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The Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL

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MEMORANDUM
FOR THE
IRAQI SPECIAL TRIBUNAL

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I. INTRODUCTION

On December 10, 2003, the Iraqi Governing Council adopted the Statute of the Iraqi Special Tribunal ("IST Statute") creating the legal foundation for the Iraqi Special Tribunal ("IST") with provisions on its organization, jurisdiction and basic procedures. Under the IST Statute, the IST is independent of any Iraqi government bodies and has jurisdiction over any Iraqi national or resident accused of committing between July 17, 1968, and May 1, 2003, war crimes, crimes against humanity and genocide, in addition to certain specified Iraqi crimes.[1] The newly created IST follows the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL"). This memorandum will examine the key lessons the IST can learn from these three currently active ad hoc tribunals which will assist the IST in carrying out its mandate.[2]

[1] Statute of the Iraqi Special Tribunal, art. 1(b), Dec. 10, 2003, *available at* http://www.cpa-iraq.org/human_rights/Statute.htm (last visited Oct. 26, 2004) [hereinafter IST Statute]. [Reproduced in the accompanying notebook 1 at Tab 4].

[2] Where previous students working with the Cox Center War Crimes Research Office have researched and written extensively on issues addressed in this memorandum, I have adopted their analysis and have provided a copy of their memorandums in the accompanying notebooks.

II. IRAQI SPECIAL TRIBUNAL JURISDICTION

The IST has jurisdiction over only Iraqi nationals or residents of Iraq who are accused of the following crimes: genocide, crimes against humanity, war crimes, manipulation of the judiciary or involvement of the functions of the judiciary, wastage of national resources, squandering of public assets and funds, and the abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country in accordance with Iraqi law.[3] The IST shall have jurisdiction over these crimes committed in Iraq or elsewhere, between July 17, 1968, and May 1, 2003.[4]

The IST and the national courts of Iraq have concurrent jurisdiction with respect to the following crimes: manipulation of the judiciary or the involvement of the functions of the judiciary; wastage of national resources and squandering of public assets and funds.[5] In spite of this concurrent jurisdiction, if at any point the IST demands of any other Iraqi court to transfer cases involving crimes that the IST has jurisdiction over, the national courts must transfer such cases to the IST.[6] Primacy over the crimes of genocide, crimes against humanity, and war crimes lies with the IST.[7]

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[3] IST Statute, *supra* note 1, at arts. 10, 14. [Reproduced in the accompanying notebook 1 at Tab 4].

[4] *Id*. at art. 10.

[5] *Id*. at art. 29(a).

[6] *Id*. at art. 29(c).

[7] *Id*. at art. 29(b).

III. KEY LESSONS THE IRAQI SPECIAL TRIBUNAL CAN LEARN FROM THE ICTY, ICTR, AND SCSL

A. Challenges to Legitimacy or Legality of International Criminal Tribunals

Lawyers hired by Saddam Hussein's wife have publicly indicated that they will argue that the IST lacks legitimacy, or lawful creation.[8] During his first pre-trial hearing in July, Hussein attacked the legitimacy of the IST, questioning the judge before him on the law under which the IST was created.[9] Hussein's intention may be to follow in the footsteps of Slobodan Milosevic who has been notoriously indignant in his refusal to cooperate with the ICTY. Similar to Hussein, some of the accused before the ICTY, ICTR, and SCSL have challenged the legitimacy of these tribunals. Notably, Dusko Tadic and Milosevic questioned the legitimacy of the ICTY.

The ICTY, like the ICTR, was established by a Security Council resolution.[10] Dusko Tadic, the first defendant to be tried by the ICTY, challenged the legality of the ICTY. The ICTY Trial Chamber held that it was not competent to determine its legality.

> This International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to

[8] Rory McCarthy and Jonathan Steele, *Saddam on Trial: Legitimacy and Neutrality of Court Will Be Challenged*, THE GUARDIAN, July 2, 2004, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html (last visited Oct. 10, 2004). [Reproduced in the accompanying notebook 2 at Tab 51].

[9] Rupert Cornwell, *Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House*, THE INDEPENDENT (London), July 2, 2004 (reporting that Hussein stated, "This is all theater," at his first pre-trial hearing) *available at* http://news.independent.co.uk/world/americas/story.jsp?story=537296 (last visited Oct. 4, 2004). [Reproduced in the accompanying notebook 2 at Tab 49].

[10] *See* S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). [Reproduced in the accompanying notebook 1 at Tab 6].

> those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.[11]

The Appeals Chamber of the ICTY in *Prosecutor v. Tadic*, however, disagreed with the Trial Chamber and found that "its 'inherent' power to determine the propriety of its own jurisdiction (*competence de la competence*) permitted review of the legality of the Council's actions in establishing the Tribunal."[12] It held that the ICTY had the power to review its own legitimacy and that it was under the ambit of the Security Council's broad powers to establish the ICTY.[13] The Appeals Chamber's decision precluded Tadic from bringing this issue to domestic courts to confirm the legality of the ICTY and it also prevented him from raising the issue further during his trial.[14]

The Appeals Chamber made an important point in response to Tadic's argument that the ICTY was not "established by law," which is a requirement set out in the International Covenant on Civil and Political Rights ("ICCPR").[15] The Appeals Chamber held that the requirement that the tribunal be "established by law" only requires that the ICTY is "established in accordance with the proper international standards and that it provide all the guarantees of fairness, justice, and even-handedness, in full conformity

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[11] Prosecutor v. Tadic, Case No.: IT-94-1, Decision on the Defence Motion on Jurisdiction, Aug. 10, 1995, *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (last visited Sept. 15, 2004). [Reproduced in the accompanying notebook 1 at Tab 29].

[12] MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 104 (Carolina Academic Press 1997) [hereinafter MICHAEL P. SCHARF, BALKAN JUSTICE]. [Relevant chapter reproduced in the accompanying notebook 1 at Tab 34].

[13] *Id*. at 105.

[14] *Id*. at 104.

[15] *Id*. at 105. *See International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, entered into force March 23, 1976, G.A. Res. 2200A (XXI), UN. Doc. A/6316 (1966), 999 UNTS 171, reprinted in 6 ILM 368 (1967) at art. 14(1). Article 14(1) states, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal *established by law*." [Reproduced in the accompanying notebook 1 at Tab 2].

with internationally recognized human rights instruments."[16] The Appeals Chamber determined that the ICTY fulfilled these requirements and ultimately dismissed Tadic's appeal.

During his initial appearance before the ICTY on July 3, 2001, Milosevic verbally announced his intention to challenge the legality of the establishment of the ICTY.[17] In a pre-trial motion, Milosevic stated, "I challenge the very legality of this court because it is not established in the basis of law."[18] He argued that the ICTY was an illegal entity because the Security Council did not have the power to establish it.[19] He further argued that his arrest and transfer to The Hague, the Netherlands, were unlawful because those actions were in violation of Serbian and Yugoslav constitutions.[20]

The Trial Chamber held that the creation of the Tribunal was to "restore international peace and security" and dismissed Milosevic's motion. In its view, Security Council Resolution 827 which established the ICTY, centered on the ICTY's role of promoting peace and reconciliation in the former Yugoslavia.[21] Therefore, the Trial

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[16] MICHAEL P. SCHARF, BALKAN JUSTICE, *supra* note 12, at 106. [Relevant chapter reproduced in the accompanying notebook 1 at Tab 34].

[17] Prosecutor v. Milosevic, Case No.: IT-02-54, Transcript, July 3, 2001. (Milosevic stated, "I consider this a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [sic] illegal organ."). [Reproduced in the accompanying notebook at Tab 20].

[18] *Milosevic Challenges the Legality of the U.N. Tribunal*, ONLINE NEWSHOUR, Feb. 13, 2002, *available at* http://www.pbs.org/newshour/updates/february02/milosevic _2-13.html (last visited Oct. 20, 2004). [Reproduced in the accompanying notebook 2 at Tab 54].

[19] Prosecutor v. Milosevic, Case No.: IT-02-54, Decision on Preliminary Motions, Nov. 8, 2001, at 3, *available at* http://www.un.org/icty/milosevic/trialc/decision-e/1110873516829.htm (last visited Oct. 26, 2004) [hereinafter Prosecutor v. Milosevic, Decision on Preliminary Motions]. [Reproduced in the accompanying notebook 1 at Tab 23].

[20] *Id*.

[21] *Id*.

Chamber held that the creation of the ICTY was within the powers of the Security Council under Article 39[22] and Article 41[23] of the Charter of the United Nations and accordingly dismissed his motion on this ground.[24] In determining whether the Trial Chamber could determine the ICTY's legitimacy, it deferred to the Appeals Chamber's decision in Tadic that the Tribunal had the competence to determine its own legality.[25]

The SCSL's creation is substantially different from the creation of the ICTY and ICTR. The SCSL was established by a treaty between the Government of Sierra Leone and the United Nations to prosecute those with the greatest responsibility for violations of international humanitarian law.[26] In the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Amnesty Agreement"), the Government of Sierra Leone granted blanket amnesty to all participants in the Sierra Leonean conflict. Later, however, the Appeals Chamber of the SCSL determined that the Lomé Amnesty Agreement was not valid before the SCSL.[27] The Appeals Chamber also declared that it was not vested with the power to determine its

[22] U.N. CHARTER art. 39 (giving the Security Council the power to "determine the existence of any threat to peace, breach of the peace, or act of aggression" and it "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 . . . to maintain or restore international peace and security"). [Reproduced in the accompanying notebook 1 at Tab 8].

[23] *Id*. at art. 41 (authorizing the Security Council to decide which "measures not involving the use of armed force" will be taken to fulfill Article 39).

[24] Prosecutor v. Milosevic, Decision on Preliminary Motions, *supra* note 19, at 3. [Reproduced in the accompanying notebook 1 at Tab 23].

[25] *Id*. at 4.

[26] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N.-Sierra Leone, *available at* http://www.sc-sl.org/scsl-agreement.html (last visited Oct. 15, 2004) [hereinafter Agreement between the UN and Sierra Leone]. [Reproduced in the accompanying notebook 1 at Tab 1].

[27] Prosecutor v. Kallon and Kamara, Case No.: SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Mar. 13, 2004, *available at* http://www.sc-sl.org/SCSL-04-16-PT-033-I.pdf (last visited Oct. 15, 2004). [Reproduced in the accompanying notebook 1 at Tab 15].

own legality and explicitly stated that the ICTY's Tadic decision was not binding on it.[28] The Appeals Chamber articulated the SCSL's legal basis in *Prosecutor v. Charles Taylor*.[29] It stated that although the SCSL was established in a different manner from the ICTY and the ICTR, it was set up in a lawful manner by the Security Council which derived its power from the United Nations Charter.[30]

If Saddam Hussein or any other defendant that is tried before the IST challenges the legitimacy or legality of the IST, it is an important issue that the IST will need to fully examine in light of the unique circumstances surrounding the creation of the IST. The IST Trial Chamber or Appeals Chamber must determine whether it has the competency to examine its own legality and the legality of the IST Statute. In any decision it makes on these determinations, the IST should base its decision firmly in the law and craft an opinion that will satisfy not only the Iraqis but also the entire world who will surely be watching the actions of this Tribunal.

