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International jurisprudence on impeachment of a witness specifically addressing the procedure for impeachment of a witness of the court

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MEMORANDUM FOR THE SPECIAL COURT OF SIERRA LEONE

ISSUE: INTERNATIONAL JURISPRUDENCE ON IMPEACHMENT OF A WITNESS

SPECIFICALLY ADDRESSING THE PROCEDURE FOR IMPEACHMENT OF A WITNESS OF THE COURT

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Issue: SCSL – Witness Impeachment

TABLE OF CONTENTS

8. **There are also alternatives to impeachment of a witness.**

II. FACTUAL BACKGROUND OF TRIAL PROCEEDINGS

A. General Procedure

B. Witness Testimony in the Trial Process

C. Once testimony begins, a witness becomes one of the court and the parties must gain access to the witness.

D. The purpose of the trial proceedings is to promote justice and this can only be ensured if both parties are granted equally fair trial rights.

III. THE INTERNATIONAL JURISPRUDENCE ON WITNESS IMPEACHMENT

A. Party's may wish to impeach a witness by discrediting the witness for a variety of reasons.

1. **Prior inconsistent statements.**
2. **Character evidence.**
3. **Bias of a Witness.**

B. When dealing with the credibility of a witness, impeachment may be limited as to not be fatal to the entire testimony of the witness.

C. Parties may wish to impeach opposing counsel's witness or their own witness.

1. **Impeachment of opposing counsel's witness is done through cross-examination.**
2. **Impeaching of one's own witness is left to the discretion of the court and the procedure has evolved over time.**
   a. **The hostile witness.**

b. The reasons against impeachment of one's own witness.

c. The reasons to allow impeachment of one's own witness.

D. Impeachment is done through cross-examination of a party's witness; however, there have been many problems and so the Trial Chambers have much discretion in the impeachment process.

1. Local counsel, working at the tribunal, may not have the experience with the procedure of cross-examination.

2. The accused may wish to participate in cross-examination.

E. Aside from cross-examination, parties have difficulty in gaining access to many of the witnesses which presents a problem when attempting to discredit a witness.

1. Access to witness of the court.

2. Access to witnesses that give testimony through depositions.

3. Access to witnesses that give testimony through video-link.

4. Access to expert witnesses.

5. Access to witnesses under the Victims and Witnesses Unit within the Registry.

6. Access to anonymous witnesses.

F. With all of the difficulties that a party may face for impeachment, a party may want to seek alternatives to impeachment.

IV. SUMMARY AND CONCLUSIONS

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2. *Prosecutor v. Akayesu,* ICTR-96-4-T, 1998 *available at* 1998 WL 1782077.

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25. *Prosecutory v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, ¶ 44; see also Prosecutor v. Oric, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defense Case of 20 July 2005, ¶ 7.

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Issue: SCSL – Witness Impeachment

I. INTRODUCTION

A. Issue

This memorandum addresses the international jurisprudence or standards regarding whether and how a party can impeach a witness.[1] This is in the circumstance where, once a witness is sworn into the court; neither party can have contact with the witness until the testimony is concluded. The ICTY developed this prohibition on the theory that once a witness is sworn in, he or she is a witness of the Court. This memorandum will focus on the law developed within the international tribunals for impeachment of a witness. This memorandum will look at the law and tribunal practice that has developed over time in the International Criminal Tribunal of the Former Yugoslavia ("ICTY"), the International Criminal Tribunal of Rwanda ("ICTR"), the Special Court of Sierra Leone ("SCSL") (collectively, "Tribunals"), and the law of various other international jurisdictions that deal with the topic of witness impeachment. In order to understand the procedure of witness impeachment, it is also important to understand what impact access to a witness may have on the procedure for impeachment.

[1] "What is the thrust of international jurisprudence or standards regarding whether a party can impeach a witness? This is in the circumstance where, once a witness is sworn in, neither party can have contact with the witness until the testimony is concluded. The ICTY developed this prohibition on the theory that once a witness is sworn, he or she is a witness of the Court. There is and ICTY Appeals Chamber Decision in 2007 or 2008 which deals with this topic. I think it is in the Popvic case."

B. Summary of Conclusions

1. Party's can impeach witnesses even when they become witnesses of the court.

Generally, the tribunals have attempted to use a blend of the adversarial and civil law approach. However, the tribunals' approach remains primarily adversarial when addressing evidence and procedure of the tribunal. The Tribunal's approach becomes difficult because it has generally been noted that parties do not have access to witness after they are sworn into court and begin their testimony.[2] However, parties are also granted the ability to discredit witnesses via cross-examination.[3] Cross-examination of a witness becomes difficult when access to witnesses is not readily available. Therefore, the tribunals have developed ways in which to grant access to witnesses whether they are of the opposing party, under protective measures, anonymous witnesses, or expert witnesses.

2. International jurisprudence recognizes that the interests of the defense and prosecution must be balanced and both should have an "equality of arms" when obtaining evidence to cross-examine a witness.

European human rights courts developed the idea of the equality of arms which guarantees both parties to have equal rights in trials.[4] This idea is encompassed in the statutes of

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[2] *Prosecutor v. Jelisić*, Case No IT-95-10-T, Decision on the Communication Between Parties and Witnesses, 11 December 1998. [reproduced in accompanying notebook in Tab 8]

[3] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierre Leone,. Cambridge: C.U.P., 2006, p. 472. [reproduced in accompanying notebook in Tab 29]

[4] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierre Leone, Cambridge: C.U.P., 2006, 513.

the international tribunals.[5] The equality for both parties at trial can be violated if they do not have equal rights to witnesses and the Trial Chamber heavily weighs their decisions to grant access to witnesses to ensure equality to both parties. Therefore, equal access to witnesses in quintessential is seeking to give equal rights to each party.

