responsible for genocide and other such violations committed in the territory of neighbouring States. This entails balancing the rights of the accused with the ends of justice. The accused's right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the accused is charged."[411]

6. ACCUSED'S RIGHT TO BE TRIED IN HIS PRESENCE

6.1. ECtHR JURISPRUDENCE

6.1.1. Generally

Although this is not expressly mentioned in Article 6(1) of the ECHR, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present.[412]

Although proceedings conducted in the absence of the defendant are not in themselves incompatible with Article 6 of the Convention, a denial of justice will nevertheless occur where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself.[413] A waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.[414]

To inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6(3)(a) of the Convention; vague and informal knowledge cannot suffice.[415]

411 *Bizimungu et al.*, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), Case No. ICTR-99-50-I, T. Ch., 8 November 2002, para. 32.

412 *Sejdovic* v. *Italy* [GC], no. 56581/00, 1 March 2006, para. 81; *Belziuk* v. *Poland*, no. 23103/93, 25 March 1998, para. 37; *T.* v. *Italy*, no. 14104/88, 12 October 1992, para. 26; *F.C.B.* v. *Italy*, no. 12151/86, 28 August 1991, para. 33; *Colozza v. Italy*, no. 9024/80, 12 February 1985, para. 27.

413 *Somogyi* v. *Italy*, no. 67972/01, 18 May 2004, para. 66.

414 *Poitrimol v. France*, no. 14032/88, 23 November 1993, para. 31.

415 Ibid., para. 75.

6.1.2. Appeals Proceedings

In regard to the appeal proceedings, the personal attendance of the accused does not take on the same crucial significance as it does for trial.[416] The special features of the procedure before the court of appeal and the particular circumstances of the appeal must be taken into account in determining whether the person's rights have been violated.[417] In particular, the right to be heard at the appeal may depend on whether the proceedings involve questions of law or questions of fact.[418]

The manner in which Article 6 is applied to proceedings before courts of appeal depends on the special features of the proceedings involved, and account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.[419]

Proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, despite the fact that the appellant is not given the opportunity to be heard in person by the appeal or cassation court, provided that a public hearing is held at first instance.[420] Even where the court of appeal has jurisdiction to review the case as to both the facts and the law, Article 6 does not always require a right to a public hearing, still less a right to appear in person.[421] In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it.[422] However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence.[423]

416 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 55; *Kamasinski* v. *Austria*, no. 9783/82, 19 December 1989, para. 106.

417 *Kamasinski* v. *Austria*, no. 9783/82, 19 December 1989, para. 106.

418 *Ekbatani* v. *Sweden*, no. 10563/83, 26 May 1988, para. 31.

419 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 55; *Ekbatani* v. *Sweden*, no. 10563/83, 26 May 1988, para. 27; *Monnell and Morris* v. *the United Kingdom*, nos. 9562/81, 9818/82, 2 March 1987, para. 56.

420 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 55; *Monnell and Morris* v. *the United Kingdom*, nos. 9562/81, 9818/82, 2 March 1987, para. 58.

421 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 56; *Fejde* v. *Sweden*, no. 12631/87, 29 October 1991, para. 31.

422 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 56; *Hermi v. Italy* [GC], no. 18114/02, 18 October 2006, para. 60; *Belziuk* v. *Poland*, no. 23103/93, 25 March 1998, para. 37.

423 *Seliwiak* v. *Poland*, no. 3818/04, 21 July 2009, para. 56; *Dondarini* v. *San Marino*, no. 50545/99, 6 July 2004, para. 27.

6.2. GENERALLY

Pursuant to Article 21(4)(d) of the ICTY Statute, 20(4)(d) of the ICTR Statute, 17(4)(d) of the SCSL Statute, and 67(1)(d) of the ICC Statute, an accused has the right to be tried in his presence.

It was emphasised by the ICTR Appeals Chamber that the *physical presence* of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial.[424] Article 20(4)(d) provides for the physical presence of an accused at trial, as opposed to his facilitated presence *via* video-link.[425]

In other words, an accused's right to be tried in his or her presence implies a right to be *physically* present at trial.[426]

It was also noted that this right is not absolute, and an accused can waive or forfeit the right to be present at trial, in particular if he refuses to attend proceedings after being given notice of the time and place, the charges against him, and his right to be present.[427]

6.3. A TRIAL IN THE ABSENCE OF THE ACCUSED

Pursuant to Rule 60 of the SCSL Rules, in the version of March 2003, an accused may not be tried in his absence, unless the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do. In either case the accused may be represented by counsel of his choice, or as directed by a judge or Trial Chamber. The matter may be permitted to proceed if the judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present. In May 2003, the ICTR adopted Rule 82 *bis* with a similar provision. According to the Rule, if an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that: (i) the accused has made his initial

424 *Zigiranyirazo*, Decision on Interlocutory Appeal, Case No. ICTR-2001-73-AR73, App. Ch., 30 October 2006, para. 11.