The IST's analysis of its legitimacy will differ from the other ad hoc tribunals. Unlike the ICTY and the ICTR, the IST was not created by a UN Security Council resolution. And unlike the SCSL, the IST was not created by a treaty but was established by the Coalition Provisional Authority prior to transfer of sovereignty back to Iraq.

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[28] Simon Meisenberg, *The Lomé Amnesty Decision of the Special Court for Sierra Leone* (June 28, 2004), *available at* http://www.ifhv.de/ (last visited Oct. 5, 2004). [Reproduced in the accompanying notebook 2 at Tab 52].

[29] Prosecutor v. Taylor, Case No.: SCSL-2003-01-I, Decision on Immunity from Jurisdiction, May 31, 2004, *available at* http://www.sc-sl.org/SCSL-03-01-I-059.pdf (last visited Oct. 5, 2004). [Reproduced in the accompanying notebook 1 at Tab 30].

[30] *See id*. at 18. (the Appeals Chamber stated, "[I]t was clear that the power of the Security Counsel to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone")

Because the IST follows in time the ICTY, ICTR, and SCSL, it is only natural that it should look to previous ICTY, ICTR, and SCSL decisions on legality and borrow and apply similar logic and reasoning even though it may come to far different conclusions.

B. The *Tu Quoque* Defense

The *tu quoque* defense has been attempted by individuals accused of war crimes, crimes against humanity, and genocide in the Nuremberg Tribunal and the ICTY. Likewise, Saddam Hussein may attempt to raise a *tu tuoque* defense and claim American involvement in the crimes he is charged with. The Latin phrase *tu quoque* means "thou also" or "you too."[31] A defendant raising the *tu quoque* defense claims justification for his or her acts based on the actions of the state that was harmed or the state making the accusation because it behaved in the same way as the accused.[32] In other words, the accused is saying, "You cannot fairly criticize me on that basis, for you are just as bad. You are doing the same yourself."[33] The defense of *tu quoque* is not invoked to convince the other side "to desist from its unlawful conduct . . . but as an estoppel against the enemy's subsequent attempt to call into question the lawfulness of the same kind of conduct of the other side."[34]

The *tu quoque* defense has had marginal success in the Nuremberg Tribunal and the ICTY. At Nuremberg, only one defendant, Grand Admiral Karl Donitz, Commander-in-Chief of the German Navy from 1943 and succeeding to the position of Head of State from Adolf Hitler in 1945, received a positive result from raising this defense.[35] Donitz

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[31] Stephanie Berlin, *The Tu Quoque Defense*, Memorandum for the Office of the Prosecutor of the ICTR, Nov. 2002, at 4 [hereinafter Stephanie Berlin, *The Tu Quoque Defense*]. [Reproduced in the accompanying notebook 2 at Tab 58]. *See also*, Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 925 (2003) [hereinafter Michael P. Scharf, *The Legacy of the Milosevic Trial*]. [Reproduced in the accompanying notebook 2 at Tab 43].

[32] *Id*.

[33] Michael P. Scharf, *The Legacy of the Milosevic Trial*, *supra* note 31.

[34] Stephanie Berlin, *The Tu Quoque Defense*, *supra* note 31, at 9.

[35] *Id*. at 15.

was charged with waging unrestrictive submarine warfare, among other charges. In response to this charge, his defense argued that his order forbidding German naval ships from helping survivors from a sunken British vessel, the *Laconia*, was given because American navy officers had an identical policy.[36] Donitz's defense procured evidence from U.S. Admiral Chester Nimitz, commander of the American fleet in the Pacific, in which the Admiral admitted that the U.S. Navy had a similar policy of unrestricted submarine warfare.[37] Instead of claiming that Donitz's action was justified because the Americans had a similar policy, Donitz's defense argued that neither the German nor American policy was illegal since "the universality of these acts demonstrated that the laws of war had changed through practice so as to free them of their illegal character."[38] The Nuremberg Tribunal, without ever stating that it had accepted a *tu quoque* defense, did not convict Donitz of unrestricted submarine warfare. In other cases at Nuremberg, this defense was unsuccessful.

At the ICTY, in the case of *Prosecutor v. Kupreskic et al.*, the Trial Chamber stated at the *tu quoque* defense is "irrelevant because it does not tend to prove or disprove any of the allegations made in the indictment against the accused."[39] The *Kupreskic* case involved six defendants who allegedly helped Bosnian Croat forces kill more than one

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[36] *Id*. at 18.

[37] *Id*.

[38] *Id*.

[39] Prosecutor v. Kupreskic *et al.*, Case No.: IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, Feb. 17, 1999, at 3. [Reproduced in the accompanying notebook 1 at Tab 17].

hundred Bosnian civilians and destroying property including two mosques in 1993.[40] The six defendants sought to use a *tu quoque* defense and argue that Bosnian Muslims committed atrocities against Bosnian Croats in Bosnia and Herzegovina.[41] In rejecting the *tu quoque* defense, the Trial Chamber reiterated its previous view that "the *tu quoque* principle does not apply to international humanitarian law."[42] It further went on to state that the obligations to comply with international humanitarian law are "designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties."[43] The ICTY's position on the *tu quoque* defense seems to be that in no circumstance in ICTY proceedings can the *tu quoque* defense be used to mitigate the responsibility of the accused when he or she is tried for crimes in violation of international humanitarian law.

At the IST, Saddam Hussein and others charged at the IST may attempt to raise the *tu quoque* defense and argue that the United States (who authorized the Iraqi Governing Council to create the IST) illegally invaded Iraq or had involvement in the actions which ultimately lead to the charges. While the Nuremberg and ICTY Tribunals' policy of ignoring the *tu quoque* defense has drawn criticism that the policy reinforces the notion of victor's justice,[44] the IST should be careful in analyzing the *tu tuoque* defense so as not to appear to be enforcing that notion. The IST may have to allow Saddan

[40] Stephanie Berlin, *The Tu Quoque Defense*, *supra* note 31, at 25. [Reproduced in the accompanying notebook 2 at Tab 58].

[41] Prosecutor v. Kupreskic, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, *supra* note 39, at 3. [Reproduced in the accompanying notebook 1 at Tab 17].

[42] *Id*.

[43] *Id*.

[44] Stephanie Berlin, *The Tu Quoque Defense*, *supra* note 31, at 22. [Reproduced in the accompanying notebook 2 at Tab 58].

Hussein to raise the issue of the invasion by the United States of Iraq in March 2003, in the context of arguing that the definition of the crime of aggression is not clearly established, much as the Nuremberg Tribunal allowed Donitz to raise Nimitz's actions to show that the law on submarine warfare was not clearly established. If faced with a motion by the defense raising the *tu quoque* defense, the IST should look to the examples set forth at Nuremberg and at the ICTY.

C. Asserting the "Right to Self Representation"

The IST Statute states that the accused is guaranteed a right to self-representation.[45] It has been predicted that Saddam Hussein will follow Slobodan Milosevic's lead and attempt to represent himself during his upcoming trial. Although his wife has hired a team of international lawyers, Hussein may choose to assert a right to self-representation having observed how successful Milosevic has been in representing himself. During Hussein's first appearance before the IST on July 1, 2004, he took the opportunity to speak on his political views as well as verbally attack the 2003 invasion in Iraq. This is very similar to the nature of Milosevic's speeches before the ICTY and therefore, it is not inconceivable that Hussein will attempt to represent himself, like Milosevic, with an army of lawyers assisting him from behind the scenes.

The ICTY, ICTR, and the SCSL vary in their treatment of the right to self-representation. Famously, the ICTY allowed Milosevic to represent himself during his trial which has been criticized by many observers. During Milosevic's initial appearance before the ICTY, he refused to enter a plea and declined to appoint legal representation.[46] The prosecution raised their concern that Milosevic was unable to effectively represent himself[47] The Trial Chamber denied the prosecution's request for appointment of counsel to Milosevic and found that while Milosevic has a right to counsel under

[45] IST Statute, *supra* note 1, at art. 20(d). [Reproduced in the accompanying notebook 1 at Tab 5].

[46] Prosecutor v. Milosevic, Case No.: IT-02-54, Transcript, July 3, 2001, *supra* note 17. [Reproduced in the accompanying notebook 1 at Tab 20].

[47] In requesting that the ICTY consider appointing counsel in addition to amicus counsel, the prosecution pointed out that Milosevic submitted a "confusing" motion which "if counsel were assigned to him, these matters would not be as confusing." Prosecutor v. Milosevic, Transcript, August 30, 2001, at 15. [reproduced in the accompanying notebook 1 at Tab 21].

customary international law, he also "has a right not to have counsel" and "to represent himself."[48] The Chamber went on to say, "[I]t would not be practical to impose counsel on an accused who wishes to represent himself . . . ."[49] This decision enabled Milosevic to turn the ICTY Trial Chambers into his own personal stage for making "unfettered speeches throughout the trial" and treating the prosecution, witnesses and the trial chamber judges in a way that would never be permitted of ordinary defense counsel.[50]

During this same initial appearance, the Trial Chamber appointed amicus curiae counsel. The Trial Chamber chose to appoint amicus curiae because the Court was able to avoid imposing counsel on Milosevic and it did not compromise the right to self representation.[51] The amicus curiae's role was not to represent Milosevic, but rather to ensure Milosevic would get a fair trial by assisting the Trial Chamber in the proper administration of justice. However, appointing amicus curiae was not a perfect solution "as the amicus counsel is not a party to the trial and may disturb the adversarial nature of the proceeding."[52] Despite the appointment of amicus curiae, throughout his trial, rather than defending himself against the charges, he used his time in court to "play on Serbia's

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[48] *Id*. at 18.

[49] *Id*.

[50] Michael P. Scharf and Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. (forthcoming 2004). [Reproduced in the accompanying notebook 2 at Tab 42].

[51] Simon Meisenberg, *The Right to Self Representation Before the Special Court for Sierra Leone*, June 19, 2004, *available at* http://www.ifhv.de/ (last visited Oct. 5, 2004). [Reproduced in the accompanying notebook 2 at Tab 53].

[52] *Id*.

psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing."[53]

In June 2004, it became apparent that for health reasons Milosevic would not be able to continue defending himself before the ICTY.[54] His defense was postponed numerous times on account of his ill health and on September 22, 2004, the Trial Chamber concluded that Milosevic was not fit to represent himself and that if he did continue to do so, there would be further delays.[55] The Trial Chamber found that the right to self representation is not absolute and that the Trial Chamber is competent to assign counsel "in the interests of justice."[56] The Trial Chamber stated that "[t]he fundamental duty of the Trial Chamber is to ensure that the trial is *fair* and *expeditious*" and it decided to assign counsel to Milosevic.[57] Milosevic's amicus curiae appealed the Trial Chamber decision and on November 1, 2004, the ICTY Appeals Chamber ruled that Milosevic had a right to defend himself but that he must have standby counsel if his "health problems resurface with sufficient gravity."[58]

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[53] *Id*. at 3, citing Dusko Doder, *Book Review of Slobodan Milosevic and the Destruction of Yugoslavia by Louis Sell*, THE NATION, May 27, 2002, at 25. [Reproduced in the accompanying notebook 1 at Tab 37].