3. There are many reasons why a party may wish to impeach a witness and these reasons are validated by the discretion of the Court.

A party may wish to discredit a witness for several reasons. Many times there may be prior inconsistent statements, lack of credibility in a witness's character, or a bias of the witness.[6] However, there have been many barriers to discrediting a witness. Some of these barriers are cultural while others are based on difficulty of translation of testimony that may be of a local language.[7] Each of these difficulties must be taken into account when preparing a defense for cross-examination of a witness.

4. A party may wish to impeach a witness of opposing counsel which can be done through cross-examination.

The Rules of Procedure and Evidence allow the parties to cross-examine witnesses. During cross-examination a party can attempt to discredit a witness based on the evidence that has been previously admitted into evidence.[8] However, it can be difficult for a party to create a defense by which to cross-examine a witness because a witness becomes one of the court. The

[5] ICTY Statute, art. 21(4)(b); ICTR Statute, art. 20(4)(b); SCSL Statute, art. 17(4)(b). [reproduced in accompanying notebook in Tab 32, 33, 36]

[6] Richard May, International Criminal Evidence, International and Comparative Criminal Law Series 2002, 169-172. [reproduced in accompanying notebook in Tab 28]

[7] *Prosecutor v. Akayesu*, ICTR-96-4-T, 1998 *available at* 1998 WL 1782077. [reproduced in accompanying notebook at Tab 2]

[8] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierre Leone,. Cambridge: C.U.P., 2006, p. 472. [reproduced in accompanying notebook in Tab 29]

tribunals have developed limitations by which a party can cross-examine opposing counsel's witness and limitations by which a party can cross-examine their own witness.

5. A party may wish to impeach its own witness because the witness proved to be adverse towards its calling party.

A calling party generally does not have the ability to discredit its own witness because a calling party is to ensure the credibility of its own witness.[9] However, many jurisdictions have allowed the exception to impeach one's own witness if that witness is adverse to its own party.[10] The procedure for impeaching one's own witness has changed through the years. There were not many restrictions on the procedures for impeachment but later the ICTY created more limitations on the procedure in order to balance the interests of the accused and witnesses.[11]

6. Impeachment can be obtained through cross-examination of the witness.

Either party can impeach a witness through cross-examination. The cross-examination can only be based on evidence that was already admitted as evidence to the court. When impeaching one's own witness, the party can cross-examine its own witness during redirect examination. When impeaching one's own witness, the calling party should seek permission from the Trial Chamber and submit the scope of which the party wishes to impeach the

[9] Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, *Milosevic,* IT-02-54-T, Judgment of 29 April 2004. [reproduced in accompanying notebook in Tab 27]

[10] Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY,* 3 J. Int'l Crim. Just. 1037 (2005). [reproduced in accompanying notebook in Tab 41]

[11] *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008. [reproduced in accompanying notebook in Tab 16]

witness.[12] The Trial Chamber has much discretion when allowing the impeachment of a party's own witness and may come up with a number of solutions by which to address such a witness.

7. Cross-examination may prove to be problematic because of the limitations that are placed on access to witnesses.

There are many limitations on access to witnesses. To examine opposing counsel's witness prior to their testimony, a party should ask the opposing party's permission and the only way to compel a witness is through a Trial Chamber's subpoena.[13] If a witness is under protection the party seeking to question the witness must notify the Witnesses and Victims Section who will then notify the witness to gain their consent for questioning.[14] Access to witnesses can also prove to be difficult when the witness is to remain anonymous. A party planning to cross-examine an anonymous witness must deal with several roadblocks when they cannot gain much personal information about an anonymous witness.[15] In some instances, they get the information close to the time the witness is to testify in court.

8. There are also alternatives to impeachment of a witness.

While parties may wish to discredit a witness, they need not do so only through the means of witness impeachment. The trial Chamber also has the discretion to find other ways by

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[12] *Id.*

[13] Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY,* 3 J. Int'l Crim. Just. 1037 (2005). [reproduced in accompanying notebook in Tab 41]

[14] *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Sesay Defense Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006, para. 25(j). [reproduced in accompanying notebook at Tab 20]

[15] Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused,* 23 St. John's Legal Comment. 167, 192 (2008). [reproduced in accompanying notebook in Tab 37]

which to resolve the issue of discrediting a witness.[16] Parties have the ability to discredit the witness through seeking leave from the Trial Chamber to cross-examine the witness.[17] For instance, a party may seek leave of the court by which to cross-examine a witness about previous statements they may have made. Also, if the party knows before a witness gives oral testimony that the witness may become adverse, the Trial Chamber may grant the calling party the ability to ask leading questions in order to promote efficiency and discredit the witness at an early stage of the trial proceedings.[18]

II. FACTUAL BACKGROUND OF TRIAL PROCEEDINGS

A. General Procedure

At the beginning of trial, each party may make an opening statement limited to evidence each party plans to present in support of his or her case.[19] After the conclusion of opening statements, each party is entitled to call witnesses and present evidence in the following sequence: evidence for the prosecution; evidence for the defense; prosecution evidence in rebuttal, with leave of the Trial Chamber; and evidence ordered by the Trial Chamber itself.[20] Rebuttal evidence for the prosecution is limited to matters that have arisen out of defense

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[16] *Prosecutor v. Krajisnik*, IT-00-39-T, Transcript of 23 November 2004. [reproduced in accompanying notebook in Tab 10]

[17] *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008, para. 20. [reproduced in accompanying notebook in Tab 16]

[18] *Id*.

