the defendant.[144]

In *Seselj*, the defendant was also assisted by chosen legal associates, although all written and oral submissions emanated from the defendant. The Trial Chamber nonetheless reasoned that the right to self-representation was not necessarily incompatible with the right to legal representation, and therefore decided to appoint a 'stand by Counsel', who was tasked to assume responsibility for the Defence if the defendant engaged in misconduct.[145] This position nonetheless proved untenable. The first Counsel appointed in this capacity withdrew in order to file a defamation claim against the defendant.[146] The Chamber's later attempt to assign Counsel was then reversed by the Appeals Chamber, due to the Trial Chamber's failure to first caution the defendant that this would occur if he persisted in obstructionist conduct.[147] After the Trial Chamber attempted to appoint the same Counsel as 'standby Counsel', the defendant reacted by instigating a hunger strike in protest against the decision. Faced with this recalcitrance, the Appeals Chamber reversed on the appointment of standby Counsel, on the grounds that the

[142] Ibid., paras. 13–18.

[143] *Prosecutor v. Norman*, 8 June 2004 (Decision on the Application of Samuel Hinga Norman for Self- Representation under Article 17(4)(D) of the Statute of the Special Court), SCSL-04–14-T-125, 8 June 2004, para. 26.

[144] *Prosecutor v. Milošević*, Transcript of 30 August 2001, p. 7, and 'Order' of 16 April 2002.

[145] *Prosecutor v. Šešelj, Decision on Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence*, 9 May 2003.

[146] *Prosecutor v. Šešelj*, IT-03–67-PT, 'Decision of the Registrar', IT-03–67-PT, 16 February 2004, p. 2.

[147] *Prosecutor v. Šešelj*, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, IT-03–67-AR73.3, para. 52.

appointment of the same Counsel created the impression that the Chamber was not implementing the spirit of the Appeals Chamber's prior ruling.[148] The case then concluded without any standby or appointed counsel.

In *Karadzic*, the defendant appointed his own Defence team (composed of lawyers who were qualified to act as Counsel), but conducted the questioning of witnesses and signed all written submissions. After the defendant engaged in what the Chamber described as obstructionist conduct, the Chamber also appointed two Counsel who acted as 'stand by Counsel'. The Chamber vested them with the mandate to assume representation of the accused, for example, by questioning witnesses, whenever requested by the Chamber to do so, in response to obstructionist conduct by the defendant.[149] The mandate was discontinued after closing submissions,[150] and the defendant elected to be represented by Counsel on appeal.[151]

A less confrontational approach has been to allow defendants to exercise some, but not all of the elements of the right to self-representation, whilst being represented by Counsel. The defendant Praljak was thus permitted to pose questions to witnesses, in particular, in relation to events in which he participates or on issues that fell within his expertise.[152] Tolimir was also authorised to represent himself, whilst retaining a 'legal advisor' who could attend hearings, and address the Chamber on discrete issues authorised by the Chamber.[153] In both these cases, the Court did not appoint or assign additional *amicus* or standby counsel.

In deciding which model might be best suited for the African Court, it is important to bear in mind that the ICTY did not benefit from the existence of an internal defence office, staffed by qualified lawyers who could either advise the defendant, or assume responsibility for aspects of the Defence at short notice.[154] In contrast, Charles Taylor was temporarily without Counsel due to

[148] *Prosecutor v. Šešelj*, Decision on Appeal against the Trial Chamber's Decision (no. 2) on Assignment of Counsel, IT-03–67-AR73.4, 8 December 2006, paras. 24, 26.

[149] *Prosecutor v. Karadzic*, 'Decision on the Appointment of Counsel and Order on Further Trial Proceedings', IT-95–5/18-T, 5 November 2009, para. 27.

[150] *Prosecutor v. Karadzic*, 'Decision on Standby Counsel', IT-95–5/18-T, 14 October 2014.

[151] *Prosecutor v. Karadzic*, Decision of the Registrar on Appointment of Counsel, 24 March 2016.

[152] *Prosecutor v. Prlic et al.*, 'Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses dated 26 June 2008,' 11 September 2008, paras. 19–22.