[54] Ian Black, *Milosevic's Poor Health Hits Trial: Judge Orders Radical Review as New Delay Halts Defense Case*, THE GUARDIAN, July 6, 2004, *available at* http://www.guardian.co.uk/yugo/article/0,2763,1254973,00.html. [Reproduced in the accompanying notebook 2 at Tab 47].

[55] Prosecutor v. Milosevic, Reasons for Decision on Assignment of Defense Counsel, Sept. 2004, quoting Transcript of Sept. 2, 2004, *available at* http://www.un.org/icty/transe54/040902IT.htm. [Reproduced in the accompanying notebook 1 at Tab 24].

[56] *Id*.

[57] *Id*.

[58] Prosecutor v. Milosevic, Case No.: IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, Nov. 1, 2004, *available at* http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm. [Reproduced in the accompanying notebook 1 at Tab 22].

The ICTR in *Prosecutor v. Barayagwiza* did not follow the lead of the ICTY in Milosevic and imposed counsel on the accused in the interest of justice.[59] Barayagwiza filed a motion with the Trial Chamber to withdraw his counsel's mandate to represent him. The Trial Chamber refused to grant his motion and held that, "[O]nly in 'exceptional circumstances' will Counsel assigned by the Tribunal represent an accused to be permitted to withdraw from the case."[60] The Trial Chamber further stated that appointed counsel "are under obligation to continue to represent an accused to the best of his ability, unless the Chamber decides that they are permitted to withdraw."[61] The Trial Chamber observed that Barayagwiza did not lack confidence in his lawyers and that the reason he wanted to withdraw them was because he did not believe he would be given a fair trial.[62] The Trial Chamber found this allegation to be without foundation and rejected Barayagwiza's motion because it was "merely boycotting the trial and obstructing the course of justice."[63]

The SCSL encountered the issue of self-representation in *Prosecutor v. Norman*.[64] In that case, Sam Hinga Norman, the former Minister of Interior Affairs of Sierra Leone,

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[59] Prosecutor v. Barayagwiza, Case No.: ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, Nov. 2, 2000, *available at* http://www.ictr.org/default.htm. [Reproduced in the accompanying notebook 1 at Tab 10].

[60] *Id*..

[61] *Id*..

[62] *Id*..

[63] *Id*.

[64] Prosecutor v. Norman, Case No. 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, June 8, 2004. [Reproduced in the accompanying notebook 1 at Tab 25].

was jointly charged with two other persons of crimes against humanity and war crimes.[65] Just after the prosecutor's opening statements, Norman notified the Trial Chamber that he decided to defend himself.[66] During pre-trial hearings and motions, Norman was represented by counsel that he had picked. Although the Trial Chamber stated that it was "[m]indful of the International Human Rights norms which guarantee both a right of self-representation and a right of legal assistance,"[67] it rejected Norman's request for three reasons. First, Norman was being tried with two co-defendants. Allowing Norman to represent himself would be "to the detriment of the rights of his two co-accused to a fair and expeditious trial."[68] Second, Norman waited until after the prosecutor's opening statements "after over a year of pre-trial detention" and if he assumed his own defense, it "would necessarily result in unnecessarily prolonging the proceedings.[69] Third, the right to self-representation was not absolute, but a qualified right.[70] The Trial Chamber agreed with a U.S. court decision which said that self-representation "threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence."[71]

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[65] Simon Meisenberg, *The Right to Self Representation Before the Special Court for Sierra Leone*, *supra* note 41. [Reproduced in the accompanying notebook 2 at Tab 53].

[66] *Id*.

[67] Prosecutor v. Norman, Decision on the Application of Samuel Hinga Norman for Self Representation, *supra* note 64. [Reproduced in the accompanying notebook 1 at Tab 25].

[68] *Id*.

[69] *Id.*

[70] *Id*.

[71] *Id*.

The SCSL eventually assigned standby counsel to Norman, while preserving his right to self-representation.[72] The Trial Chamber defined the role of standby counsel stating that they would "assist [him] in the exercise of [his] self-representation . . . preparation and presentation of [his] case during the trial phase . . . offer legal advice . . . and address the Court whenever [he] request[s] them to address the Court."[73] The SCSL's decision to appoint standby counsel was a departure from the ICTY's decision to appoint amicus curiae. Standby counsel differs from amicus curiae in that they are party to the trial and do not disturb the adversarial process.[74]

The IST should look carefully to the most analogous case – *Prosecutor v. Milosevic* in the ICTY. Like Milosevic, Hussein is a former head of state. In addition, Hussein and Milosevic are notorious for their alleged war crimes. Like Milosevic's trial before the ICTY, Hussein's trial is likely to be intently observed not just by Iraqis but by the world community. Although the IST Statute states that the accused has the right to self-representation, it is ambiguous on whether this right is absolute. If granted the right to self-representation, Hussein, like Milosevic, will be given a world stage upon which he will be given the opportunity to disrupt the proceedings of the IST and make speeches intended not to help in his defense, but to stir up the emotions of the Iraqi people and to disturb the course of justice. The IST should look to the analyses of its predecessors in

[72] Prosecutor v. Norman, Case No. SCSL-04-14-T, Transcript, June 10, 2004, *available at* http://www.sc-sl.org/Transcripts/CDF-061004.pdf (last visited Oct. 5, 2004). [Reproduced in the accompanying notebook 1 at Tab 26].

[73] *Id*.

[74] Simon Meisenberg, *The Right to Self Representation Before the Special Court for Sierra Leone*, *supra* note 51. [Reproduced in the accompanying notebook 2 at Tab 53].

evaluating whether the right to self-representation is an absolute right and under what circumstances the Trial Chamber can assign counsel.

D. Standard of Competence for Attorneys

The Special Tribunal Statute does not provide guidelines on the standard of attorney competence. However, the Statute does provide for the right to self representation or legal assistance of the defendant's choosing.[75] The Statute also ensures that a defendant who does not have the means to pay for legal counsel has the right to have counsel assigned by the IST at no cost to the defendant.[76] There is an ongoing dispute in the media between the IST and the lawyers hired by Saddam Hussein's wife. While Hussein's lawyers are claiming that they are not being granted access to Hussein, the IST has countered that the lawyers have not been recognized by Iraqi authorities. As the IST addresses the issue of attorney competence, it should strive to fully respect the rights of all of the accused that stand before it and comply with international standards of human rights.

In the ICTY, a defense counsel is considered qualified to represent defendants if the Registrar is satisfied that he or she:

> (i) is admitted to the practice of law in a State, or is a university professor of law;
> (ii) has written and oral proficiency in [English or French], unless the Registrar deems it in the interests of justice to waive this requirement;
> (iii) is a member in good standing of an association of counsel practicing at the [ICTY] recognised by the Registrar;
> (iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the

[75] IST Statute, *supra* note 1, at art. 20(d)(4). [Reproduced in the accompanying notebook 1 at Tab 5].

[76] *Id*.

> [ITCY], unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
> (v) has not been found guilty in relevant criminal proceedings;
> (vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the [ICTY] or the administration of justice, or otherwise bring the [ICTY] into disrepute; and
> (vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.[77]

The ICTR Rules of Procedure and Evidence ("ICTR RPE") requires only that defense counsel be "admitted to the practice of law in a State, or is a University professor of law."[78]

The Appeals Chamber in *Prosecutor v. Tadic* held "the essential characteristic of a tribunal 'established by law' is that it 'genuinely afford the accused the full guarantees of fair trial set out in Art. 14 of the International Covenant on Civil and Political Rights.'"[79] Article 14 of the ICCPR provides, among others, a "fair and public hearing by a competent, independent and impartial tribunal established by law."[80] The ICTY and ICTR provide guidelines for the IST's own rules of procedure and evidence. The ICTY

[77] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, rule 44. [Reproduced in the accompanying notebook 1 at Tab 3].

[78] *Id*.

[79] Melanie Popper, *Standard of Competence for Attorneys Who Represent Defendants Before the International Criminal Tribunal for Rwanda*, Memorandum for the Office of the Prosecutor, Dec. 2000, at 7. [Reproduced in the accompanying notebook 2 at Tab 60].

[80] *See* International Covenant for Civil and Political Rights, art. 14, *supra* note 15. [Reproduced in the accompanying notebook 1 at Tab 2].

and ICTR standards for attorney qualifications ensure that defendants are represented by competent attorneys who satisfy minimum international human rights standards.

Attorney competence is an issue the IST should carefully examine as it has implications for effective representation of defendants. The IST should ensure that attorneys who appear before it, including prosecutors, meet the minimum standards as set out in international law, including the ICTY Rules of Procedure and Evidence ("ICTY RPE") and the ICTR RPE. The IST should also look to the International Bar Association[81] and the American Bar Association[82] which have programs for training defense counsel who are to appear in war crimes trials.

[81] For information on the International Bar Association's programs on human rights and humanitarian law training, please call Mahmuda Ali at +44 (0)20-7629-1206, or email questions to mahmuda.ali@int-bar.org.

[82] For information on the American Bar Association's programs on human rights and humanitarian law training, please call +1(202) 662-1000, or email questions to intllaw@abanet.org.

E. The Importance of Building an Initial Prosecutorial Strategy

Unlike the ICTY, ICTR, and the SCSL, the IST has no limits as to the level of the perpetrators to be prosecuted. Because of limited resources and judges, the IST cannot prosecute everyone accused of crimes under the jurisdiction of the IST. Thus, the IST should create a prosecutorial strategy. "A successful initial prosecutorial strategy . . . stems from a mandate that can be established within the political expectations of a reluctant international community."[83] This mandate should not be too vague for there is a greater chance that the mandate will be frustrated or even fail.[84] A workable mandate is one that is specific and can be reasonably accomplished while keeping in mind the budget and timeframes originally contemplated as well as the true purpose of the tribunal – to help victims whose lives were destroyed by the acts of the accused.[85] The SCSL is a good example of how a specific mandate was implemented into action by a prosecutor who understood that an initial prosecutorial strategy was necessary for a successful international tribunal.

To develop an initial prosecutorial strategy, it is important to build the prosecution and support teams around a general strategy which should be developed before deployment.[86] Building the prosecution office around the strategy allows for efficient hiring of the prosecution staff which will accomplish the mandate.[87] An

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[83] David Crane, Address at Case Western Reserve University School of Law Klatsky Lecture (Oct. 27, 2004). [Reproduced in the accompanying notebook 2 at Tab 66].

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *Id*.

efficient hiring will reduce the occurrence of endemic "hall walkers" syndrome which is found in some international organizations.[88] The initial prosecutorial strategy should be planned out as far in advance as possible.