[19] ICTY RPE, Rule 84, ICTR RPE, Rule 84, SCSL RPE, rule 84. [reproduced in accompanying notebook in Tab 30, 31, 34]

[20] ICTY RPE, Rule 85; ICTR RPE, Rule 85; SCSL RPE, Rule 85. [reproduced in accompanying notebook in Tab 30, 31, 34]

evidence.[21] However, if the defense brings evidence of a fresh matter that the prosecution could not have foreseen, rebuttal evidence may be called by the prosecution.[22] Judges also have the ability to call witnesses, *proprio motu*, by which they may attempt to explore further evidence of the case.[23] For example, in *Statić,* the ICTY Trial Chamber called several witnesses in an attempt to explore indications of genocidal intent at a leadership level.[24]

B. Witness Testimony in the Trial Process

In the tribunals, witness testimony is brought to the court in an adversarial process. In a civil law system witnesses would be questioned under the control of the court rather than of the parties, and the court would have available any previous statements of the witness.[25] In the adversarial system, it is the parties who call and question their respective witnesses, who are then cross examined by the other party.[26] While the tribunals have attempted to blend the elements of both civil and adversarial systems for the procedure and evidence of the tribunal, this aspect

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[21] *Prosecutor v. Delatić et al.,* Case No. IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 23. [reproduced in accompanying notebook in Tab 6]

[22] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Mortion for Leave to Call Rebuttal Evidence, 27 March 2002. [reproduced in accompanying notebook in Tab 19]

[23] ICTR RPE, Rule (A)(iv); ICTY RPE, Rule (A)(iv); SCSL RPE, Rule 85(A)(iv). [reproduced in accompanying notebook in Tabs 30, 31, 34]

[24] *Prosecutor v. Stakić,* Case No. IT-97-24-T, Judgment of 31 July 2003, para. 551. [reproduced in accompanying notebook in Tab 23]

[25] *Prosecutor v. Limaj*, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, ¶ 8. [reproduced in accompanying notebook in Tab 15]

[26] *Id.*

remains purely adversarial.[27] This adversarial approach becomes difficult for each of the parties because access to witnesses is not readily available because the witness becomes one of the court[28] as indicated below. The ramifications of this approach are notable because they can cause much difficulty when a party wishes to find evidence by which to impeach a witness during cross-examination.

In the SCSL, witness testimony may be given orally or in written form. For instance, a witness may give a deposition[29] or may give direct evidence "in court, or via such communications media, including video, closed-circuit television, as the Trial Chamber may order."[30] Witnesses are generally brought to the tribunal by either one of the parties, however, once they begin to testify they are no longer considered a party's witness rather they become a witness of justice.[31] The calling party presents its witnesses and then the opposing counsel cross-examines the witness. The "Rules limit cross-examination to the subject matter of the evidence-

[27] *Id.*

[28] *Prosecutor v. Jelisić,* Case No. IT-95-10-T, Decision on the Communication Between Parties and Witnesses, 11 December 1998. [reproduced in accompanying notebook in Tab 8]

[29] SCSL RPE, Rule 90(A) in accordance with Rule 71. [reproduced in accompanying notebook in Tab 35]

[30] SCSL RPE, Rule 90(A) in accordance with Rule 85(D). [reproduced in accompanying notebook in Tab 35]

[31] *Prosecutor v. Jelisić*, Case No IT-95-10-T, Decision on the Communication Between Parties and Witnesses, 11 December 1998. [reproduced in accompanying notebook in Tab 8]

in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case."[32]

C. Once testimony begins, a witness becomes one of the court and the parties must gain access to the witness.

Once the witness becomes a witness of justice and begins to testify, there should be no further communication between parties and witnesses.[33] A party can request an interview with a witness of the opposing party in preparation for trial, but only the issuance of a subpoena by a Chamber can compel an unwilling witness to attend an interview.[34] An ICTY Trial Chamber reasoned that "permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the Tribunal."[35]

Another problem that parties face is that the Rules allow the Trial Chamber to, "in lieu of oral testimony, admit as evidence in whole or in part, information including written statements

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[32] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierre Leone,. Cambridge: C.U.P., 2006, p. 472. [reproduced in accompanying notebook in Tab 29]

[33] See e.g., *Prosecutor v. Jelsić*, Case No. IT-95-10-T, Decision on Communication Between Parties and Witnesses, 11 December 1998. [reproduced in accompanying notebook in Tab 8]

[34] Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY,* 3 J. Int'l Crim. Just. 1037 (2005). [reproduced in accompanying notebook in Tab 41]

[35] *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Decision on Communication Between the Parties and Their Witnesses, 21 September 1998. [reproduced in accompanying notebook in Tab 12]

and transcript, that do not go to the proof of the acts and conduct of the accused"[36] but instead show the proof of facts that may be relevant to confirm certain facts of the case.[37] However, out of the materials that are admitted in such a manner, the "portions of the witness statement that are struck out by the Chamber for non-compliance with Rule 92 *bis* may not be resurrected by parties for the purpose of cross-examination on the credibility of the witness, and may not be treated as a prior representation for cross-examination purposes as they exist only for the purpose of the rule 92 *bis* procedure and do not stand alone."[38] The Trial Chamber has discretion as to allowing inquiry into additional matters.[39]

Therefore, not only is it difficult to gain access to witnesses for interviews other evidence that may exist is not accessible to parties as information which they may use in order to discredit a witness. This can make it problematic to impeach a witness because the less evidence a party can obtain, the less they have to use to discredit a witness's testimony. Here the Trial Chambers has wide discretion as to the inquiry that they may allow. In some ways this may be beneficial to a party if they have adequate reasons to gain information that was admitted by 92*bis*. However, this proves to be a difficult task when this evidence is only to be used to show proof of facts.