[153] *Prosecutor v. Tolimir*, 'Decision on Motion Requesting the Chamber to Allow the Accused's Legal Advisor to be Present in the Courtroom', IT-05–88/2-PT, 22 February 2010; 'Decision on Accused's Request to the Trial Chamber concerning Assistance of his Legal Advisor', IT-05–88/2-PT, 28 April 2010,

[154] See Charles C. Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 Penn St. L. Rev. 3, 708 (analyzing the evolution of the practice of international penal courts with regard

funding disputes with the Registry, the Chamber was able to appoint a duty counsel from the Defence office, who was able to assume responsibility for the Defence at short notice, due to the ongoing assistance provided by the Defence office to all external defence teams.[155] This suggests that rather than incurring the financial cost of appointing an external standby counsel or amicus, who might prove to be unnecessary, it might be more efficient to simply put the defendant on notice that if he conducts his defence in an obstructive manner, Counsel from the Defence Office may be appointed as Counsel in his case. For that possibility to be efficient, effective and ultimately not impairing of the defendant's rights, there should be sufficient counsel to assign to the different cases and to follow their progress. This would include appearance in court and receipt of documents such as disclosure and other materials relating to the substantive case. This would better enable the counsel to step in at a moment's notice to fill the gap in representation where assigned counsel has been terminated or resigned or the accused is not present in court even if insisting on his right to self-representation. This, for example, would permit her or him to continue with filings or replies to filings from the prosecution, pending the appointment of permanent counsel. This appeared to work well in the Taylor Case.

(d) representation through counsel At first glance, Article 46(a) appears to restrict the right to legal representation to 'accused' persons rather than suspects. Although this wording is in line with the equivalent provisions at other international courts and tribunals, the latter also have separate provisions governing the rights of suspects, for example, as concerns the rights of suspects during suspect interviews.[156] In contrast, the Malabo Protocol is silent as concerns the legal regime that applies to suspects.

This lacuna could be addressed, conceivably, through judicial interpretation, human rights law, domestic law, or the issuance of supplementary rules of procedure and evidence.

In terms of the first possibility, the term 'accused' could be interpreted judicially to encompass suspects as well as accused persons, although such an approach would not be consistent with the jurisprudence of other international criminal courts. The ICC has, for example, confirmed that the

to the right to self-representation from a more common law oriented approach that was deferential to the accused's preference to a more civil law model that emphasizes the integrity of the process).

[155] *Prosecutor v. Taylor*, 'Oral decision', Transcript of 25 June 2007, p. 45.

[156] Article 55, ICC Statute; Rules 42, and 43 of the ICTY, ICTR and SCSL Rules of Procedure and Evidence.

rights of suspects are governed by the specific regime set out in Article 55, rather than the general rights of the accused set out in Article 67(1). The ICC further relied on this distinction in order to conclude that suspects do not possess a general right to legal representation before their arrest and appearance at the Court.[157] Nonetheless, in contrast to the ICC, Article 22(C)(1) of the Malabo Protocol states that the role of the Defence Office is to ensure 'the rights of suspects, the accused, and any other person entitled to legal assistance'. In accordance with the *ejusdem generis* rule, the phrase 'any other' implies that suspects and the accused are also persons who are 'entitled to legal assistance'.

This lacuna could also be filled through domestic law in combination with African Charter obligations. The Protocol does not provide any detail as to the means by which the Prosecutor will conduct its investigations, and whether it will have a right to do so *in situ*, or whether it will depend on the efforts of national authorities. In terms of the latter, Article 46(L)(2)(b) provides that State parties shall cooperate with requests for the collection of evidence and taking of testimony and (2)(d) pertains to the reliance on national authorities to effect arrest and surrender to the Court. It can safely be assumed that these aspects will necessarily be addressed in the rules and regulations or other secondary instruments adopted by the Court. Although not stated explicitly, States would be required to effect these forms of cooperation in a manner which is consistent with both domestic law, including the law pertaining to the rights of suspects, and any international legal obligations, including those deriving from the African Charter, and Article 9 of the ICCPR. The African Commission has affirmed that such minimum rights includes the right to legal representation from the moment at which a person is deprived of his or her liberty.[158] Article 9 of the ICCPR also protects the rights of all detainees to access legal representation.[159]

In any case, given that the Preamble to the Malabo Protocol underscores the the ACJ's commitment to promoting respect for human and peoples'

[157] *Prosecutor v. Kony et al.*, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, 16 September 2009, ICC-02/04–01/05–408, paras. 65–6; *Prosecutor v. Gaddafi and Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"', 24 July 2014, ICC-01/11–01/11–565, paras. 147–8.