425 Ibid., para. 12.

426 *Hategekimana*, Judgement, Case No. ICTR-00-55B-A, App. Ch., 8 May 2012, para. 37; *Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, App. Ch., 28 November 2007, para.96; *Zigiranyirazo*, Decision on Interlocutory Appeal, Case No. ICTR-2001-73-AR73, App. Ch., 30 October 2006, paras. 8, 13.

427 *Hategekimana*, Judgement, Case No. ICTR-00-55B-A, App. Ch., 8 May 2012, para. 37; *Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, App. Ch., 28 November 2007, paras. 99, 109; *Zigiranyirazo*, Decision on Interlocutory Appeal, Case No. ICTR-2001-73-AR73, App. Ch., 30 October 2006, para. 14; *Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Case No. IT-02-54-AR73.7, App. Ch., 1 November 2004, para. 13.

appearance under Rule 62; (ii) the Registrar has duly notified the accused that he is required to be present for trial; (iii) the interests of the accused are represented by counsel.

The amendment was preceded by the *Barayagwiza* trial conducted in the absence of the accused. Barayagwiza boycotted his trial on the grounds that he challenged the ability of the ICTR to render independent and impartial justice due, notably, to the fact that "it is so dependent on the dictatorial anti-Hutu regime of Kigali."[428] The Trial Chamber held that the accused was fully aware of his trial, but chosen not to be present, despite being informed by the Chamber that he may join the proceedings at any time. According to the Chamber, in such circumstances, where the accused was duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence.[429] The accused, who was in detention at the Tribunal's Detention Facility, failed to appear at the hearings from 23 October 2000, the first day of the hearing, until 22 August 2003, the last day of the hearing.[430]

It was noted, that, even though the ICTY Rules do not contain a rule corresponding to the above SCSL and ICTR Rules, the jurisprudence of the ICTY recognises that the right to be present at trial can be explicitly waived.[431]

An accused's right to be present for his or her trial can be restricted on the basis of substantial trial disruptions.[432] In assessing a particular limitation on a statutory guarantee, a Chamber shall bear in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. Reference to "substantial trial disruptions" provides a useful measure by which to assess other restrictions on the right to be present at trial.[433]

Derogation from the right to be present is reasonable under some circumstances. In particular, derogation may be justified even on the basis of substantial trial disruptions on the part of an accused that are unintentional in

428 *Barayagwiza*, Decision on Defence Counsel Motion to Withdraw, Case No. ICTR-97-19-T, T. Ch., 2 November 2000, para. 5.

429 Ibid., para. 6.

430 *Barayagwiza et al.*, Judgement, Case No. ICTR-99-52-A, App. Ch., 28 November 2007, paras. 83, 98.

431 *Nahimana et al.*, Judgement, Case No. ICTR-99-52-A, App. Ch., 28 November 2007, para. 105, with reference to *Milan Simić*, Judgement, Case No.IT-95-9/2-S, T. Ch., 17 October 2002, para. 8.

432 *Zigiranyirazo*, Decision on Interlocutory Appeal, Case No. ICTR-2001-73-AR73, App. Ch., 30 October 2006, para. 14; *Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Case No. IT-02-54-AR73.7, App. Ch., 1 November 2004, para. 13.

433 *Zigiranyirazo*, Decision on Interlocutory Appeal, Case No. ICTR-2001-73-AR73, App. Ch., 30 October 2006, para. 14; *Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Case No. IT-02-54-AR73.7, App. Ch., 1 November 2004, para. 17.

nature.[434] It is reasonable to balance the right of the accused to be present with the right of both the accused and his co-accused to an expeditious trial. However, in balancing these two rights, the Chamber shall give sufficient weight to the right of the accused to be present and according undue weight to the objective of commencing the proceedings.[435] Indeed, the right to be present is a fundamental right and derogation from this right is not appropriate when reasonable alternatives exist. For instance, it was found that derogation from the right to be present through the establishment of a video-conference link that enables the accused to participate in his trial from the detention unit would violate the accused's right if other potential options existed, such as allowing the case to remain in the pre-trial phase for three to six months.[436]