The SCSL Prosecutor immediately mapped out his prosecutorial strategy in the first two months he was appointed.[89] He planned his strategy to be executed according to the SCSL's mandate which was to "prosecute persons who bear the *greatest responsibility* for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law."[90] The operative words in the SCSL's mandate are "greatest responsibility."[91] The inclusion of these words in the SCSL mandate meant that the Court would not cast a wide net but would prosecute and hold accountable the warlords with the greatest responsibility for the murder, rape, maiming, and mutilation of over 500,000 people.[92] Focusing on those with the greatest responsibility would allow the SCSL to be efficient and effective in dispensing justice while staying within its budgetary and time constraints.[93]

The SCSL Prosecutor's strategy also included timed phases from pre-deployment all the way to trial and did not deviate from this strategy.[94] The SCSL Prosecutor also

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[88] *Id*.

[89] *Id.*

[90] Agreement between the UN and the Sierra Leone, *supra* note 26, at para. 1. [Reproduced in the accompanying notebook 1 at Tab 1].

[91] David Crane, Address at Case Western Reserve University School of Law Klatsky Lecture, *supra* note 83. [Reproduced in the accompanying notebook 2 at Tab 66].

[92] *Id*.

[93] *Id*.

[94] *Id*.

time phased the Office of the Prosecutor's movement into Sierra Leone.[95] The Office of the Prosecutor started by putting into place its support system, investigators, and finally trial counsel.[96] The SCSL Prosecutor also sought to develop connections with domestic players such as the Sierra Leone government, non-governmental organizations, and the people of Sierra Leone.[97] In addition, the Prosecutor sought to understand the international dynamics affecting the SCSL trials. These international players included States, international criminal cartels, corporations, terrorists, and heads of state who engaged in joint criminal enterprises.[98]

In addition to developing an initial prosecutorial strategy which accomplishes the mandate of the IST, it is important for the Prosecutor of the IST to set a "new standard in judicial effectiveness that begins to establish a respect for legal institutions."[99] This is especially important in Iraq where the legal system is being rebuilt and where a renewed respect for fair judicial processes and the rule of law is a legacy that the IST can leave behind.

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[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] *Id*.

F. Gaining Credibility in the Community: The Importance of an Effective Outreach Program

The IST Statute provides for the hiring of a "public relations expert" to give "regular briefings to the press and the public at large with respect to the developments relating to the Tribunal."[100] One of the reasons of trying Saddam Hussein and his associates is to bring justice and reconciliation to Iraq for the horrors its people endured under his rule. In addition to a hiring a public relations expert, to be effective in achieving these aims, the IST must develop a good outreach program to inform the Iraqis of "the IST's plans, including the proposed timeframe for its activity, and what the IST intends to achieve within it."[101] If the IST does not develop an effective outreach program and does not inform Iraqis of its mandate and its process, the IST risks not being "seen as a credible contributor to justice and stability."[102] It is important for the IST to explain to Iraqis the nature of the indictments it issues and to proceed throughout the trials in an open and transparent manner.[103]

The ICTY's Outreach Programme's mandate is to "bridge the divide separating the [ICTY] in The Hague from the communities it serves in the states and territories that have emerged from the former Yugoslavia."[104] Despite its mandate, many regard the

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[100] IST Statute, *supra* note 1, at art. 9. [Reproduced in the accompanying notebook 1 at Tab 5].

[101] *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, U.S. Institute of Peace, Special Report, June 2004, at 3, *available at* http://www.usip.org/pubs/specialreport/sr122.pdf [hereinafter Building the Iraqi Special Tribunal]. [Reproduced in the accompanying notebook 2 at Tab 64].

[102] *Id*.

[103] *Id*.

[104] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ICTY OUTREACH PROGRAMME INTRODUCTION *available at* http://www.un.org/icty.bhs/outreach_info.htm (last visited Oct. 24, 2003) [hereinafter ICTY OUTREACH PROGRAMME]. [Reproduced in the accompanying notebook 2 at Tab 67].

ICTY to have failed at developing and implementing an effective outreach program – instead of focusing on the people in the region that the ICTY concerned, the ICTY reached out primarily to its international donors and diplomatic supporters, which has contributed to widespread misunderstanding and lack of credibility in the eyes of many in the region.[105] As explained further below in Section I, Milosevic has been able to gain the sympathy and support of many in the former Yugoslavia despite the atrocities for which he is being tried.

An illustration of the ICTY's failure to inform the people in country is the widespread misunderstandings of the people of the former Yugoslavia which continued during the trials. For example, in 2003, Gabrielle Kirk McDonald, a former judge and President of the ICTY, told of a story where notwithstanding the 301-page judgment against Tadic, which included "a detailed description of the horrors of the Omarska and Keraterm camps, many in the region still believed the tale that these were 'collection centers,' temporarily housing those who desired to leave the Prijedor area."[106] Thus, the ICTY has largely failed at playing a reconciliatory role in the region.[107] To this day, the

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[105] Building the Iraqi Special Tribunal, *supra* note 101. [Reproduced in the accompanying notebook 2 at Tab 64].

[106] Gabrielle Kirk McDonald, Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia, Remarks at the University of Texas School of Law International Conference *International War Crimes Trials: Making a Difference?* (Nov. 6, 2003), in INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE?: PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 18-19 (Steven R. Ratner & James L. Bischoff eds., University of Texas School of Law Publications 2003). [Reproduced in the accompanying notebook 1 at Tab 33].

[107] *Id*.

ICTY does not have outreach factored into its budget; the outreach function is instead funded solely by voluntary contributions from outsiders.[108]

Similar to the experience of the ICTY, the ICTR has also largely failed to reach out to Rwandans and educate them on the ICTR. The Rwandan government is one of the most outspoken critics of the ICTR and its negative views of the ICTY is reflected in Rwandan popular opinion.[109] The majority of Rwandans' knowledge of the ICTY and its operations is "extraordinarily low."[110] In a survey conducted in February 2002, only 0.7% of respondents stated they were "well informed" and 10% "informed" about the work of the ICTR.[111] 55% of those surveyed claimed to be "not well informed" and 31.3% were "not at all informed."[112] In addition, a majority of Rwandans feel that the ICTR is "a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the [Rwandan Patriotic Front]."[113]

The SCSL, learning from the ICTY and ICTR's failures to conduct effective outreach programs, has placed a strong emphasis on community outreach from the

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[108] ICTY OUTREACH PROGRAMME, *supra* note 104. [Reproduced in the accompanying notebook 2 at Tab 67].

[109] Timothy Longman, The Domestic Impact of the International Criminal Tribunal for Rwanda, Remarks at the University of Texas School of Law International Conference *International War Crimes Trials: Making a Difference?* (Nov. 6, 2003), in INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE?: PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 36 (Steven R. Ratner & James L. Bischoff eds., University of Texas School of Law Publications 2003). [Reproduced in the accompanying notebook 1 at Tab 31].

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Cf*. KATHY MARKS, (INTERNATIONAL CRISIS GROUP), THE RWANDA TRIBUNAL: JUSTICE DELAYED (2001), *available at* http://www.globalpolicy.org/intljustice/tribunals/2001/0607icg.htm (last visited Oct. 25, 2004). [Reproduced in the accompanying notebook 2 at Tab 70].

Court's inception. The SCSL's outreach program is widely considered to have played a large role in garnering credibility among the local population.[114] The SCSL has conducted its outreach program through "town hall forums around the country, ongoing communications through local media, and regular meetings and consultations with a broad range of civil society representatives."[115] The Outreach section of the SCSL has also included the involvement of the Prosecutor, David Crane, who for four months traveled the Sierra Leone countryside and visited every district and every major town.[116] Mr. Crane felt it important to meet the people of Sierra Leone and hear first-hand their stories of the tragedies that befell them.[117]

In addition to town hall meetings, consultations, and communications through local media, the SCSL's outreach program created "The Special Court Made Simple," a booklet aimed at making the SCSL's "mission and procedures more accessible to Sierra Leoneans, especially those at the village level."[118] This booklet explains key concepts relating to the SCSL in simple language and is accompanied by illustrations that communicate the written words. Included in the booklet are sections on each step of the investigative and trial steps and has sections such as "Who will the Special Court Try?",

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[114] *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, *supra* note 101. [Reproduced in the accompanying notebook 2 at Tab 64].

[115] *Id*.

[116] David Crane, Address at Case Western Reserve University School of Law Klatsky Lecture, *supra* note 83. [Reproduced in the accompanying notebook 2 at Tab 66].

[117] *Id*.

[118] The Special Court Made Simple, Special Court for Sierra Leone Outreach Section, Aug. 2003, *available at* http://www.sc-sl.org/specialcourtmadesimple.pdf. [Reproduced in the accompanying notebook 2 at Tab 71].

"Why was the Special Court for Sierra Leone Created?", and "How Does the Special Court Work?"

Following the example of the SCSL, the IST should explore the possibility of developing an outreach program immediately. It is important to inform the Iraqi public of how the IST works and why it has been created. As seen in the regions affected by the ICTY and the ICTR, if the IST fails to develop an effective outreach program, it risks being dismissed by an indifferent and or uninformed Iraqi public as a Court that does not have much significance. Although the current security situation may preclude launching some aspects of an outreach program in the near future, the IST should start planning an outreach program and implement initiatives such as publication of a booklet modeled on that provided by the SCSL as soon as possible. As the security situation improves, the IST can take other steps to inform the Iraqi public of its mandate and mission. The IST should do its utmost to ensure that ordinary Iraqis see that the IST is fair in the administration of justice and should take steps to dispel the notion that the IST is a "kangaroo court."

G. Protection of Witnesses

The rights of the accused versus the requirement of protection of victims and witnesses has been raised numerous times in the ICTY. Frequently in international criminal tribunals, cooperation by witnesses largely hinges on the provision of witness protection.[119] This issue was first raised in the trial of Dusko Tadic. Much to the chagrin of many ICTY observers, the prosecutor was forced to abandon rape charges after its only rape witness refused to testify.[120] She explained that she and her family were threatened and that she was no longer willing to testify because of the threats.[121]

An international court or tribunal's ability to protect witnesses directly affects its legitimacy.[122] If criminals are able to intimidate witnesses and an international court or tribunal is unable to protect them, witnesses will not testify in the courtroom and the judicial process will be rendered ineffective. The issue of protection of witnesses is important as a court's legitimacy may suffer if any of its witnesses are harmed.[123]

The ICTY Statute guarantees the accused the right "to examine, or have examined, the witnesses against him."[124] Following the adoption of the ICTY Statute, the ICTY RPE were drafted and adopted. ICTY RPE Rule 69 provides for the protection of victims and witnesses. It states that in exceptional circumstances, the prosecutor may request to a

[119] Sarah Suscinski, *Witness Protection*, Memorandum for the Office of the Prosecutor, Nov. 2002, at 1. [Reproduced in the accompanying notebook 2 at Tab 62].

[120] *Id*. at 2.