[158] *African Commission v. Libya*, application 002/2013, para. 93; *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, Communication 334/06, para 172; Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, as annexed to UN GA Res. A/55/89, 4 December 2000, paras. 20, 27.

[159] General Comment no. 35 on Article 9, CCPR/C/GC/35 , para. 58.

rights under the ACHPR, and its complementary relationship with the African Commission, it seems likely that the ACJ will endeavour to interpret and apply the Protocol in a manner that avoids the current lacuna concerning explicit suspects' rights.

(e) THE RIGHT TO LEGAL ASSISTANCE IN THE INTERESTS OF JUSTICE, OR WITHOUT PAYMENT IF THE ACCUSED DOES NOT HAVE SUFFICIENT MEANS In order for the right to legal representation to be effective, there is also a corollary right to legal aid.[160] This right raises three issues: firstly, which criteria should govern the Court's assessment as to whether the accused has sufficient means, secondly, is there any basis for allocating legal aid to a defendant even if the defendant is not indigent, and thirdly, can an accused, who receives legal aid, choose his or her lawyers freely.

Regarding the first issue, the Malabo Protocol provides no guidelines concerning the Court's assessment as to whether an accused has 'sufficient means' to fund legal costs fully or partially. Each international/internationalised court also employs a different formula and system for assessing whether the defendant is indigent.[161] There are, however, some practical considerations that can be gleaned from the experiences of these courts and tribunals. In particular, any assessment as to whether an accused can fund his or her costs must take into consideration the likely length of the proceedings, the extent to which the accused can liquidate his or her assets or realize their value in a manner which is consistent with his or her right to be represented as soon as is practicable,[162] and the defendant's ongoing obligations to dependents and third parties.[163] In order to avoid some of these issues, the general practice has been to allocate legal aid on a provisional basis until a proper

[160] *Artico v. Italy*, ECHR Judgment of 13 May 1980, para. 33.

[161] See 'Interim report on different legal aid mechanisms before international criminal jurisdictions', ICC-ASP/7/12, 19 August 2008.

[162] ICC: *Prosecutor v. Bemba*, Redacted version of 'Decision on legal assistance for the accused' ICC-01/05–01/08–567-Red, 26 November 2009.

[163] ICC: Regulation 84(2) of the Regulations of the Court specifies that the Court shall base its assessment on the means which the applicant 'has direct or indirect enjoyment or power to freely dispose', and further specifies that the Court shall allow necessary and reasonable expenses, which has been interpreted to include the living expenses of dependents. Unlike the ICC, the ICTY included the assets of dependents in its assessment of the total value of assets available for the costs of the Defence. Nonetheless, in the *Karadzic* case, the Presidency recognised the difficulty in compelling a spouse to contribute her resources to the costs of her husband's defence, and therefore found that the assets were not 'available': *Prosecutor v. Karadzic*, 'Decision on Indigence', MICT-13–55-A, 24 June 2016.

assessment of the accused's indigence has been made.[164] Alternatively, if the accused's assets are frozen or not easily liquidated, Courts have provided legal aid with the caveat that the Court, rather than the Defence, will seek to recuperate the expenses from the accused.[165]

Human rights law also specifies firstly that the process used to determine the financial means of an accused should not be unfair, arbitrary, or unreasonably complex or delayed,[166] and secondly, that provisional legal aid should be allocated immediately to suspects who require legal representation on an urgent basis, to avoid any prejudice arising whilst issues of indigence are determined.[167]

Apart from the scenario in which an indigent accused receives legal aid, the wording of Article 46(A) also envisages that 'legal assistance' can be granted 'in the interests of justice', that is, even if the defendant could, in theory, pay for his or her defence. As noted above, international courts and tribunals have granted legal aid to non-indigent defendants in circumstances in which there were practical impediments as concerns the ability of the defendant to access or dispose of his or her assets. In this specific circumstance, the defendant has remained obligated to refund the legal aid, once the practical impediments were resolved. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems further envisage that '[l]egal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty'.[168]

International criminal cases fulfil the last last two criteria. They are exceedingly complex, which in turn, drives up the related costs of mounting an effective defence, such that the costs are vastly higher than the equivalent costs for a domestic trial. The penalties also range to the highest sentence available (life), the imposition of a potential fine, and reparations.