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[36] SCSL Rule 92*bis.* [reproduced in accompanying notebook in Tab 34]

[37] SCSL RPE, Rule 92 *ter*. [reproduced in accompanying notebook in Tab 34]

[38] *Prosecutor v. Simic et al.,* Case No. IT-95-9-T, Decision on the Prosecutor's Motion for Trial Chambers Redetermination of its Decision of 2 April 2003 Relating to Cross-Examination of Defence Rule 92 *bis* Witnesses or Alternatively Certification Under Rule 73(B) of the rules of Procedure and Evidence. [reproduced in accompanying notebook in Tab 21]

[39] See *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008, para. 20. [reproduced in accompanying notebook in Tab 16]

D. The purpose of the trial proceedings is to promote justice and this can only be ensured if both parties are granted equally fair trial rights.

"Equality of Arms" is an expression from the ECHR law which refers to a range of fair trial rights, some of them codified in the tribunal's statutes including: the accused is entitled "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;"[40] and the accused also has the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[41] The ICTY Appeals Chamber held that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee."[42] "Equality of arms obligated a judicial body to ensure that neither party is put at a disadvantage when presenting its case."[43] The Chamber in *Tadić* noted that this principle:

> Must be given a more liberal interpretation that that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defense must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in

[40] ICTY Statute, art. 21(4)(b); ICTR Statute, art. 20(4)(b); SCSL Statute, art. 17(4)(b). [reproduced in accompanying notebook in Tab 32, 33, 36]

[41] ICTY Statute, art. 21(4)(e); ICTR Statute, art. 21(4)(e); SCSL Statute, art. 21(4)(e). [reproduced in accompanying notebook in Tab 32, 33, 36]

[42] *Prosecutory v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, ¶ 44; see also *Prosecutor v. Oric,* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defense Case of 20 July 2005, ¶ 7.[reproduced in accompanying notebook in Tab 25]

[43] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment 15 July 1999, ¶ 48, 50 [reproduced in accompanying notebook in Tab 24]

> presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some states have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses.[44]

III. THE INTERNATIONAL JURISPRUDENCE ON THE PROCEDURE TO IMPEACH A WITNESS.

To ensure that trials are fair, the parties must be given equally fair trial rights. In order to ensure fair trial rights, parties must have access to witnesses. While parties are given the right to cross-examine witnesses, it can be difficult at times to find discrediting evidence by which to cross-examine a witness. This is due to the difficulty of access to the witnesses which makes it difficult to impeach a witness. A party may also seek to impeach opposing counsel's witness or its own witness. Impeachment of a witness is a difficult task whether a party wishes to impeach its own or opposing counsel's witness.

The Trial Chamber is given much discretion in the process of impeachment. It has been given broad authority over the years when giving witness access to parties, allowing specific evidence to be obtained, and allowing a party to impeach a witness. This discretion has proven especially important in cases where a party may wish to impeach its own witness. For instance, in *Popović*, the Trial Chambers was given discretion on a case by case basis to decide under

[44] *Id.* at ¶ 52.

which circumstances a party may impeach its own witness.[45] The Trial Chambers was also given the discretion to find alternatives for a party to discredit its own witness.[46] Therefore, it is important to note that, when dealing with witnesses of the court, parties have encountered many problems which seem to be resolved only through the practices developed through the discretion of the Trial Chambers.

A. Parties may wish to impeach a witness by discrediting the witness for a variety of reasons.

There are many reasons for which a party may wish to impeach a witness. Some of the main reasons for witness impeachment are due to prior inconsistent statements, character evidence of the witness, or bias of the witness for one of the parties.[47]

1. Prior inconsistent statements.

Prior statements that are relied upon at trial must be admitted into evidence.[48] If there are prior inconsistent statements, they should be raised to a witness during cross-examination.[49] These may help the Trial Chamber to assess the credibility of the witness. When dealing with prior inconsistent statements, the Trial Chamber looks at several factors such as the difficulty of

[45] *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008. [reproduced in accompanying notebook in Tab 16]

[46] *Id.*

[47] Richard May, International Criminal Evidence, International and Comparative Criminal Law Series 2002, 169-172. [reproduced in accompanying notebook in Tab 28]

[48] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T Judgment of 2 September 1998, para. 137. [reproduced in accompanying notebook at Tab 1]

[49] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Prosecutorys Motion for Production of Defense Witness Statements (Separate Opinion of Judge McDonald), 27 November 1996, ¶ 46. [reproduced in accompanying notebook in Tab 24]

recollecting precise events years after the fact, difficulty of translation of the original testimony, the impact of trauma and illiteracy of the witness.[50]

Other factors that must be considered when dealing with inconsistent statements are culture and language which can create a barrier in interpreting testimony from witnesses who may be from a different background than Tribunal judges.[51] *Akayesu*[52] discusses "cultural factors which might affect an understanding of the evidence presented."[53] The following explains the impact of culture and language when considering inconsistent statements in *Akayesu*:

a. Inconsistencies of testimony can be attributed to "the interpretation of oral testimony from Kinyarwanda into one of the official languages of the tribunal [French and English] has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English."[54]
b. Certain words in the Kinyarwanda terms had special meanings that could only be understood in the context of Rwandan culture. This was in reference to some derogatory terms that were used to also refer to Tutsis.