The right to an expeditious trial as a right guaranteed to all accused by the Statute of the Tribunal is a relevant consideration for the Trial Chamber in balancing whether or not to proceed in the absence of the accused. However, in the circumstances of a complex and lengthy case, a several-day delay to the trial is not a sufficient to outweigh the statutory right of the accused to be present at his own trial when the absence of the accused was due to no fault of his own.[437]

A comparison between the limitations placed on the accused's access to the examination of a witness and the restrictions permitted under Rules 92 *bis* and 94(B) is misguided. Rules 92 *bis* and 94(B) address the proof of facts of a matter other than the acts of the accused. It is different from the issue of whether the presence of an accused is required during the cross-examination of a witness by a co-accused or his counsel. In the circumstances of a joint trial, it is irrelevant for the purpose of that determination whether or not the witness's testimony was likely to concern the alleged acts and conduct of a co-accused only.[438]

A Chamber may limit the right of the accused to be tried in his presence. Article 21 enshrines the right of an accused to represent himself and his right to be tried in his presence. Just as the former right is not absolute, the latter may also be restricted in cases of substantial trial disruption.[439] Indeed, an accused should be duly warned before restricting the right of an accused to be tried in his presence. In this way, an accused is fully and fairly informed and is afforded the opportunity to change the disruptive circumstances, whether resulting from deliberate misconduct or unintentional factors, so as avoid surrendering that right.[440] The warning should specifically indicate that the disruptive conduct, if

434 *Stanišić and Simatović*, Decision on Defence Appeal of the Decision on Future Course of Proceedings, Case No. IT-03-69-AR73.2, App. Ch., 16 May 2008, para. 15.

435 Ibid., para. 18.

436 Ibid., para. 19.

437 *Karemera et al.*, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, Case No. ICTR-98-44-AR73.10, App. Ch., 5 October 2007, para. 15.

438 Ibid.

439 *Šešelj*, Decision on Assignment of Counsel, Case No. IT-03-67-PT, T. Ch., 21 August 2006, para. 23.

440 *Šešelj*, Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel, Case No. IT-03-67-AR73.3, App. Ch., 20 October 2006, para. 23.

it persists, could result in a specific restriction. In this way, there can be no question that the accused has been put on notice that the warning is serious and could lead to restriction of a fundamental right if it is not heeded.[441]

It is noteworthy that, pursuant to Article 63(2) of the ICC Statute, if the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

There are circumstances under which a trial in absence of the accused can be permitted. While due consideration must be given to ensure that all rights to a fair trial are respected, an accused person charged with serious crimes who refuses to appear in court should not be permitted to obstruct the judicial machinery by preventing the commencement or a continuation of trials be deliberately being absent, after his initial appearance, or by refusing to appear in court after he has been afforded the right to do so, and particularly where no just cause, such as illness, has been advanced to justify the absence.[442] Though in essence trial in the absence of an accused person is an extraordinary mode of trial, it is still clearly permissible and lawful in very limited circumstances. It is not the policy of the criminal law to allow the absence of an accused person or his disruptive conduct to impede the administration of justice or frustrate the ends of justice. To allow such an eventuality to prevail is tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification.[443]

The Trial Chamber in the *Karadžić* case decided to proceed with the prosecution opening statement in the absence of the accused. The latter, according to the Chamber, "voluntarily and unequivocally" waived his right to be present at the proceedings. The Chamber emphasised that the opening statement forms an introduction to the prosecution's case but does not constitute evidence. The Chamber also requested the Registry to convey a copy of the transcript and an audio recording of the hearing to the accused and his assigned legal advisors.[444] In the *Šešelj* case, the prosecution had also made its opening statement in the absence of the accused. Later, however, the Appeals Chamber reversed as erroneous the Trial Chamber's decision assigning counsel to the accused. The

441 Ibid., para. 25.

442 *Sesay et al.*, Ruling on the Issue of the Refusal of the Accused Sesay and Kallon to Appear for Their Trial, Case No. SCSL-04-15-T, T. Ch., 19 January 2005, para. 15.

443 *Sesay et al.*, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, Case No. SCSL-04-15-T, T. Ch., 12 July 2004, para. 8.

444 *Karadžić*, Tr. Transcr., Case No. IT-95-5/18, 27 October 2009, p. 511.