[164] Article 11 of the ICTY Directive on the Assignment of Counsel, Regulation 85 of the ICC Regulations of the Court, ICC 01/04–490-tENG, 26 March 2008, pp. 3–4; ICC-01/04–01/06–63; ICC-01/04–01/07–79, ICC-01/04–01/07–298; ICC- 01/04–01/07–562; ICC-01/04–01/07–563, ICC-CPI-20120117-PR762

[165] ICC-01/05–01/08–568, para. 6.

[166] *Del Sol v. France*, Application no. 46800/99, para. 26; *A. B. v. Slovakia*; *Tabor v. Poland*, Application no. 12825/02 ; Bakan v. Turkey, Application no. 50939/99, *VM v. Bulgaria*, Application no. 45723/99, *Santambrogio v. Italy*, Application no. 61945/00,

[167] Para. 41(c) (Guideline 1. Provision of legal aid), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNODC, 2013: 'Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined (. . .)'.

[168] Principle 3, para. 21, ibid.

A further consideration that merits legal assistance 'in the interest of justice' is that according to the SCSL, the role of Defence Counsel 'is institutional and is meant to serve, not only the interests of his client, but also those of the Court and the overall interests of justice'.[169] This description of the role of Counsel implies that the institution itself has an overriding duty to ensure that a defendant is not deterred from seeking legal representation due to the impact that the related costs will have on the defendant (and his or her family's) resources.[170]

In terms of the third issue, that is, the extent to which the accused's indigent status impacts on the right to freely choose counsel, most international courts have found that the right to freely choose counsel, and more particularly, replace counsel, is limited for indigent defendants.[171] That being said, bearing in mind the practical difficulties associated with imposing Counsel on a defendant during the course of a lengthy and complex trial, there is a general preference for acceding to the wishes of the defendant, if there are no legal impediments to Counsel's appointment.[172] The ICC has, in particular, underscored that an accused, even if indigent, should be afforded a full and effective chance to choose a qualified counsel.[173]

[169] *Prosecutor v. Sam Hinga Norman et al.*, SCSL-04–14-T, Decision on the Application of Samuel Hinga Norman for Self-Representation under Article 17(4)(D) of the Statute of the Special Court, 8 June 2004, para. 23.

[170] Some defendants at international courts have opted to represent themselves after disputes with the Registry concerning funding. See, for example, *Prosecutor v. Krajisnik*, Transcript 5 July 2007, pp. 108–9; *Prosecutor v. Prlic et al.*, 'Decision on Praljak's Request for Stay of Proceedings', IT-04–74-A, 27 June 2014, paras. 2–6. The ECHR has also found that the right to a fair trial could be engaged in circumstances where the obligation to reimburse defence costs is so onerous that it could deter defendants from exercising their right to legal representation: *Ognyan Asenov v. Bulgaria*, app. no. 38157/04, para. 44.

[171] *Prosecutor v. Nahimana et al.*, 'Decision on Withdrawal of Co-Counsel', ICTR-99–52-A, 23 November 2006, para. 10. *Prosecutor v. Blagojevic & Jokic*, Appeals Judgment, IT-02–60-A, 9 May 2007, paras. 14, 17.

[172] *Prosecutor v. Martic*, Decision on Appeals Against Decision of the Registry', IT-95–11-PT, 2 August 2002, 'CONSIDERING that the jurisprudence of the International Tribunal and of the International Criminal Tribunal for Rwanda3 indicates that the right of the indigent accused to counsel of his own choosing may not be unlimited but that, in general, the choice of any accused regarding his Defence Counsel in proceedings before the Tribunals shall be respected; that, in the view of the Chamber, the choice of all accused should be respected unless there exist well-founded reasons not to assign Counsel of choice'.

[173] *Prosecutor v. Lubanga*, 'Reasons for 'Decision of the Appeals Chamber on the Defence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007', ICC-01/04–01/06–844, 9 March 2007, paras. 12–16.