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[50] *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T Judgment of 2 September 1998, para. 455 . [reproduced in accompanying notebook at Tab 1]

[51] Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda,* bepress Legal Series (2005). [reproduced in accompanying notebook in Tab 39]

[52] *Prosecutor v. Akayesu,* ICTR-96-4-T, 1998 *available at* 1998 WL 1782077. [reproduced in accompanying notebook at Tab 2]

[53] *Id.* at ¶ 130.

[54] *Id.* at ¶ 140.

c. Another cultural factor to consider was received by expert testimony that "most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else."[55]

d. "[I]t is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be 'decoded' in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question."[56]

e. In reference to the cultural and language barriers in understanding witness testimony judges had to be careful when discounting testimony in order to avoid an unjust result in the *Akayesu* case.

f. The cultural and language factors were also of issue in *Rutaganda.*[57] There the Court also found that the essence of the witnesses' testimony was lost when it was translated from Kinyarwanda to French or English.

2. Character evidence.

Character evidence is based on assessment of either a poor reputation for truthfulness or of specific misconduct. For instance, in *Kupreškić* the defense counsel used medical, divorce,

[55] *Id.* at ¶ 155.

[56] *Id.* at ¶ 156.

[57] *Prosecutor v. Rutaganda*, ICTR-93-3 (1999). [reproduced in accompanying notebook in Tab 18]

and employment records to attack the credibility of a critical witness.[58] There the witness had denied any alcoholism or eye sight problems but under cross-examination records, which showed implications of problems with sight and alcohol, were used to discredit the witness.[59] This approach should only be used if it touches directly on the credibility of the witness.

3. Bias of a Witness.

This problem arises when a party can show evidence that a witness has a motive to testify against the accused. For instance, in *Akayesu* the defense argued that prosecution witnesses were biased because they either belonged to a syndicate of informers or were interested in taking over the property of the accused. In this situation the Trial Chambers advised the defense to challenge the witness, based on the information about their possible ulterior motives, at cross-examination.[60]

The Trial Chamber suggested this approach because the presentation of evidence to the witness allows the witness to have a chance to admit or rebut the discrepancies which may have arisen in the evidence. Otherwise, never presenting the information to the witness deprives the Chamber from finding a possible resolution of the matter.[61] Similarly, the prosecution can attack a defense witness for any bias toward the accused like having a close relationship to the accused or gaining a benefit from testifying for the accused.[62]

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[58] *Prosecutor v. Kupreškić et al*, Case No. IT-95-16, Judgment of 14 January 2000, para. 392. [reproduced in accompanying notebook in Tab 13]

[59] *Id.*

[60] *Prosecutor v. Akayesu*, ICTR-96-4-T, 1998 available at 1998 WL 1782077, para. 45-47. [reproduced in accompanying notebook at Tab 2]

[61] *Id.* at ¶ 47.

[62] *Prosecutor v. Kayishema and Ruzindana*, Judgment of 21 May 1999, para. 266-267.

B. When dealing with the credibility of a witness, impeachment may be limited as to not be fatal to the entire testimony of the witness.

Inconsistencies need not be fatal to the testimony of a witness because the Trial Chamber may still accept the evidence of the witness even with these inconsistencies.[63] The Trial Chamber may accept parts of a witness' testimony while rejecting other parts.[64] While the Trial Chamber will naturally form an opinion as to the credibility of a witness during their testimony, the final assessment of credibility must be taken into account in light of the entire trial record.[65] In the case of *Bagelishema,* the ICTR Trial Chamber addressed various factors that should be used to determine a witness's credibility:

1. credibility in terms of internal consistency and detail;[66]
2. strength under cross-examination;[67]
3. consistency against prior statements of the witness;[68]
4. credibility based on other witness accounts or other evidence submitted in the case;[69] and

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[reproduced in accompanying notebook in Tab 9]

[63] Richard May. International Criminal Evidence, International and Comparative Criminal Law Series 2002, 167. [reproduced in accompanying notebook in Tab 28]

[64] *Prosecutor v. Kupreskic et al.,* Case No. IT-95-16, 23 October 2001, para. 202. [reproduced in accompanying notebook in Tab 11]

[65] Richard May. International Criminal Evidence, International and Comparative Criminal Law Series 2002, 167. [reproduced in accompanying notebook in Tab 28]

[66] *Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-T , Judgment of 7 June 2001, para. 532, 656, 700. [reproduced in accompanying notebook at Tab 3]

[67] *Id*. at ¶ 615.

[68] *Id*. at ¶ 374, 411.

[69] *Id*. at ¶ 374.

5. possible motives on behalf of the witness.[70]

After looking at each of the factors, the Trial Chamber can then assess the credibility of the witness in reference to the entire trial record.

C. Parties may wish to impeach opposing counsel's witness or their own witness.

1. Impeachment of opposing counsel's witness is done through cross-examination.

As discussed above, after the calling party presents the testimony of a witness in court the opposing party then has the chance to cross-examine the witness. Parties may use cross-examination to discredit the witness' statements in order to impeach them. However, this endeavor has proven to be difficult when a party attempts to discredit a witness. The Trial Chamber may order the Prosecutor or the Defense to produce copies of the written statements of each witness that party intends to call to testify.[71] As listed above, the SCSL has established that in order to have access to a witness the opposing counsel must contact the WVS which will then contact the specific witness. The witness then has the option of whether or not to accept the interview. Rejection by the witness for an interview can be problematic. The only way to compel a witness to answer these questions is if the Trial Chamber later compels the witness to answer questions.