Appeals Chamber then, "in interests of fairness" to the accused, nullified the opening of the proceeding in the case and ordered that the trial restart.[445]

In the *Karadžić* case, the Trial Chamber noted that there may be circumstances in which a Trial Chamber could decide to proceed in his absence, even if an accused were not represented by counsel. However, the Chamber found that in that case it would not be in the interests of justice to proceed with the presentation of evidence by the prosecution in the absence of the accused or counsel to represent him.[446] In the first place, according to the Chamber, the truth-seeking function of the trial process would be deprived of defence evidence which may go to challenge the evidence adduced by the prosecution. Secondly, an important function of the trial process, as originally envisaged by the Security Council of the United Nations in the very creation of the Tribunal, was to seek to further peace and reconciliation amongst and between the various factions involved in the conflict in the former Yugoslavia. To allow the Trial Chamber to hear and assess only half of the evidence, albeit from the party charged with the burden of proving its case beyond reasonable doubt, would be to deny the opportunity the trial process may have to engender such peace and reconciliation as may be gleaned from a full hearing of the evidence brought by both the prosecution and the accused.[447]

In the same case, in regard to the accused who waives his right to attend his trial, the prosecution argued that "if necessary, force can be used to secure his presence in the courtroom". According to the prosecution, the fact that the accused has a right to be present for trial, "does not negate the fact that he also has an obligation to be present."[448] However, when asked by the presiding judge, the prosecution conceded that if an accused who has been brought by force does not participate in the proceedings and "does not cooperate with the proceedings", there would be no difference from the situation where the proceedings take place in the absence of an accused.[449] Subsequently, the Chamber ordered the Registrar to appoint counsel, who will begin immediately to prepare him or herself to represent the interests of the accused when the trial resumes, if that should be required. At the same time, the Chamber decided that notwithstanding the appointment of counsel for this specific purpose, the accused will continue to represent himself, including by dealing with the day-to-day matters that arise, such as the filing of motions and responses to motions filed by the prosecution, and further preparing himself for the trial.[450]

445 *Šešelj*, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, Case No. IT-03-67-AR73.4, App. Ch., 8 December 2006, para. 29.

446 *Karadžić*, Decision on Appointment of Counsel and Order on Further Trial Proceedings, Case No. IT-95-5/18-T, T. Ch., 5 November 2009, para. 19.

447 Ibid., para. 20.

448 *Karadžić*, Tr. Transcr., Case No. IT-95-5/18, 3 November 2009, pp. 680-681.

449 Ibid., p. 693.

450 *Karadžić*, Decision on Appointment of Counsel and Order on Further Trial Proceedings, Case No. IT-95-5/18-T, T. Ch., 5 November 2009, para. 25.

In the *Rwamakuba* case, the accused refused to attend the trial and the Chamber requested the parties to comment on whether the Chamber would need to compel the accused's presence. Subsequently, the Chamber ordered that the trial proceed in the absence of the accused pursuant to Rule 82 *bis* ("Trial in the Absence of Accused"). The Chamber encouraged the accused to attend his trial.[451]

Although in principle an accused should be present during an on-site visit, a Trial Chamber may deny a motion for an on-site visit if it considers that the presence of the accused during a visit by the Chamber would pose a considerable security risk for the parties and the accompanying staff, and that it would be virtually impossible to guarantee the safety of the accused during the visit, considering the charges brought against him, his former position in the army, and the locations to be visited.[452]

6.4. ACCUSED'S PARTICIPATION IN THE PROCEEDINGS *VIA* VIDEO-LINK

In order to both expedite the proceedings and assist the accused's medical condition, provided that the accused files signed waivers of the right to be present in court during the proceedings, a video-link system and a two-way telephone link between the accused in the detention unit and his counsel in the courtroom can be installed. Such a system enables the accused to follow the proceedings from the detention unit and communicate with his counsel.[453]

It was found that derogation from the right to be present through the establishment of a video-conference link that enables the accused to participate in his trial from the detention unit would violate the accused's right if other potential options existed, such as allowing the case to remain in the pre-trial phase for three to six months.[454]

An accused who was provisionally released may be allowed to enter a plea on the new charges in the amended indictment via video-link.[455]

It was noted that there is no provision in the Statute or the Rules of the Tribunal which would prohibit the making of a further appearance of the accused by video-conference link.[456]

451 *Rwamakuba*, Minutes of Proceedings, Case No. ICTR-98-44C, 6 June 2005, paras. 1(a) and (b) and 2(a), available at www.ictr.org/ENGLISH/cases/Rwamakuba/minutes/2005/050606pretrial.pdf.

452 *Galić*, Judgement and Opinion, Case No. IT-98-29-T, T. Ch., 5 December 2003, para. 805.

453 *Milan Simić*, Judgement, Case No.IT-95-9/2-S, T. Ch., 17 October 2002, para. 8 and n. 18.