A final point of significance concerns the source of funds for legal aid. Article 46M of the Malabo Protocol specifies that the Assembly shall establish a Trust fund for legal aid. This suggests that legal aid will be funded through voluntary donations, rather than regular contributions, which is likely to generate uncertainty concerning the existence and scope of any annual legal aid budget. Such an outcome would be deleterious to the effective representation of defendants at the Court, and generate a potential structural inequality of arms if the Prosecution is funded through regular contributions, and thus better equipped to prepare and conduct the litigation without the concern that funding could dissipate at critical junctures.

This is an interesting approach, considering that in the current African Court in Arusha, which addresses human rights issues only, funding for legal aid for litigants is through assessed contributions to AU member states. Arguably, such a funded scheme is even more imperative when it comes to the use of criminal law in the future Court given the implications for the suspect in terms of denial of their liberty. Voluntary contributions received from partners and others are managed through a Trust Fund in the Arusha Court. And it may be that the inadequate funding for the current scheme gave rise to the desire to have a trust fund. However, it would be important that such a funding scheme is not left to the vagaries of a donations based scheme as that would not provide the kind of certainty and foundation required to meaningfully give effect to that right.[174]

Indeed, we might look at the current African Court, which contains provision for legal aid for persons wishing to initiate a case before the Court. The legal basis stems from Article 10 of the Protocol to the African Charter on the Establishment of the African Court of Human and Peoples' Rights which, in Article 10, provides that 'Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.' This right is addressed in Rule 31 of the Rules of Procedure and Evidence which provides for the provision of free legal representation and or legal assistance to any party in the interest of justice and within the limits of the financial resources available. As part of the determination of the entitlement, the Court may consider the applicant poor unless evidence is adduced stating otherwise; or require the applicant to declare his means or possibly those of his close relatives. Access to

[174] www.african-court.org/en/images/Legal%20Aid%20Scheme/Policy/Legal_Aid_Policy_as_amended_in_2014.pdf?4ea03332baad719f3a6b2ef8c979f25c=d61cd09dc7944075277b31d65b70c955.

the support needed by the litigants is determined by indigence, the need for equality of arms and a determination that representation would be in the interests of justice. It might be expected that such a system would serve as a sort of model for the future African Court though care will have to be exercised to account for the specificities of the new criminal law mandate.

8. The Right to Examine, or Have Examined, Witnesses and to Obtain Their Attendance under the Same Conditions as the Prosecution

The right to obtain the attendance of witnesses, under the same conditions as the Prosecution, is a fundamental element of equality of arms.[175] Since the Prosecution bears the burden of proof, it does not translate to numerical equality in terms of the number of witnesses who may be called, or the length of time for the presentation of the case, but it does require the Chamber to ensure basic proportionality between the Prosecution and the Defence on such issues.[176]

Moreover, the fact that the Defence and the Prosecution might have the same theoretical possibility to call witnesses will not, in itself, satisfy the right to a fair trial if there are structural, political, or safety issues that might deter witnesses from testifying for the Defence.[177] For example, if the defendant is a political opponent, witnesses might be reluctant to testify 'for the Defence' due to the negative connotations associated with doing so. In such circumstances, it is crucial that the Court has the power to either *subpoena* witnesses, or to call them as witnesses of the 'Court' rather than the 'Defence'. The subpoena power should be included in the rules of procedure of the future court, based on the model of the ad hoc tribunals, though modalities will have

[175] *Prosecutor v. Oric*, 'Interlocutory Decision on Length of Defence Case', IT-03–68-AR73.2, 20 July 2002, para. 7.

[176] *Prosecutor v. Prlic et al.*, 'Decision after Remand', IT-04–74-AR73.4, 11 May 2007, para. 38.