[70] *Id*. at ¶ 749.

[71] SCSL RPE, Rule 73*bis* and 73*ter*. [reproduced in accompanying notebook in Tab 34]

2. Impeachment of one's own witness is left to the discretion of the court and the procedure has evolved over time.

Generally witnesses are impeached by opposing counsel but in some cases a party may wish to impeach its own witness.[72] An application may be submitted to impeach one's own witness to the Court.[73] For instance, a party may wish to impeach its own witness because a witness has become hostile. [74] This problem has arisen in the context of when a party brings a witness to testify and the witness proves to be adverse to its own party. The Trial Chamber in *Blagojević and Jokić* merely agreed that, in principle, a hostile witness may be cross-examined.[75] The Court explained that a witness is hostile when a witness chooses not to cooperate or becomes adverse to the calling party in which situation the calling party would have to cross-examine their own witness in order to impeach him or her.[76] In that case, the prosecution filed a motion to the Trial Chamber to grant them the ability to ask leading questions if the witness is hostile toward the calling party.[77]

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[72] See e.g., *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008. [reproduced in accompanying notebook in Tab 16]

[73] *Id.*

[74] Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY,* 3 J. Int'l Crim. Just. 1037 (2005). [reproduced in accompanying notebook in Tab 41]

[75] *Prosecutor v. Blagojević et al.,* IT-02-06-T, Judgment of 20 October 2003. [reproduced in accompanying notebook at Tab 5]

[76] *Id*. at ¶ 3099-3100.

[77] *Id.*

a. The hostile witness.

If a party argues that a witness is hostile, they must explain how and why that witness is considered hostile. In *Limaj*, where opposing counsel attempted to impeach a witness, a hostile witness was described as "one who was not prepared to tell the truth".[78] The impeachment of a witness was refused when it was found that disparity in a witness's testimony, when compared to previous statements, did not prove hostile. There was lack of clarity whether the difference in the witness's accounts was due to some reasonably simple explanation or a change in position by the witness. However, the court did not find this to lead to a hostile witness.[79]

b. The reasons against impeachment of one's own witness.

There has been much controversy over whether a party should be able to impeach its own witness.[80] Some of the arguments against allowing impeachment of a party's own witness are as follows:

1. A party should not be granted any means to discredit its witness;
2. a party guarantees the trustworthiness of evidence it adduces;
3. it would be unfair for the witness to be subjected to cross-examination twice; and

[78] *Prosecutor v. Fatimir Limaj et al.*, IT-03-66-T. [reproduced in accompanying notebook in Tab 15]

[79] *Id*.

[80] Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, *Milosevic*, IT-02-54-T, Judgment of 29 April 2004. [reproduced in accompanying notebook in Tab 27]

4. such cross-examination may lead the jury, the fact finders in a common law system, to confusion because the witness has been discredited by the party calling him.[81]

However, in *Popović,* the Trial Chamber relied on Judge O-Gon Kwon's opnion that the above reasons were not convincing and the Tribunal should allow the principle of attacking the credibility of a witness by any party, including the party calling the witness.[82]

c. The reasons to allow impeachment of one's own witness.

The Trial Chamber in *Popović* decided that "it is open to any party to challenge the credibility of his or her witness in part or in full."[83] The Trial Chamber originally decided "that a party seeking to challenge the credibility of its own witness: (i) need not seek permission; (ii) need not have the witness declared "hostile" as a first step; (iii) would not be limited in the manner in which challenge is made *i.e.* he or she should be able to "cross-examine" the witness using all of the relevant techniques, including leading questions; and (iv) may do so during the course of the examination-in-chief or on redirect."[84] However, the Trial Chamber noted that notice had to be given when the challenge begins and ends and that evidence found through this

[81] *Id.*

[82] *Id.*

[83] *Prosecutor v. Popović,* Case No. IT-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's own Witness, 1 February 2008, ¶ 2. [reproduced in accompanying notebook in Tab 16]

[84] *Id.* at ¶ 6.

process would not be limited to challenging the credibility of the witness, but may also be considered in relation to substantive issues.[85]

However, on appeal the Appellate Chamber raised arguments against removing the many safeguards for the witness impeachment process because the procedure for the hearing of witnesses at the Tribunal is rooted in the adversarial process.[86] *Popović* explains that the adversarial process generally assumes that the calling party should claim responsibility for its own witness, and so, should not need to discredit that witness.

Some of the concerns of the Appellate Chamber were:

1. that the calling party might not wish to impeach their witness, rather they may use the opportunity to ask leading questions and that such a procedure may affect strategic and tactical decisions regarding the calling of particular witnesses; and
2. that such an unlimited impeachment process will be used to tender additional material, which would be otherwise inadmissible, for its substantive value and not to discredit the witness.[87]

Therefore, the Appellate Chamber in *Popović* determined that the Trial Chamber must be the one to determine whether a party can cross-examine its own witness.[88] The scope of the questioning must also be left to the discretion of the Trial Chamber.[89] Therefore, the calling

[85] *Id.*

[86] See e.g., *Id.* at ¶ 24 (citing examples of the adversarial practice for witness impeachment).

[87] *Id.* at¶ 20.