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] Statute of the International Criminal Tribunal for the Former Yugoslavia, at art. 21(e). [Reproduced in the accompanying notebook 1 at Tab 4].

judge or the Trial Chamber that the identity of a particular victim or witness who is in danger be shielded until that person is brought under the protection of the ICTY.[125] Subject to rules providing for specific measures, the identity of victims or witnesses shall be disclosed to the defense to allow sufficient time to prepare his or her case.[126]

Specific measures provided for victims and witnesses include non-disclosure of identity to the public or media of their identity or their whereabouts.[127] For example, names may be expunged from public court records or testimony may be given through voice-altering devices.[128] The ICTY has also created a Victims and Witnesses Section. The Victims and Witnesses Section is a specialized section within the ICTY Registry that provides assistance to victims and witnesses. There are three units of the Victims and Witnesses Section: "the Protection Unit which co-ordinates responses to the security requirements, the Support Unit which provides social and psychological counseling and assistance to witnesses, and the Operations Unit which is responsible for logistical operations and witness administration."[129] The Victims and Witnesses Unit duties range from assisting witnesses with disabilities travel to the seat of the ICTY to assisting in the temporary or permanent relocation of witnesses where there are serious threats to their lives.[130]

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[125] ICTY RPE, *supra* note 77, at rule 69. [Reproduced in the accompanying notebook 1 at Tab 3].

[126] *Id*. at rule 70.

[127] *Id*. at rule 75.

[128] *Id*.

[129] View From the Hague: Witnesses Given Every Support Testifying Before the ICTY, Feb. 18, 2004, *available at* http://www.un.org/icty/bhs/outreach/articles/eng/article-040218e.htm. [Reproduced in the accompanying notebook 2 at Tab 75].

[130] *Id*.

Although the protection of victims and witnesses is provided for in the ICTY Statute and the ICTY RPE, it is important to balance the need to protect witnesses against the right of the accused to have a fair trial and have the opportunity to confront witnesses that testify against them. As mentioned above, the issue of witness protection was raised in the ICTY's first case, *Prosecutor v. Tadic*. The ICTY prosecutor's office filed a motion requesting protection of applicable witnesses.[131] They asked that some of the witnesses' identities be kept from the public and the media.[132] For other witnesses, the prosecution asked that their identities be completely shielded from the accused or his lawyers.[133] The Trial Chamber granted the prosecution's request to keep the witness identities from the public and the media finding that Rule 75 of the ICTY RPE explicitly provided for such measures.[134]

However, the Trial Chamber did not find that the ICTY RPE authorized the prosecution's motion on witness anonymity.[135] The Trial Chamber created a five-prong test which must be satisfied in order to grant a motion of witness anonymity.[136] They are:

1) there must be "an existence of a real fear for the safety of the witness;"
2) the prosecution must show that the witness's testimony is "sufficiently relevant and important to the case;"
3) "there must be no prima facie evidence of the witness's unworthiness in any way;"
4) there is no witness protection program in existence; and

[131] Sarah Suscinski, *Witness Protection*, *supra* note 119, at 19. [Reproduced in the accompanying notebook 2 at Tab 62].

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] *Id*.

5) there are no less restrictive protective measures available.[137]

The Trial Chamber ruled that if the defendant is given the opportunity to examine the anonymous witness, the defendant's rights have not been violated.[138]

The following procedural guidelines were also adopted by the Trial Chamber in *Prosecutor v. Tadic*:

1) judges must be able to observe the demeanour of the witness 'in order to assess the reliability of the testimony';
2) judges must be aware of the identity of the witness;
3) the defence must be allowed ample opportunity to question the witness on matters unrelated to identity or current whereabouts;
4) the identity of the witness must be disclosed where there is no longer any reason to fear for his/her safety.[139]

There have been several cases in the ICTY where witnesses were harassed or intimated by defendants. In 1999, the ICTY found Milan Vujin guilty of "interfering with witnesses in a manner which dissuaded them from telling the truth."[140] Vujin was fined 15,000NLG (£4,120). Later, defense counsel for Tihomir Blaškić was found in contempt and fined for disclosing the identity and occupation of a protected witness.[141] The ICTY in the trial of Blaškić held:

[137] *Id*. at 20-22.

[138] *Id*. at 22.

[139] RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 107 (Oxford Univ. Press 2004). [Relevant chapter reproduced in the accompanying notebook 1 at Tab 32].

[140] *Id*. at 108.

[141] *Id*. at 109.

> the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the state of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.[142]

IST prosecutions will be largely dependant on witness testimony. Therefore, the IST should draft rules of procedure and evidence that will reduce the trauma to witnesses resulting from testifying that is balanced against the defendant's right to confront his or her witnesses. Some commentators have suggested that international tribunals could appeal to UN member countries to grant political asylum and new identities to victims and witnesses, as they are in the category of persecuted ethnic minorities and could qualify for refugee status.[143] The IST may wish to persuade countries to grant asylum to the witnesses that will be in danger on account of their testimony.[144] However, one problem that may arise is that witnesses may level false claims in the hope of escaping Iraq. With the important testimony to be garnered from witnesses and the current security situation in Iraq, the IST should also create a Victims and Witnesses Section to facilitate the participation of witnesses in IST trials.

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[142] *Id*. at 110.

[143] Anna M. Haughton, *The Balancing of the Rights of the Accused Against the Rights of a Witness in Regard to Anonymous Testimony*, Memorandum for the Office of the Prosecutor, Dec. 2001, at 28. [Reproduced in the accompanying notebook 2 at Tab 59].

[144] *Id*. at 29.

H. The Preference for Live Witness Testimony

If the ICTY trials have been a harbinger of things to come in the IST, the issue of live testimony will surely be a contentious issue that the IST judges should examine carefully. There has been sharp criticism of the ICTY's problem of lagging trials which is attributed in part to the substantial amount of witness testimony. ICTY trials, on average, have a hundred witnesses or more and each witness' testimony takes up a full day.[145] Much of witness testimony in the ICTY involves "background events leading up to indicated offenses, jurisdictional prerequisites to the charges, the impact of the alleged crimes on the victims, or factors that aggravate or mitigate the accused's guilt."[146]

In an effort to cut down on long and drawn out testimony that is repetitive or testimony that does not go directly to the heart of the charges against the accused, the ICTY has looked for ways to shorten the amount of time-consuming testimony and to ensure speedier trials. The ICTY RPE, which among others, includes provisions related to testimony of witnesses, were formulated in 1994.[147] Since 1994, these provisions have undergone numerous revisions in response to time-consuming trials and outside pressure to fulfill its mandate to try individuals "without undue delay."[148]

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[145] Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 549 (2001). [Reproduced in the accompanying notebook 2 at Tab 45].

[146] *Id.*

[147] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 21(4)(c). [Reproduced in the accompanying notebook 1 at Tab 4].

[148] *Id*.

The original ICTY RPE strongly preferred live testimony of witnesses rather than the use of written witness testimony. Article 21(4)(e) of the Statute of the ICTY entitles the accused "to examine, or have examined, the witnesses against him"[149] and Rule 90 previously said that "witnesses shall, in principle, be heard directly by the Chambers."[150] However, Rule 89 of the ICTY RPE confers broad discretionary power to the Chamber to "admit any relevant evidence which it deems to have probative value."[151] The original Rule 71 of the ICTY RPE, dealing with depositions, stated that witness depositions shall be used only in "exceptional circumstances" at trial.[152] Later, Rule 94*ter* was added to the ICTY RPE to allow affidavits "to prove a fact in dispute" where the affidavit, completed in accordance with the RPE, corroborated the live testimony of a witness."[153] Under this rule, if the other party objected, and the Trial Chamber agreed with the objecting party, then the witness was required to be present to be cross-examined.[154] In 1999, the ICTY amended the ICTY RPE omitting the requirement of finding "exceptional circumstances" before the Trial Chamber can order that a deposition be taken for use at trial.[155]

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[149] *Id*. at Art. 21(4)(e).

[150] Patricia M. Wald, "*To Establish Incredible Events by Credible Evidence"*, *supra* note 145, at 540. [Reproduced in the accompanying notebook 2 at Tab 45].

[151] ICTY RPE, Rule 89(C), *supra* note 77. [Reproduced in the accompanying notebook 1 at Tab 3].

[152] Patricia M. Wald, "*To Establish Incredible Events by Credible Evidence"*, *supra* note 145, at 540. [Reproduced in the accompanying notebook 2 at Tab 45].

[153] *Id*.

[154] *Id*.

[155] ICTY RPE, Rule 71, *supra* note 77. [Reproduced in the accompanying notebook 1 at Tab 3]. [Reproduced in the accompanying notebook __ at Tab__].

Today, Rule 94*ter* allowing for the use of affidavits "to prove a fact in dispute" does not exist and has been replaced by Rule 92*bis*. Rule 92*bis* has been amended to allow for the admission of affidavits, completed in accordance with the ICTY RPE, in lieu of live testimony only if it "goes to proof of a matter *other than the acts and conduct of the accused as charged in the indictment*."[156] As before, if the other party objects, and the Trial Chambers so rules, the witness must appear for cross-examination.[157] Rule 92*bis* is the ICTY's attempt to return to the original preference of the ICTY RPE to hear live witness testimony and allow cross-examination. However, Rule 92*bis* does not assure the right of cross-examination with regard to the content of the affidavit submitted pursuant to it.

In 2002, in *Prosecutor v. Milosevic*, the Prosecutor sought to introduce the written statements of twenty-three witnesses pursuant to Rule 92*bis*. These written statements regarded events such as "attacks, killings and assaults in Kosovo, events that constitute the widespread or systematic campaign of terror and violence that the Prosecution charged the accused with having committed."[158] The Prosecution sought to introduce these statements to prove a "crime base" as the statements pertained to crimes committed in Kosovo but not to the specific acts of Milosevic and thus under the ambit of the Rule. The Trial Chamber eventually allowed the written testimony with the right of Milosevic to cross-examine the witnesses.

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[156] *Id.* at Rule 92*bis*(A).

[157] *Id*. at Rule 92*bis*(E).

[158] Megan A. Fairlee, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*", 34 Cal. W. Int'l L.J. 47, 76 (2003). [Reproduced in the accompanying notebook 1 at Tab 38].

The Appeals Chamber clarified the scope of Rule 92*bis* in *Prosecutor v. Galic*, stating: "where the evidence is so pivotal to the Prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would be fair to the accused to permit the evidence to be given in written form."[159] The Appeals Chamber held that parties may use Rule 92*bis* to submit written testimony on the acts and conduct of others to establish the state of mind of the accused with respect to the charges.[160] The Appeals Chamber's decision clarifying the scope of Rule 92*bis* has binding effect on all Trial Chambers.

It is clear from the history of the Tribunal's amendments of the provisions on written testimony that live testimony, while preferred, is not always required. It has been said that Rule 92*bis* "appears to have had a dramatic impact on the way in which parties, and in particular the Prosecution, are seeking to present their cases before the [ICTY]."[161] While a literal reading of Rule 92*bis* only allows the admittance of written testimony which does not go to the acts and conduct of others, some say the Appeals Chamber's binding decision allows the introduction of written testimony to be used as "background or peripheral evidence."[162] [163]

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[159] *Id*. at 77.