[177] In the context of decision whether to refer cases back to Rwanda under Rule 11 *bis*, the ICTR found that the right to a fair trial would be compromised if the Defence were unable to call witnesses due to protection concerns: *Prosecutor v. Gaspard Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, ICTR-2002–78-R11bis, 30 October 2008, paras. 26–27. Similarly, in the *Gaddafi* case, the ICC Pre-Trial Chamber found that the existence of a witness protection programme for both Prosecution and Defence witnesses , and the practical ability of the Court to obtain the attendance of witnesses, were relevant to the Court's assessment as to whether domestic courts would be 'able' to conduct trial proceedings in an effective manner: *Prosecutor v. Gaddafi & Sennussi*, 'Public Redacted Decision on Admissibility', ICC-01/11–01/11–344-Red, 31 May 2013, paras. 209–11.

to be provided for states that are unable to arrest and surrender their nationals to the court to enable them to testify. If, after exhausting various avenues for securing access to witness testimony or evidence, the Court is unable to secure basic equality in terms of access to witnesses or exculpatory evidence, it might be necessary to stay the proceedings and release the defendant.[178]

Although the right to 'examine' witnesses has often been described as the right of the defendant to 'confront' adverse testimony in court, the notion of confrontation must also be interpreted in a manner which is consistent with witness protection and the logistical imperatives associated with international trials. The right will not be infringed merely because the witness testifies *via* video-link or is shielded from the accused by a partition in the courtroom,[179] although the frequent use of such measures could create an appearance that the accused is a 'dangerous' person, which has implications for the presumption of innocence. Moreover, given that testimony *via* video-link impacts on the ability of the Judges to assess the credibility and demeanour of the witness, the ICTR Appeals Chamber has further held that 'it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person'.[180]

The passive phrase, 'have examined', suggests that this right could be complied with even if someone external to the Defence examined the witness. This possibility is reflected in ICC provisions concerning 'unique investigative situations', which allow the Chamber to consider appointing an '*ad hoc*' Counsel to question a witness on behalf of an absent defendant, if there is a risk that the testimony might not be available at trial.[181] The STL Rules of Procedure and Evidence also presage that the Court may appoint a 'special counsel' to represent the interests of the defence in connection with information protected by national security or confidentiality agreements.[182] Bearing in mind critical commentary as to whether Counsel can adequately represent

[178] ICTY: *Prosecutor v. Tadic*, Appeals Judgment, IT-94–1-A, 15 July 1999, paras. 51–2; ICC: *Prosecutor v. Lubanga*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04–01/06–1486, 21 October 2008, paras. 4–5.

[179] ICC: *Prosecution v. Lubanga*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04–01/06–1140, 29 January 2008, paras. 35, 41.

[180] *Prosecutor v. Gaspard Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, ICTR-2002–78-R11bis , 30 October 2008, para. 33.

[181] ICC Article 56(2)(d) of the Statute.

[182] Rule 119 of the RPE.

the interests of the defendant without the benefit of instructions,[183] the Court should give careful consideration as to whether such scenarios are compatible with the defendant's overarching right to a fair trial.

9. The Right to Have the Free Assistance of an Interpreter

The issue of language rights has been discussed above, in the context of the translation of disclosure and court filings.

10. The Right Not to Be Compelled to Testify against Himself or Herself or to Confess Guilt

This language mirrors that of Article 14 of the ICCPR, and the respective fair trial provisions at the ICTY, ICTR and SCSL, but lacks the explicit language in the ICC Statute concerning the right to 'remain silent without such silence being a consideration in the determination of guilt or innocence'.[184] Although the right to silence might seem to be an obvious corollary of the right not to be compelled to testify, this language also protects the defendant against the possibility that the Court might draw adverse inferences against a defendant who chooses not to testify.[185] The ICC Appeals Chamber has further clarified that this language protects the defendant from being pressured to provide information about his defence at early stages of the case (for example, as a condition for obtaining disclosure).[186]

The fact that the Malabo protocol lacks this language does not, however, mean that the protections afforded to defendants against adverse inferences are less than that of the ICC. It is notable in this regard that in the *Celebici* case, the ICTY Appeals Chamber found that although the ICTY Statute lacked an explicit protection against adverse inferences, it also lacked an explicit power to draw such inferences:[187]

[183] ECHR: *A & others v. The United Kingdom*, App. no. 3455/05, (Grand Chamber) para. 220.
[184] Article 67(1)(f), ICC Statute.
[185] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04–01/06–1433, 11 July 2008, Partly dissenting opinion, Judge Pikus, para. 14.
[186] *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04–01/06–1433, 11 July 2008, para.1.
[187] *Prosecutor v. Delalic et al.*, Appeals Judgment, IT-96–21-A, 20 February 2001, para. 783.

Should it have been intended that such adverse consequences could result, the Appeals Chamber concludes that an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore, it finds that an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute.