[88] *Id.* at ¶ 32.

[89] *Id.*

party must seek permission of the Trial Chamber to impeach its own witness and also must submit the scope of material by which it would like to impeach the witness.

D. Impeachment is done through cross-examination of a party's witness; however, there have been many problems and so the Trial Chambers have much discretion in the impeachment process.

1. Local counsel may not have the experience with the procedure of cross-examination.

It is well-established in the jurisprudence of the ICTY that the Trial Chambers exercise discretion in relation to trial management and the conduct of proceedings before them.[90] The Appeals Chamber, generally, has held that when an accused is effectively represented by counsel, it is, in principle, for the counsel to conduct the examination of witnesses.[91] There are many problems with cross-examination that can occur during a trial. One of the problems that the tribunals have faced thus far is that of lack of experience with cross-examination.[92] For instance, in the ICTY the bulk of defense counsel are Balkan-trained lawyers and are typically not experienced in cross-examination and while some are quick learners others have a difficult

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[90] *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecutor Case, 6 February 2007, para. 8; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 4; *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, ¶ 14. [reproduced in accompanying notebook in Tab 7, 22, 26]

[91] *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006. [reproduced in accompanying notebook in Tab 26]

[92] Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court* in 5 WASH. U. J.L. & POL'Y 87 (2001), p. 104. [reproduced in accompanying notebook in Tab 40]

time accomplishing the task.[93] This lack of experience must be mitigated in trial proceedings by the Trial Chambers if the trial is to be fair.

2. The accused may wish to participate in cross-examination.

The Trial Chambers may also, under exceptional circumstances, authorize an accused to participate in the examination of a witness.[94] The Trial Chambers are entitled under Rule 90(F) of the RPE to exercise control over the manner in which such examination is conducted,[95] including ensuring that it "is not impeded by useless and irrelevant questions". For instance, in *Prlić* the court addressed the issue of deciding under what circumstances may the accused participate in witness examination. This issue was raised to prevent the violation of the accused's rights under Article 21(e) of the ICTY's statute which states that the accused shall be entitled "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[96]

The Trial Chamber attempted to restrict the accused's right to participate to situations which "related to the examination of events in which he personally took part or to the

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[93] *Id.*

[94] *Prosecutor v. Prlić,* Case No. IT-04-74-AR70.11, 11 September 2008, ¶ 19. [reproduced in accompanying notebook in Tab 17]

[95] Rule 90(F) of RPE provides: "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
(i) make the interrogation and presentation effective for the ascertainment of the truth; and
(ii) avoid needless consumption of time." [reproduced in accompanying notebook in Tab 35]

[96] ICTY Statute, Article 21(e). [reproduced in accompanying notebook in Tab 32]

examination of issues about which he has specific expertise."[97] The Trial Chamber further restricted the accused's right by defining what "specific expertise" included, which was determined to be "the expertise held by an Accused at the time of the alleged facts an owing to which he was charged in the Amended Indictment of 11 June 2008."[98] While it was decided in *Prlić* that the Trial Chamber had discretion over the proceedings on the accused's participation in examination of a witness, it held that "the Trial Chamber should have allowed more flexibility for its assessment of the notion of specific expertise and perform such assessment on a case-by-case basis when faced with a specific request."[99] Here we see the progression of allowing the Trial Chamber more discretion on a case by case basis for the procedure dealing with witnesses during trial proceedings. There are many other problems that the tribunals have faced with witnesses and more discretion has been given over time to the Trial Court when assessing how to deal with witnesses.

E. Aside from cross-examination, parties have difficulty in gaining access to many of the witnesses presenting a problem when attempting to discredit a witness.

1. Access to witness of the court.

Before giving any evidence at the tribunal, a witness must take a solemn declaration to tell the truth.[100] Until the point that a witness takes this oath, the party calling has free

[97] *Prosecutor v. Prlić,* Case No. IT-04-74-AR70.11, 11 September 2008, para. 3. [reproduced in accompanying notebook in Tab 17]

[98] *Id.* at ¶ 21.

[99] *Id.* at ¶ 21.

[100] SCSL RPE, Rule 90(B). [reproduced in accompanying notebook in Tab 35]

communication with his or her witness.[101] However, once the witness takes the oath there is a growing practice in the tribunals to prohibit communication. For instance, the Trial Chamber II in *Kupreškić* ordered that once a witness has taken the solemn declaration to tell the truth, he or she becomes "a witness of truth before the Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either party."[102] The Chamber also noted that:

> [P]ermitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the Tribunal.[103]

However, in situations where witnesses wish to communicate certain information to either party, they can contact the Victims and Witnesses Section who will notify the party in question. That party should then obtain leave of the Trial Chamber to communicate with the witness, or inform the other party, who could raise an objection to this communication.[104]

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[101] Richard May. International Criminal Evidence, International and Comparative Criminal Law Series 2002, 156-57. [reproduced in accompanying notebook in Tab 28]

[102] *Prosecutor v. Kupreškić et al*., Case. No. IT-95-16, Decision on Communication Between the Parties and Their Witnesses. 21 September 1998. [reproduced in accompanying notebook in Tab 12]

[103] *Id.*

[104] *Prosecution v. Kordić and Cerkez,* Case No. IT-95-14/2, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999. [reproduced in accompanying notebook in Tab 14]

2. Access to witnesses that give testimony through depositions.

Generally, if a witness gives a deposition, the opposing counsel has a right to cross-examine the witness.[105] Notice of taking of a deposition must be given to the opposing party who has the right to attend the deposition and cross-examine the witness.[106]

3. Access to witnesses that give testimony through video-link.

If necessary, evidence may be received via video-conference link.[107] The same rules apply for the presentation of evidence, including cross-examination by the opposing party.[108] This way, parties are still able to obtain evidence by which to cross-examine and possibly discredit the witness.