454 *Stanišić and Simatović*, Decision on Defence Appeal of the Decision on Future Course of Proceedings, Case No. IT-03-69-AR73.2, App. Ch., 16 May 2008, para. 19.

455 *Čermak and Markač*, Scheduling Order, Case No. IT-03-73-PT, T. Ch., 7 December 2005, p. 2.

456 *Gotovina et al.*, Decision on Accused Mladen Markač's and Ivan Čermak's Joint Motion to Enter a Plea by way of Video-Link, and Scheduling Order, Case No. IT-06-90-PT, T. Ch.,

7. PUBLIC HEARING, CLOSED SESSIONS AND *EX PARTE* PROCEEDINGS

See also Protection of Victims and Witnesses, p. 341.

7.1. ECtHR JURISPRUDENCE

Pursuant to Article 6(1) of the ECHR, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a public hearing. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

It is a fundamental principle enshrined in Article 6(1) of the ECHR that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's 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, the guarantee of which is one of the principles of any democratic society within the meaning of the ECHR.[457]

However, the requirement to hold a public hearing is subject to exceptions. Even in a criminal law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 of the ECHR to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.[458]

Article 6(1) does not prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, "the press and public may

29 November 2006, p. 3; *Stanišić and Simatović*, Order Scheduling Further Appearance, Case No. IT-03-69-PT, T. Ch., 6 March 2006, p. 3.

457 *Osinger* v. *Austria*, no. 54645/00, 24 March 2005, para. 44; *Werner* v. *Austria*, no. 21835/93, 24 November 1997, para. 45; *Diennet* v. *France*, no. 18160/91, 26 September 1995, para. 33; *Pretto and Others* v. *Italy*, no. 7984/77, 8 December 1983, para. 21; *Axen v. Germany*, no. 8273/78, 8 December 1983, para. 25.

458 *Osinger* v. *Austria*, no. 54645/00, 24 March 2005, para. 45; *Jasper* v. *the United Kingdom* [GC], no. 27052/95, 16 February 2000; *Murray* v. *the United Kingdom* [GC], no. 18731/91, 8 February 1996, para. 52; Z. v. *Finland*, no. 22009/93, 25 February 1997, para. 99; T. v. *the United Kingdom* [GC], no. 24724/94, 16 December 1999, paras. 83-89; *Doorson* v. *The Netherlands*, no. 20524/92, 26 March 1996, para. 70.

be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"; holding proceedings, whether wholly or partly, *in camera* must be strictly required by the circumstances of the case.[459]

A trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.[460]

7.2. GENERALLY

The benefits of a public hearing are well known. The principal advantage of press and public access is that it helps to ensure that a trial is fair. In addition, the International Tribunal has an educational function and the publication of its activities helps to achieve this goal.[461] A Trial Chamber cannot without good reason, deny the accused the right to a public hearing enshrined in Articles 20(4) and 21(2).[462]

All proceedings before an Appeals Chamber, including the Appeals Chamber's orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential.[463]

459 *Diennet* v. *France*, no. 18160/91, 26 September 1995, para. 34.

460 *Riepan* v. *Austria*, no. 35115/97, 14 November 2000, para. 29.

461 *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, T. Ch., 10 August 1995, para. 32.

462 *Delalić et al.*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M", Case No. IT-96-21-T, T. Ch., 28 April 1997, para. 33.

463 *Mrkšić et al.*, Order Concerning Confidential Filings, Case No. IT-95-13/1-A, App. Ch., 3 September 2008, p. 2; *Blaškić*, Decision on Defence's Request for Relief with Regard to *Ex Parte* Filings, Case No. IT-95-14-R, App. Ch., 20 November 2006, p. 3; *Blaškić*, Order Withdrawing Confidential Status of Pre-Review Order and Decisions, Case No. IT-95-14-R, App. Ch., 5 December 2005, p. 2; *Naletilić and Martinović*, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, Case No. IT-98-34-A, App. Ch., 4 May 2005, p. 3.

7.3. CLOSED SESSIONS

Pursuant to Rule 79(A) of the ICTY, ICTR, and SCSL Rules, the Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: public order or morality, safety, security or non-disclosure of the identity of a victim or witness, or the protection of the interests of justice.