[160] *Id*.

[161] Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Triunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. L.F. 167, 176 (2001). [Reproduced in the accompanying notebook 1 at Tab 36].

[162] Megan A. Fairlee, *Due Process Erosion*, *supra* note 158, at 78. [Reproduced in the accompanying notebook 1 at Tab 38].

[163] *See* the related issue of judicial notice in Section M.

I. The Effects of Televising Trials

Although public accountability for the Saddam Hussein trial will be through television cameras in the courtroom, there are risks that this medium will be used to Saddam Hussein's advantage much like Slobodan Milosevic. There are hopes that televising Saddam Hussein trial will show Iraqis a fair judicial process, help Iraqis heal and reassure the public that justice is being carried out. However, there are fears that Saddam Hussein will take a chapter out of Milosevic's trial book and attempt to use the same or similar courtroom antics for which Milosevic is well known.

Rule 78 of the ICTY RPE states, "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided."[164] In an effort achieve one of its aims of helping Serbs, Croats, Albanians and Bosnian Muslims heal their wounds from atrocities committed during wars in the former Yugoslavia, the ICTY televises the Milosevic trial among others. However, Milosevic has been able to use this medium to his advantage and endear himself to Serbs. There is much criticism that televising the Milosevic trial has improved Milosevic's standing at home in Serbia. The daily televised trial is a highly rated show through which Milosevic has "stirred admiration and sympathy" in Serbia.[165]

As mentioned before, Milosevic has represented himself during his trial. He appears on television screens back in Serbia as "a solitary individual pitted against an army of foreign lawyers and investigators" which has helped to "boost his underdog

[164] ICTY RPE, Rule 78, *supra* note 77. [Reproduced in the accompanying notebook 1 at Tab 3].

[165] Marc Champion, *Court of Opinion: With Hague Case, Defiant Milosevic Wins Fans at Home As Daily Coverage Keeps Serbs Riveted to TV, Many Feel As if They're on Trial, Too*, WALL ST. J., Jan. 10, 2003, at A1. [Reproduced in the accompanying notebook 2 at Tab 48].

appeal."[166] Moreover, the manner of Milosevic's "sharp", "funny", and "cynical" courtroom dramatics has garnered him admiration in Serbia.[167] It has also been reported in opinion polls that 75% of Serbs "do not feel that Milosevic is getting a fair trial."[168] Also, 67% of Serbs think that Milosevic is "not responsible for any war crimes."[169]

The use of television cameras in U.S. courtrooms has been the subject of much debate. The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and *public* trial."[170] The United States Supreme Court first addressed the effect of cameras in the courtroom in 1965 in *Estes v. Texas*, a criminal case involving an accused embezzler.[171] In *Estes*, the U.S. Supreme Court agreed with defendant Estes, that he was deprived of a fair trial due to the disruptive media presence in the Texas court that tried him.[172] The Court held that while U.S. law favors public proceedings, this safeguard does not require the privilege of televised and audio recorded proceedings: "It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including

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[166] Michael P. Scharf, *The Legacy of the Milosevic Trial*, *supra* note 31, at 917. [Reproduced in the accompanying notebook 2 at Tab 43].

[167] Marc Champion, *Court of Opinion*, *supra* note 165. [Reproduced in the accompanying notebook 2 at Tab 48].

[168] Michael P. Scharf, *Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense*, WASH. POST, Aug. 29, 2004, at Outlook, B02. [Reproduced in the accompanying notebook 2 at Tab 55].

[169] *Id*.

[170] U.S. CONST. amend. VI. [Reproduced in the accompanying notebook 2 at Tab 74].

[171] David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 799 (1993). [Reproduced in the accompanying notebook 2 at Tab 39].

[172] Estes v. Texas, 381 U.S. 532 (1965). [Reproduced in the accompanying notebook 1 at Tab 9].

television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media."[173]

Several legal commentators and scholars in the United States have articulated the pros and cons of televising criminal trials in the United States. Some of the benefits of televised criminal trials mentioned are: they educate the public on the criminal justice system and the law;[174] they have therapeutic and cathartic value for victims and the public; and they allow the public to act as a check on the judicial process.[175] In spite of some of the benefits that televising trials bring, there are oft-cited reasons for excluding cameras from courtrooms in the United States which affect fair trial prospects for defendants such as: "[t]he presence of broadcast media can inhibit witnesses" from testifying, thereby, impairing the ability of the prosecution and defense from obtaining evidence;[176] cameras "may allow judges and lawyers to play to the cameras creating a celebrity status for them" thus depriving defendants effective counsel and fair and impartial decisions by judges;[177] and "heightened public clamor resulting from . . . television coverage will inevitably result in prejudice."[178]

In determining whether a trial should be televised, U.S. courts in different jurisdictions have varying criteria on whether trials should be televised. For example,

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[173] *Id*. at 541-42.

[174] Harris, *supra* note 171, at 819. [Reproduced in the accompanying notebook 2 at Tab 39].

[175] Dolores K. Sloviter, *If Courts are Open, Must Cameras Follow?*, 26 HOFSTRA L. REV. 873, 886 (1998). [Reproduced in the accompanying notebook 2 at Tab 44].

[176] Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1552 (1985). [Reproduced in the accompanying notebook 2 at Tab 40].

[177] Joyce M. Cossin, *The Pros and Cons of Television in the Courtroom*, at http://www.wcu.edi/ceap/psychology/journal/pdf/Cossin-j-8-03.pdf (last visited Nov. 21, 2004). [Reproduced in the accompanying notebook 2 at Tab 65].

[178] *Estes*, 381 U.S. 532, *supra* note 172, at 549. [Reproduced in the accompanying notebook 1 at Tab 9].

some jurisdictions outright prohibit televising trials, while others allow cameras in courtrooms in certain cases and provide guidelines for the media on media coverage.[179] For example, according to Missouri law and a set of guidelines published by the Missouri Supreme Court, media coverage is not permitted in a courtroom without the express permission of the trial judge.[180] In Missouri, a trial judge may deny permission for media coverage if he or she finds that "media coverage would interfere materially with the rights of a party to a fair trial."[181] The Missouri guidelines list the responsibilities of the media and guidelines on equipment.[182]

While there was positive potential in televising Milosevic's trial at the ICTY, it is clear that he has been able to use television coverage of his trial to his advantage by weakening its aims by endearing himself to the Serbs and discrediting the ICTY at every turn. The problems posed by Milosevic do not lie solely with the ICTY's decision to televise his trial, but it is evident that television is a powerful medium that can be abused by Saddam Hussein during his trial. While the IST Statute provides that the IST hearings "shall be public unless the Trial Chamber decides to close the proceedings," it should look to the example of the ICTY and the impact of televising Milosevic's trial in whole.[183] In addition, the IST should refer to the jurisprudence and analyses in the

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[179] *See* Supreme Court of Missouri, *Cameras in the Courtroom: A Guide to Missouri's Court Operating Rule 16* (June 2003), *available at* http://www.courts.mo.gov/SUP/index.nsf/0/ea61c4a40450464e86256e36006ffbb9?OpenDocument (last visited Nov. 21, 2004).

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] IST Statute, *supra* note 1, at art. 21(d). [Reproduced in the accompanying notebook 1 at Tab 5].

United States on televising fair trials which have been developing for the last twenty-five years.

J. The Role of Fair Trial Observers

The IST Statute requires the President of the IST to appoint non-Iraqi trial observers or advisers.[184] The role of these appointed observers or advisers are to "provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards."[185] If needed, the President of the IST may call upon the international community for assistance.[186] The IST Statute requires that observers or advisers be "persons of high moral character, impartiality and integrity."[187] The IST Statute has a decided preference for persons who "have acted in either a judicial or prosecutorial capacity in his or her respective country," or persons who "have experience in international war crimes trials or tribunals."[188]

Fair trial observers ("FTO") have been used as far back as 1498 and since the end of World War II, they have become more accepted within the framework of customary international law.[189] Recently, FTOs have been selected from politically unbiased nongovernmental organizations ("NGOs").[190] FTOs, formal observers of trials, play an

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[184] *Id*. at art. 6(b).

[185] *Id*.

[186] *Id*.

[187] *Id*. at art. 6(c).

[188] *Id*.

[189] Ryan C. Scott, *Is There a Role for "Fair Trial Observers" in International Criminal Law Trials?*, Memorandum for the Office of the Prosecutor of the ICTR, Fall 2003, at 1. [Reproduced in the accompanying notebook 2 at Tab 61].

[190] *Id*.

important role in ensuring the effective and fair administration of justice by observing trial processes and applying legal know-how and training.[191]

FTOs have yet to be used in international criminal tribunals.[192] However, there have arguably been trials where the participation of FTOs would have helped in past international criminal tribunal cases. The key goals of a trial observer, according to the International Commission of Jurists' Guidelines are as follows:

> 1) to make known to the court, the authorities of the country and to the general public the interest in and concern for the trial in question;
> 2) to encourage a court to give the accused a fair trial. The impact of an observer's presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor's presence often changes the atmosphere in the courtroom and facilitates defense by, *inter alia*, making the court more cognizant of the defense's arguments, encouraging defense counsel and the defendant to be more forceful in contesting the prosecution's claims, in attracting media attention to the trial, etc.'
> 3) to obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which s/he is being tried; and
> 4) to collect general background information about the political and legal circumstances leading to the trial and possibility affecting its outcome.[193]

In spite of the many benefits FTOs may bring to the IST, the IST should be aware of the potential downside of FTOs. For the trial of the two persons accused with the bombing of Pan Am flight 103 (the "Lockerbie trial"), the United Nations appointed Dr. Hans Köechler, a professor of Philosophy of Law at the University of Innsbruck, Austria,

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[191] *Id*. at 2.

[192] *Id*.

[193] *Id*. at 10.

to observe the trial pursuant to Security Council Resolution 1192, adopted on August 27, 1998.[194] Dr. Köechler delivered a damning report of the administration of justice at the Lockerbie trial claiming that the outcome of the trial was politically motivated and "not fair."[195] Dr. Köechler's report unleashed a torrent of criticism. In response to Dr. Köechler's report, a spokesman for the Crown Office, which handled the Lockerbie trial, replied that Dr. Köechler had "completely misunderstood" the trial.[196] Similarly, a member of the Lockerbie briefing unit said that Dr. Köechler displayed a "profound misunderstanding" of the Scottish adversarial system.[197]

Following Dr. Köechler's report, there were disagreements between Dr. Köechler and the United Nations on his role as an international observer of the Lockerbie trial. In response to criticism of Dr. Köechler's report, Hans Corell, the Under-Secretary-General for Legal Affairs of the United Nations, made a statement which distanced the United Nations from the report.[198] Mr. Corell insisted that Dr. Köechler's remarks constituted his "personal views" and that the "United Nations cannot be associated with the observations made" by Dr. Köechler and the other observers.[199] Mr. Corell also stated

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[194] S.C. Res. 1192, U.N. SCOR, 3920th mtg., U.N. Doc. S/RES/1192 (1998). [Reproduced in the accompanying notebook 1 at Tab 7].