Although a defendant cannot be compelled to testify against himself, the ICTY Appeals Chamber has confirmed that defendants can be subpoenaed to testify in other cases.[188] Moreover, although a defendant cannot be compelled to testify in their Defence, Trial Chamber II found in the ICC *Katanga & Ngudjolo* case that once a defendant has elected freely to do so, the privilege against self-incrimination ceases to apply and they can be questioned in the same manner as any other witness.[189] In reaching this finding, the Chamber emphasised that a defendant could also elect to provide an unsworn statement, in which case they could not be compelled to answer questions.[190] The Malabo Protocol does not afford the defendant with the right to provide an unsworn statement, although it is possible that the opportunity to provide such a statement might be set out in the Rules of Procedure and Evidence, as is the case with the ICTY.[191]

11. The Right to Have the Judgment Pronounced Publicly

This is an obvious element of the right to public proceedings, as discussed above.

12. The Right to Be Informed of His or Her Right to Appeal

The Malabo Protocol does not address the specific contours of the right to an appeal, but in order to comport with human rights law, it is essential that the defendant possesses the right to appeal on both questions of law and fact.[192]

[188] The defendant Dragan Jokic was convicted of contempt for refusing to testify in the Popopvic case: *Dragan Contempt Proceedings Against Dragan Jokic*, 'Judgment on Allegations of Contempt', IT-05–88- R77.1-A, 25 June 2009.

[189] 'Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused', ICC-01/04–01/07–3153, 13 September 2009, paras. 7–12.

[190] Ibid., para. 12.

[191] Rule 84 *bis* of the ICTY Rules of Procedure and Evidence.

[192] As delineated by Principle O(10)(a)(i), of the *Principles and Guidelines on the Right to a Fair Trial in Africa*, the right to an appeal includes the right to have a competent court review both law and facts in a genuine and timely manner.

It is imperative that this right be addressed in the rules and that suspects and accused persons be informed of them.

3. CONCLUSION

As will be apparent from the above analysis, a fair trial is a multi-faceted notion, which depends not only on the specific wording of legal texts, but the willingness and ability of the Court to make the implementation of fair trial rights a reality. Given the political and financial considerations at play, this will be no easy task. Nonetheless, as underscored by the African Commission, 'a State party to the African Charter regardless of its level of development must meet certain minimum standards regarding fair trial or due process conditions'.[193] These observations apply with even greater force to the Court, particularly as States will be likely to look to it as the standard bearer for criminal justice in Africa. Considering that the criminal jurisdiction is effectively 'twinned' to the Court's human rights jurisdiction, the Court's success will depend on its ability to demonstrate that complex criminal investigations and prosecution can be conducted in a manner, which is fully consistent with human rights obligations, including the right to a fair trial.

Of further note, the African Court of Human and Peoples has found that States have a positive duty to take steps to ensure that the right to a fair trial is respected within their jurisdiction.[194] It follows that having elected to establish such a Court, State Parties also have a corollary duty to ensure that the Court is sufficiently funded and politically supported to fulfil its promise to bring fair and impartial justice to victims and defendants in Africa.

The text of the Malabo Protocol is, itself, a promising step in this direction. Apart from the fact that the establishment of the criminal division will play an important role in 'plugging the impunity gap' for victims (and will indeed provide a unique forum for accountability as concerns crimes perpetrated by corporations), the attention given to structural equality of arms, through the establishment of an internal Defence Office, suggests that key lessons have been learned as concerns the problems faced by the Defence at other international courts and tribunals, and that as the 'newest court on the block', the Court may in fact be better placed than its predecessors to achieve fair and

[193] *Article 19 v. The State of Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/ 2003 (2007), citing to Human Rights Committee, Albert Womah Mukong vs. Cameroon. Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 of 10 August 1994.

[194] See also *African Commission v. Libya*, application 002/2013, para. 50.

effective justice. This may depend on the extent to which these lessons learned continue to be filtered through to the adoption of secondary legal instruments, such as the Rules of Procedure and Evidence, but a key litmus test as to whether the nacscent promise to respect equality of arms will be realized is whether a Principal Defender will be appointed at the same time as the Prosecutor, so that Defence issues can be voiced and effectively represented at every stage of the proceedings before the Court.