It was stressed that the judges place considerable importance on the need to ensure a public and transparent judicial process. However, the press and the public may be excluded from all or part of the proceedings when the Trial Chamber considers that public order, morality, safety and security or non-disclosure of the identity of a victim or witness, and/or the protection of the interests of justice so require, in accordance with Rule 79. In these instances, the Trial Chamber may hold closed sessions. These sessions are designed, *inter alia*, to encourage and facilitate the giving of evidence by vulnerable witnesses. In such cases where the public and the media are excluded from the proceedings, access to the records of these sessions is restricted to the parties and the Trial Chamber. The disclosure of records of closed sessions may only be ordered by a Trial Chamber when the reasons for their confidentiality no longer exist.[464] Individuals, including journalists, cannot decide to publish information in defiance of such an order, on the basis of their own assessment of the public interest in that information.[465]

The parties should endeavour to take all steps to preserve the public character of the proceedings. In particular, the parties should seek only those specific protective measures, such as face or voice distortion, which they deem strictly necessary for the protection of the witnesses. It should be noted that closed session will only be ordered on an exceptional basis, after a party has presented the Trial Chamber with sufficient information warranting the taking of such a measure.[466] As far as practicable, the parties must respect the principle of open sessions. Accordingly, closed or private sessions shall be ordered only in those cases provided for in Rule 79(A), namely: (i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or a witness; (iii) the protection of the interests of justice.[467]

In the *Karadžić* case, the Trial Chamber found that such witness's reason to testify in closed session as "to enable him to make full and honest expressions of his views" is insufficient for granting the request.[468] The Chamber also

464 *Delalić et al.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21-T, T. Ch., 5 June 1997, paras. 26-27.

465 *Marjiačić and Rebić*, Judgement, Case No. IT-95-14-R77.2, T. Ch., 10 March 2006, para. 39.

466 *Delić*, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, Case No. IT-04-83-PT, T. Ch., 24 July 2007, para. 24.

467 *Tolimir*, Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial, Case No. IT-05-88/2-PT, T. Ch., 24 February 2010, para. 28.

468 *Karadžić*, Decision on Request for Closed Session for Yasushi Akashi, Case No. IT-95-5/18-T, T. Ch., 17 April 2013, para. 7.

considered that such a reason as negative experiences with media reporting which "frequently distorted the true intent of his statements", is too vague to support ordering such an extraordinary measure as closed session testimony.[469]

In the ICC, the Chambers also established practice for the limited use of *in camera* hearings. In particular, according to the practice, each request for private session should specify the grounds for such protective measure in a neutral and objective fashion, and try to specify the points that will be touched upon; parties and participants are encouraged not to request that the Court goes into private session unless there is a serious and established risk which needs to be explained to the Chamber; a party calling a protected witness shall prepare and provide the Chamber, and the parties and participants, with a list of sensitive information and related questions to be dealt with in private session.[470] In accordance with the adopted practice, the ICC Chambers do not favour evidence being given entirely in closed session. It was noted that there are other possible measures available to protect sensitive information such as witnesses' identities and identifying information.[471]

The practical effect of a closed session order is that the audio and video broadcast is suspended and blinds are lowered in the courtroom to prevent members of the press and public sitting in the public gallery from seeing or hearing any part of the proceedings. The transcript of a closed session is marked as such, and is not made available to the public in the manner that transcripts of open sessions are distributed. The Tribunal has also developed a practice of using so-called private sessions, which are similar in nature to closed sessions, but which are generally utilised for very short periods during proceedings. When a Chamber orders a private session, the audio and video broadcast is suspended, but the blinds in the courtroom are not lowered and therefore those sitting in the public gallery are able to see the proceedings, without being able to hear them. Those parts of proceedings that are conducted in private session are redacted from the public version of the transcript. The French terminology used to describe a closed session is *audience à huis clos*, and a private session is *audience à huis clos partiel*, indicating that a private session is considered to be a partially closed session. In accordance with the foregoing practice, the difference is that in a private session events and identities can be seen by those sitting in the public gallery.[472]

469 Ibid.

470 See *Bemba*, Decision on Directions for the Conduct of the Proceedings, Case No. ICC-01/05-01/08, T. Ch, 19 November 2010, para. 23.

471 Ibid., para. 25.

472 *Delić*, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, Case No. IT-04-83-PT, T. Ch., 24 July 2007, para. 24.