[195] *Report on and Evaluation of the Lockerbie Trial Conducted by the Special Scottish Court in the Netherlands at Kamp Van Zeist by Dr. Hans Köechler, University Professor, International Observer of the International Progress Organization Nominated by United Nations Secretary-General Kofi Annan on the Basis of Security Council Resolution 1192 (1998)* (2001), *available at* http://i-p-o.org/lockerbie-report.htm (last visited Nov. 15, 2004). [Reproduced in the accompanying notebook 1 at Tab 69].

[196] Neil Mackay, *UN Claims Lockerbie Trial Rigged: Court was Politically Influenced by US*, THE SUNDAY HERALD (Scotland), Apr. 8, 2001, at 1. [Reproduced in the accompanying notebook 2 at Tab 50].

[197] *UN Monitor Decries Lockerbie Judgment*, BBC News, Mar. 14, 2002, *available at* http://news.bbc.co.uk/1/hi/world/1872996.stm. [Reproduced in the accompanying notebook 2 at Tab 56].

[198] Letter from Hans Corell, Under-Secretary-General for Legal Affairs, United Nations, to Mr. and Mrs. Cohen (May 31, 2001). [Reproduced in the accompanying notebook 2 at Tab 68].

[199] *Id*. at 2.

that Dr. Köechler was "not required to produce and submit" his observations and that he represented his own organization, the International Progress Organization, not the United Nations at the Lockerbie trial.[200]

Dr. Köechler countered Mr. Corell's statement with his own remarks that his mission as an observer would have been "meaningless" if he were nominated only to observe the trial and kept his observations and evaluation of the trial to himself.[201] He also stated that "the only meaningful interpretation of 'international observer' . . . must be to observe the proceedings of the court in regard to basic aspects of fairness and due process, and to share the observations, when appropriate, with the United Nations Organization and the international public."[202] It is undisputable that Dr. Köechler's report undermined the Lockerbie trial in the eyes of many in the world and the United Nations should have evaluated whether Dr. Köechler was well-versed in Scottish law and his role should have been clearly defined in advance.

As the IST Statute requires and the international community demands, there is a role for FTOs in the IST. An FTO plays an important "watchdog" role as his or her role is to make sure that trials are conducted fairly. This sends a message to the IST that the world is watching and also shows the world that the IST is policing itself by utilizing FTOs. The use of FTOs serve as a safeguard to charges of unfairness, bias, and victor's

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[200] *Id*.

[201] Statement by Dr. Hans Köechler, Appointed as International Observer of the Lockerbie Trial by UN Secretary-General Kofi Annan, on Misunderstandings and Conflicting Interpretations of His Report on and Evaluation of the Trial, as Expressed in Official Statements and in the Subsequent International Media Coverage 1 (June 9, 2001), *available at* http://i-p-o.org/Lockerbie-statement-koechler.htm (last visited Nov. 22, 2004). [Reproduced in the accompanying notebook 2 at Tab 72].

[202] *Id*.

justice claims.[203] Employing unbiased FTOs will help to ease doubts that defendants before the IST will be given fair trials. However, the IST should be careful to vet potential FTOs and as the IST Statute requires "impartiality," ideally, the IST should look to unbiased third parties sent by NGOs.

[203] *Id*. at 3.

K. Granting Defendants Provisional Release Pending Trial

The issue of provisional release pending trial has been explored in depth by the ICTY. Initially, the ICTY was reluctant to grant defendants provisional release pending trial. The original version of the rule governing provisional release, ICTY RPE Rule 65(B), placed a heavy burden on defendants by requiring them to prove that they would not flee, pose no danger to others, and that there were "exceptional circumstances" which would justify granting provisional release.[204] The ICTY amended this rule in 1999 by removing the "exceptional circumstances" requirement.[205] Prior to this amendment, only four defendants were granted provisional release.[206] The rule was changed followed the death of two detainees who were in custody awaiting trial.[207] According to one of the judges of the ICTY, the ICTY was "concerned about the 'depressive effects' of prolonged pretrial detention."[208] Today, Rule 65(B) reads:

> Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.[209]

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[204] Geoffrey R. Watson, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, 37 New Eng. L. Rev. 871, at 881 (Summer 2003). [Reproduced in the accompanying notebook 2 at Tab 46].

[205] *Id*.

[206] *Id*. *See* Prosecutor v. Kupreskic, Case No.: IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipovic, 9 May 1999; Prosecutor v. Simic, Case No.: IT-95-9-PT, Decision on Provisional Release of the Accused, 26 Mar. 1998; Prosecutor v. Dukic, Case No.: IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Trial 24 Apr. 1996. [All Decisions are reproduced in the accompanying notebook 1 at Tabs 11, 16, 28].

[207] *Id*.

[208] Essays on ICTY Procedure, Patricia Wald, at 233.

[209] ICTY RPE, *supra* note 77, at Rule 65(B). [Reproduced in the accompanying notebook 1 at Tab 3].

The more relaxed rule on provisional release seems to be in step with international human rights law, which holds that "it shall not be the general rule that persons awaiting trial shall be detained in custody."[210]

The Trial Chamber in *Prosecutor v. Halilovic* granted defendant pre-trial provisional release. In granting defendant's request for provisional release, the ICTY considered the following: that Halilovic's trial would not start immediately; he would be able to emotionally support his ailing son; the prosecution did not object to the request; the Government of the Federation of Bosnia and Herzegovina provided guarantees that it would be responsible for the custody of defendant; and that he voluntarily surrendered to the custody of the ICTY.[211] The Trial Chamber granted defendant's request for provisional release on very specific terms and conditions. The terms and conditions included: defendant must remain in the territory of the Federation of Bosnia and Herzegovina; defendant must report every Monday to the local police; and defendant must not discuss the details of the case with anyone except his lawyer.

Factors that have contributed to denials of grants of provisional release by the ICTY have included: the failure by defendants to prove that they will appear for trial;[212] lack of assurances by host countries;[213] defendants at large and evading arrest by the

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[210]Geoffrey R. Watson, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade*, supra note 204, at 883. [Reproduced in the accompanying notebook 2 at Tab 46].

[211] Prosecutor v. Halilovic, Case No.: IT-01-48-PT, Decision on Request for Pre-Trial Provisional Release, Dec. 13, 2001, *available at* http://www.un.org/icty/halilovic/trialc/decision-e/11213PR516982.htm (last visited Oct. 26, 2004). [Reproduced in the accompanying notebook 1 at Tab 14].

[212] Prosecutor v. Ljubicic, Case No.: IT-00-41-PT, Decision on the Defence Motion for the Provisional Release of the Accused, Aug. 2, 2002. [Reproduced in the accompanying notebook 1 at Tab 18].

[213] *Id*.

ICTY;[214] and serious disregard for the ICTY.[215] In May 2004, Miroslav Radic requested provisional release for five days to attend a memorial commemorating the anniversary of his father's death. The Trial Chamber denied his request finding that Radic's reason "does not in itself justify the provisional release of Radic."[216]

Like the ICTY, the IST may want to grant provisional release to defendants who can prove that they will not flee and pose no danger to others. Additionally, in light of speedy trial concerns, if trials are long delayed, fairness may dictate provisional release. As the defendants appearing before the IST will be citizens or residents of Iraq, the Iraqi government must be able to give assurances that the defendants will return to appear before the IST and that the safety of Iraqis and the defendants is assured. The IST may find the use of technology in the form of "tracking devices" on defendants on provisional release to ensure that they remain in a designated area and do not flee Iraq. Given the current security situation, the IST should carefully examine whether granting provisional release to defendants at this time, or in the near future, is appropriate.

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[214] Prosecutor v. Martic, Case No.: IT-95-11-PT, Decision on the Motion for Provisional Release, Oct. 10, 2002. [Reproduced in the accompanying notebook 1 at Tab 19].

[215] *Id*.

[216] Prosecutor v. Radic, Case No.: IT-95-13/1-PT, Decision on Request by the Accused Radic for Provisional Release, May 20, 2004. [Reproduced in the accompanying notebook 1 at Tab 27].

L. Plea Bargaining

In addition to relaxing its rule on provisional release, the ICTY has also become more receptive to plea bargaining. The Statute of the ICTY did not originally provide for plea bargaining and the ICTY judges initially determined that plea bargaining was incompatible with the objectives of international war crimes tribunals.[217] However, as its trials have dragged on, the ICTY has come to incorporate plea bargaining as a procedural necessity in light of its heavy caseload and "complex body of governing law."[218] In *Prosecutor v. Erdemovic*, the Appeals Chamber commented that plea bargains serve an important purpose which take into account the ICTY's complex and lengthy proceedings and "stringent" budget concerns.[219] Acceptance of plea bargaining also contributes to legitimizing the ICTY which has been charged with being impartial by some ethnic groups.[220] A leading commentator on plea bargaining at the ICTY, Nancy Amoury Combs, in her analysis of Biljana Plavsic's guilty plea, states:

> Admissions of guilt from high-level defendants confer . . . not only practical benefits, but reputational ones. . . . [and] [a]n admission of guilt proffered by a defendant with such sterling nationalist credentials as the Serbian Iron Lady [Biljana Plavsic] not only provides strong evidence to counteract the self-serving histories that still hold sway

[217] Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. (forthcoming 2004). [Reproduced in the accompanying notebook 2 at Tab 41].

[218] Geoffrey R. Watson, Symposium: The ICTY at Ten, *supra* note __ at 883. [Reproduced in the accompanying notebook 2 at Tab 46].

[219] Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 2 (ICTY Appeals Chamber, Oct. 7, 1997). [Reproduced in the accompanying notebook 1 at Tab 12].

[220] Gabrielle Kirk McDonald, *Plea bargaining*, *supra* note 106, at 25. [Reproduced in the accompanying notebook 1 at Tab 33].

> among Serbs, but also serves to legitimize the institution that brought the criminal charges in the first place.[221]

The ICTY's acceptance of plea bargaining is a positive development overall.[222] However, Nancy Amoury Combs cautions, "[I]nstitutions like the ICTY can impair the very reconciliation they seek to advance if the rewards that they hand out in appreciation for reconciliation become themselves an additional source of bitterness."[223] Some Serbs have considered plea bargains "humiliating" and displayed "bitterness" at the ICTY's embrace of plea bargaining.[224] Others say that plea bargain procedures should be "more transparent and offer a precise explanation of what is being pled to."[225] The vice-president of the Bosnian Serb group told Gabrielle Kirk McDonald, a former ICTY judge, that Ms. Plavsic's plea would not lead to the truth coming out.[226] He states, "This is not truth that will lead to peace and reconciliation."[227] However, Ms. McDonald was told by a group of former Bosnian inmates that they understood the need for plea agreements in light of the lengthy hearings and valuable information provided to the Prosecutor as a result of the agreements.[228] The President of the ICTY stated the ICTY's view on the value of plea agreements:

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[221] Nancy Amoury Combs, *Prosecutor v. Plavsic, Case No.: IT-00-39&40/1-S. Sentencing Judgment*, 97 Am. J. Int'l L. 929, 936 – 937 (2003). [Reproduced in the accompanying notebook 1 at Tab 35].