7.4. PROTECTION OF WITNESSES

The protection of victims and witnesses permits a departure from the general principle of public proceedings. The balance between these two fundamental interests must be assessed within the context of the circumstances of each case.[473]

The two interests requiring attention in the trial which ought to be maintained are the right of the accused to a public hearing, and the right of the witness to protection in the interests of justice. Accordingly, a Trial Chamber in considering the motion must balance these two interests. This is clearly provided by Rule 79 which enables the exclusion of the press and public from the proceedings for various reasons including safety by the non-disclosure of the identity of a victim or witness. Thus, in certain circumstances, the right to a public hearing may be qualified and curtailed to accommodate other interests.[474]

With regard to closed session, the more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted. The Trial Chamber will therefore only order closed session in circumstances where it is shown that the risk to the witness is sufficiently founded and that no other less restrictive protective measures can adequately deal with that risk.[475]

Where information regarding the witnesses which might be mentioned or provided during the hearing might permit the identification of the persons affected by the requested protective measures and the disclosure of that information to the public and the media during a public hearing might endanger the privacy and safety of the victims and witnesses, the Trial Chamber may order that the hearing be held *in camera*.[476]

When a witness testifies entirely in closed session, and his name is only ever mentioned during that closed session, his name forms part of the closed session transcript, which is a confidential document. There may be circumstances in which the name of a witness who testifies in closed session is revealed by the Chamber – for example, the Chamber could issue a public order granting a request for a named witness to testify in closed session. In such circumstances, it is clear that the identity of the witness is not intended to be kept

473 *Delalić et al.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21-T, T. Ch., 5 June 1997, para. 28.

474 *Delalić et al.*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M", Case No. IT-96-21-T, T. Ch., 28 April 1997, para. 35.

475 *Mrkšić et al.*, Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses, Case No. IT-95-13/1-PT, T. Ch., 25 October 2005, para. 6; *Milošević*, Decision on Trial Related Protective Measures for Witnesses (Bosnia), Case No. IT-02-54-T, T. Ch., 30 July 2002, para. 5.

476 *Blaškić*, Order for an in Camera Hearing, Case No. IT-95-14-PT, T. Ch., 23 May 1997, p. 2.

confidential. However, when the name of a witness can only be found in confidential documents of the Tribunal, such as closed session transcripts, and he appeared in the courtroom only when the blinds were lowered and the audio and video broadcast suspended, it must be concluded that his identity is protected by the closed session order.[477]

The consequence of a closed session is that *all* information mentioned therein, including the identity of the witness who testifies, is protected from the public. It is not for third parties to determine which part of a closed session is protected.[478] In addition, where the content of a written witness statement is largely the same as the content of oral testimony given in closed session, that content must also be considered protected by the terms of the closed session order, or the protection granted would be ineffectual.[479]

7.5. PROTECTION OF THE INTERESTS OF JUSTICE

7.5.1. Generally

It is in the interests of justice for a motion relating to the simultaneous representation by a law firm of both the accused and a State, which relates to matters concerning the right of an accused to counsel of his or her own choosing, to be heard in closed session.[480]

A motion for closed session in order to protect the interests of justice from prejudicial publicity as stipulated in Rule 79(A)(iii) may be granted for testimony of a former employee of an international organisation who continues to enjoy privileges and immunities, including immunity from legal process in respect of all words spoken or written and all acts performed by him in the course of the performance of his official functions. A Trial Chamber would take into account that the evidence which the witness is called to give includes sensitive and confidential information which he allegedly obtained in the course of the performance of his official functions in the international organisation.[481]

477 *Marjiačić and Rebić*, Judgement, Case No. IT-95-14-R77.2, T. Ch., 10 March 2006, para. 25.

478 *Marjiačić and Rebić*, Judgement, Case No. IT-95-14-R77.2-A, App. Ch., 27 September 2006, para. 42.

479 *Marjiačić and Rebić*, Judgement, Case No. IT-95-14-R77.2, T. Ch., 10 March 2006, para. 27.

480 *Kordić and Čerkez*, Order for Closed Session, Case No. IT-95-14/2-PT, T. Ch., 8 January 1999.

481 *Brima et al.*, Decision on the Prosecution's Oral Application for Leave to be Granted to Witness TF1-150 to Testify Without Being Compelled to Answer Any Questions in Cross-Examination that the Witness Declines to Answer on Grounds of Confidentiality Pursuant to Rule 70(B) and (D) of the Rules, Case No. SCSL-04-16-T, T. Ch., 16 September 2005; *Norman et al.*, Decision on Prosecution Application for Closed Session for Witness TF2-218, Case No. SCSL-04-14-T, T. Ch., 15 June 2005, p. 2.

7.5.2. *Protection of Confidential Information*

A Chamber may authorise a witness who is in possession of information protected by the provisions of Rule 70 to testify in closed session.[482]

The purposes served by Rule 70(C) and (D) will not be served merely by resort to a closed session. The Rule 70 information provider must be empowered to guarantee anonymity to a confidential course. This guarantee of non-disclosure of identity cannot depend on the chance that a future Trial Chamber might order a closed session hearing or other protective measures.[483] However, the probative value of the witness's evidence may be affected by the invocation of Rule 70 protection. Thus, the fairness of the trial can be ensured by the Trial Chamber's overriding obligation to assess the evidence in its totality.[484]

It is in the interests of justice for a motion addressed to a State for the production of documents, which relates to matters that may raise issues of national security, to be heard in closed session.[485]

Partial private session testimony in order to protect the Rule 70 provider's interests, including national security interests, should only be requested sparingly. Should large portions of the witnesses' testimony eventually be received in private session, the Chamber may consider whether this impacts upon the public nature of the trial to such an extent as to violate the right of the accused to a fair trial.[486]

7.6. *EX PARTE* PROCEEDINGS

See also Access to *Ex Parte* Confidential Material, p. 241; *Ex Parte* Filings, p. 1349.

Pursuant to Rule 66(C) of the ICTY Rules and the relevant provisions of other *ad hoc* Tribunals, where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (*but only the Trial Chamber*) with the information that is sought to be kept confidential.

482 *Blaškić*, Decision of Trial Chamber I on the Motion to Protect a Witness, Case No. IT-95-14-T, T. Ch., 19 March 1999, p. 3.

483 *Brima et al.*, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, Case No. SCSL-2004-16-AR73, App. Ch., 26 May 2006, para. 33.

484 Ibid., para. 34.

485 *Kordić and Čerkez*, Order for Closed Session, Case No. IT-95-14/2-PT, T. Ch., 8 January 1999.

486 *Mladić*, Decision on Urgent Prosecution Motion for Protective Measures and Conditions for Witnesses RM-055, RM-120, RM-163, AND RM-176 pursuant to Rule 70, Case No. IT-09-92-T, T. Ch., 30 November 2012, para. 12.

Similarly, under Rule 68(iv) of the ICTY Rules and 68(D) of the ICTR Rules, the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation to disclose exculpatory information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (*but only the Trial Chamber*) with the information that is sought to be kept confidential.

It was emphasised that *ex parte* proceedings should be entertained only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact of the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[487]

The party seeking relief on an *ex parte* basis must identify with some care why the disclosure of the detail of the application to the other party to the proceedings would cause such unfair prejudice.[488]

In the *Blaškić* case, the Prosecutor sought to be relieved from the obligation to disclose all or any part of ten witness statements which were required to be made available to the defence. The Prosecutor asked that any oral presentation requested by the Trial Chamber be *ex parte* and *in camera*.[489] The Chamber noted that no provision of the Statute and the Rules envisages the possibility of holding an *ex parte* hearing after the initial appearance of the accused before a Trial Chamber of the Tribunal.[490] According to the Chamber, although it is true that Rule 66(C) does provide for *ex parte* disclosure by the Prosecutor to the Trial Chamber of the information for which confidentiality is sought, it in no manner authorises the holding of *ex parte* hearings on all the measures to be taken to ensure the protection of the witnesses as part of proceedings before the Tribunal.[491]

487 *Brđanin and Talić*, Decision on Prosecution Application for Oral Hearing of Rule 66(C) Motion, Case No. IT-99-36-PT, Pre-trial Judge. 1 June 2001, para. 3; *Brđanin and Talić*, Decision on Second Motion by Prosecution for Protective Measures, Case No. IT-99-36-PT, T. Ch., 27 October 2000, para 11; *Simić et al.*, Decision on (1) Application by Stevan Todorović to Reopen the Decision Of 27 July 1999, (2) Motion by ICRC to Reopen Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, Case No. IT-95-9-PT, T. Ch., 28 February 2000, para 41.

488 *Brđanin and Talić*, Decision on Prosecution Application for Oral Hearing of Rule 66(C) Motion, Case No. IT-99-36-PT, Pre-trial Judge. 1 June 2001, para. 3; *Brđanin and Talić*, Decision on Second Motion by Prosecution for Protective Measures, Case No. IT-99-36-PT, T. Ch., 27 October 2000, para 11; *Simić et al.*, Decision on (1) Application by Stevan Todorović to Reopen the Decision Of 27 July 1999, (2) Motion by ICRC to Reopen Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, Case No. IT-95-9-PT, T. Ch., 28 February 2000, paras. 42-43.

489 *Blaškić*, Decision Rejecting the Request of the Prosecutor for *Ex Parte* Proceedings, Case No. IT-95-14-T, T. Ch., 18 September 1996, p. 2.

490 Ibid., p. 3.

491 Ibid.