[222] Watson, at 882.

[223] Combs, *supra* note 221, at 14.

[224] Gabrielle Kirk McDonald, *Plea bargaining*, *supra* note 106, at 25. [Reproduced in the accompanying notebook 1 at Tab 33].

[225] *Id*.

[226] *Id*. at 26.

[227] *Id*.

[228] *Id*.

> [W]ith properly detailed acknowledgement by defendants of their participation in the crimes for which they acknowledge guilt and genuine expressions of remorse, plea agreements can play a constructive role. In some cases, a forthright and specific acknowledgement of guilt may offer victims as much, or even more, consolation than would a conviction following repeated protestations of innocence.[229]

Ms. McDonald has recommended certain conditions to be present when considering plea bargains. They are as follows:[230]

> 1) The complete indictment should be read aloud and a waiver of the reading should not be allowed;
> 2) The Prosecutor should be required to give the fullest disclosure of the facts that support the indictment;
> 3) The full plea agreement should be immediately released to the public and if necessary, translated;
> 4) The Prosecutor should be required to present testimony from the victims, similar to victim impact statements in the U.S.; and
> 5) The sentence should reflect the seriousness of the crimes and the judges should avoid any appearance that they are bound by such plea agreements.

Overall, plea bargaining is a positive trend observed in the ICTY. As trials become lengthy and expensive, guilty pleas "help expedite the docket" and lessen the amount of time the accused spend in detention pre-trial.[231] If the guilty pleas are accompanied by genuine expressions of remorse and guilt, they can help create a record of the truth which may lead to reconciliation.[232] Another benefit of plea bargaining is

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[229] Meron Address, see note 20 of plea bargains in Texan school of law symposium

[230] Gabrielle Kirk McDonald, *Plea bargaining*, *supra* note 106, at 28. [Reproduced in the accompanying notebook 1 at Tab 33].

[231] Gabrielle Kirk McDonald, *Plea bargaining*, *supra* note 106, at 27. [Reproduced in the accompanying notebook 1 at Tab 33].

[232] *Id*.

that it allows victims and witnesses to avoid testifying in trials and saves time and resources.[233]

The IST can avoid the need for plea bargaining if it creates a prosecutorial strategy, as mentioned above in Section E, that will limit the number of perpetrators to be prosecuted.[234] If the IST finds that plea bargains are a necessity, it should be careful to ensure transparency in the procedure of plea bargaining and be cognizant of the effect plea bargains may have on the victims. It is important to note that bargaining of sentences is "far less controversial than charge bargaining."[235] One commentator has argued that plea bargains should create a historical record of the events that transpired, "not only make findings of guilt or innocence," and should also allow "victims and witnesses to confront the perpetrators."[236] Should the IST embrace plea bargains, it should proceed very carefully and be aware of the impact plea bargains have on victims.

[233] Scharf, *supra* note 217. [Reproduced in the accompanying notebook 2 at Tab 41].

[234] *Id*.

[235] *Id*.

[236] Gabrielle Kirk McDonald, *Plea bargaining*, *supra* note 106, at 27. [Reproduced in the accompanying notebook 1 at Tab 33].

M. Judicial Notice

As the IST has yet to draft its rules of procedure and evidence, it is unclear what role, if any, judicial notice will have in IST proceedings. The Special Tribunal Statute states that the President of the Tribunal "shall be guided by the Iraqi Criminal Procedure Law."[237] While judicial notice is not addressed in the Iraqi Criminal Procedure Law,[238] taking into account the numerous pieces of evidence that will likely be introduced into evidence and time constraints on the IST, it is important for the President of the Tribunal to look to the examples of other ad hoc tribunals and their treatment of judicial notice when drafting the IST rules of procedure and evidence.

Judicial notice is defined in Black's Law Dictionary as "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact."[239] For example, a court may take judicial notice of the indisputable fact that "water freezes at 32 degrees Fahrenheit."[240] Judicial notice is taken by judges to "promote expedience in trial proceedings and to prevent flagrant error."[241] This time-saving device is commonly used in common and civil law legal systems.[242] Judicially noticed facts are traditionally divided into two categories: adjudicative and legislative. An adjudicative fact is a fact that is "controlling or operative . . . rather than a background

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[237] Statute of the IST, art. 16, *supra* note 1. [Reproduced in the accompanying notebook 1 at Tab 5].

[238] Iraqi Criminal Procedure Law. [On file with author].

[239] BLACK'S LAW DICTIONARY (8th ed. 2004). [Reproduced in the accompanying notebook 2 at Tab 63].

[240] *Id*.

[241] Marea Beeman, *Judicial Notice*, May 2001, 3. [Reproduced in the accompanying notebook 2 at Tab 57].

[242] *Id*..

fact."[243] Adjudicative facts "concern the immediate parties in a case: 'who did what, where, when, how and with what motive or intent."[244] Adjudicative facts may also be facts that are generally known or easily verified such as calendar dates.[245] A legislative fact is a fact that "explains a particular law's rationality and that helps a court . . . determine the law's content and application."[246] Legislative facts help to "determine the content of law and policy and to exercise judgment or discretion in determining what course of action to take" and "generally transcend the interests of the immediate parties."[247]

Judicial notice has also been adopted by the ICTY and the ICTR in their rules of procedure and evidence. The ICTY and the ICTR have taken a "hybrid civil/common law approach toward admission of evidence."[248] ICTY RPE Rule 94 and ICTR Rules of Procedure and Evidence ("ICTR RPE") state, "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.[249] In addition, "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."[250] By

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[243] Black's Law Dictionary, *supra* note 239. [Reproduced in the accompanying notebook 2 at Tab 63].

[244] Beeman, at 5.

[245] *Id*. at 6

[246] Black's

[247] Beeman, at 6.

[248] *Id.* at 22.

[249] ICTY RPE, *supra* note 77, rule 94(A). [Reproduced in the accompanying notebook 2 at Tab 3].

[250] *Id*. at rule 94(B).

allowing judicial notice of adjudicated facts or evidence from prior proceedings, the ICTY and ICTR in effect are allowing affidavits to "'prove a fact in dispute' where the affidavit was 'in corroboration of' a live witness's testimony."[251] However, Prosecutorial attempts to introduce affidavits pursuant to Rule 94 have been "repelled."[252] The ICTY RPE and ICTR RPE do not distinguish between "adjudicative" or "legislative" facts but only require that such facts be "common knowledge."

In the ICTY, the Trial Chamber in *Prosecutor v. Hadzihasanovic and Kubura* stated that "by taking judicial notice of an adjudicated fact from another case, the Trial Chamber proceeds from the assumption that the fact is accurate, that is [sic] does not need to be re-established at trial but that, insofar as it is an assumption, it may be challenged at trial."[253] In granting the defence request for judicial notice, the Trial Chamber in Hadzihasanovic cited to the Trial Chamber's conclusion in the Krajisnik case that for a fact to be admitted pursuant to Rule 94(B) of the ICTY RPE, the fact must have been "truly adjudicated in previous judgments" and fulfill the following factors:[254]

> (i) it is distinct, concrete and identifiable;
> (ii) it is restricted to factual findings and does not include legal characterizations;
> (iii) it was contested at trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal; or
> (iv) it was contested at trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute on appeal;

[251] Wald, *supra* note 145, at 540. [Reproduced in the accompanying notebook 2 at Tab 45].

[252] *Id*. at 541.

[253] Prosecutor v. Hadzihasanovic and Kubura, Case No.: IT-01-47-T, *Final Decision on Judicial Notice of Adjudicated Facts*, Apr. 20, 2004. [Reproduced in the accompanying notebook 1 at Tab 13].

[254] *Id*. at 6.

(v) it does not have a bearing on the criminal responsibility of the Accused;
(vi) it is not subject of (reasonable) dispute between the Parties in the present case;
(vii) it is not based on plea agreements in previous cases; and
(viii) it does not negatively affect on the right of the Accused to a fair trial.

It is proposed that the IST look to examples of judicial notice taken in the ICTY and the ICTR. The IST should focus on being transparent in its application of judicial notice so that all parties are confident that the use of it is appropriate.[255] Also, the IST should notify the opposing party that it is taking judicial notice so that the opposing party is given the opportunity to dispute the taking of it.[256] In addition, the IST should distinguish between adjudicative and legislative facts. For example, "[a] previous decision taking judicial notice of a matter as a legislative fact should generally not be authority for notice of the same matter as an adjudicative fact."[257] Judicial notice will help to expedite IST proceedings especially in light of the fact that many of the accused are being charged with the same crimes. For judicial notice to be an effective procedural tool, the IST should ensure that its use of judicial notice is executed fairly and must discourage abuse of the doctrine.

[255] Beeman, at 2.

[256] *Id*.

[257] *Id*. at 2-3.

IV. CONCLUSION

The IST has much to learn from the experiences of the ICTY, ICTR, and SCSL. While it is unlikely that the experiences of the ICTY, ICTR, or SCSL will be directly transferable to the IST as the IST was created under circumstances which set it apart from these three courts, many of the issues encountered by these courts will most likely be raised during trials at the IST. These lessons learned can be valuable and relevant as the IST's mandate is similar to the three courts – to prosecute those responsible for war crimes, crimes against humanity, and genocide.

The *tu quoque* defense in international tribunals goes back to Nuremberg and was raised in the ICTY. Saddam Hussein has indicated that he may argue a *tu quoque* defense. The right to self representation will likely be raised in the IST and there is an abundance of analysis in the ICTY, ICTR, and SCSL on whether this right is absolute. The devices adopted for judicial efficiency such as plea bargains adopted by these courts can be further explored by the IST. Also, the IST can learn from the experiences of the ICTY, ICTRY, and the SCSL, in their failures and successes in gaining credibility and reaching out to the people for whom they are conducting trials. Procedural and evidentiary matters such as the requirement of live witness testimony, protection of witnesses, and the rule of judicial notice are also issues that the IST will likely face as trials begin at the IST.

Although the IST Statutes specifies that the IST rules of procedure and evidence "shall be guided by the Iraqi Criminal Procedure Law,"[258] there are issues that the IST will likely encounter which are similar to the three international criminal tribunals that

[258] IST Statute, *supra* note 1, at art. 16. [Reproduced in the accompanying notebook 1 at Tab 5].

will warrant its examination of the relevant decisions of these courts. Also, the IST Statute specifically permits the IST Trial Chambers and Appeals Chamber to consider "relevant decisions of international courts or tribunals as persuasive authority for their decisions" in interpreting war crimes, crimes against humanity, and genocide.[259] It is important that the IST examines the actions of the ICTY, ICTR, and SCSL, so that it can learn from their experiences which will contribute to the IST's efficiency, administration of justice, and reconciliatory role.

[259] *Id*. at art. 17(b).