4. Access to expert witnesses.

Admission of experts reports into evidence are allowed without the need for the expert being called to give evidence,[109] however, if the opposing party elects to cross-examine, the witness must be called.[110] It can be difficult to examine the witness with

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[105] Richard May, International Criminal Evidence, International and Comparative Criminal Law Series 2002, 287. [reproduced in accompanying notebook in Tab 28]

[106] SCSL RPE, rule 71(C). [reproduced in accompanying notebook in Tab 34]

[107] SCSL RPE, Rule 71(D). [reproduced in accompanying notebook in Tab 34]

[108] SCSL RPE, Rule 71(E). [reproduced in accompanying notebook in Tab 34]

[109] SCSL RPE, Rule 94*bis*(C). [reproduced in accompanying notebook in Tab 34]

[110] SCSL RPE, Rule 94*bis*(B)(ii). [reproduced in accompanying notebook in Tab 34]

just their written testimony; therefore, it is necessary for a party to have access to the expert witness in order to properly cross-examine him or her.

5. Access to witnesses under the Victims and Witnesses Unit within the Registry.

The SCSL is governed by the Court's Statute and Article 16 provides that:

> The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

There are many reasons for the protection of these witnesses. For instance, the Trial Chamber in *Sesay* was given a Declaration by a Special Court Investigator which indicated that:

a. members of the population who may be called on as witnesses for the Special court are concerned for their safety if their identity becomes known;
b. many of those that committed the crimes live amongst the witnesses and the witnesses fear retaliation if their identity becomes known to the public;
c. potential witnesses also fear retaliation of relatives and friends of the Accused; and

d. there is no police presence in the remote areas that the potential witnesses may live by which to protect them if their identities are released.[111]

Some of the protections that have been allotted to these witnesses include:

> (1)non-disclosure of their identity to the media or in the public record; (2) court orders to defense counsel to keep a log and notify the prosecutor of all contacts with witnesses; (3) facial and voice distortion of the witness on camera since the proceedings are televised to the Balkans; and (4) in extreme cases taking testimony in closed session which will not appear in the public transcripts.[112]

Access to the protected witness after testimony is difficult for opposing counsel which also makes it difficult to get evidence for cross-examination in order to test the credibility of the witness.[113] Here again, the Trial Chambers is given much discretion when authorizing access to a witness for the purpose of impeachment. Through the Trial Chambers, international jurisprudence has discovered ways by which parties can be granted access to protected witnesses through a third party. In the SCSL this third party is the Witnesses and Victims Section ("WVS"),[114] which shall be notified by the opposing counsel of their intention to interview a

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[111] *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Sesay Defense Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006, para. 22. [reproduced in accompanying notebook in Tab 20]

[112] Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court* in 5 WASH. U. J.L. & POL'Y 87 (2001), p. 109. [reproduced in accompanying notebook in Tab 40]

[113] *Id.*

[114] *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Sesay Defense Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 30 November 2006. [reproduced in accompanying notebook in Tab 20]

witness. Once WVS is notified, they will notify the witness about the request for an interview at which point the witness has the ability to accept or deny the proposed interview.[115] *Sesay* also identifies that "except under exceptional circumstances, any such interview shall not take place at the outset of the witness' testimony in court."[116]

6. Access to anonymous witnesses.

Witness anonymity makes it very difficult for the opposing party to impeach and cross-examine a witness.[117] Recent Trial Chambers decisions of the ICTY have noted that both prosecution and defense must have the right to engage in effective cross-examination to ensure a fair trial.[118] For instance, in *Blaskić*, the defense provided the prosecution with pseudonyms of two key witnesses and refused to give any additional information until the moment the witnesses appeared to testify.[119] While the defense counsel only gave pseudonyms in an attempt to shield the witnesses from outside pressure, the Trial Chamber concluded that withholding information interfered with the prosecution's ability to effectively cross-examine the defense's witnesses. In that case, the Chamber ordered the defense to provide the prosecution with witness information

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[115] *Id.* at ¶ 25(j).

[116] *Id.*

[117] Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused,* 23 St. John's Legal Comment. 167, 192 (2008). [reproduced in accompanying notebook in Tab 37]

[118] Elizabeth M. Dipardo, *Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses before the ICTY,* 31 B.C. Int'l & Comp. L. Rev. 277 at 284, (2008). [reproduced in accompanying notebook in Tab 38]

[119] *Prosecutor v. Blaskic,* Case No. IT-95-14, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, 25 September 1998, ¶ 6. [reproduced in accompanying notebook at Tab 4]

two days before the scheduled testimony[120] in order to balance the rights of the witnesses and the fairness of the trial.

F. With all of the difficulties that a party may face for impeachment, a party may want to seek alternatives to impeachment.

In an attempt to promote efficiency and due to the difficulty that can occur in the impeachment process, it may be beneficial to seek alternatives to impeachment of a witness. In *Popović* the court explains that there are other ways to discredit one's own witness.[121] The Trial Chamber may decide to allow the party to take leave to cross-examine its own witness on an inconsistent statement with showing any adversity on the witness's part.[122] Granting leave of the court to cross-examine witnesses was permitted in *Limaj* where witnesses of the prosecution have evidence which differed from their original interview with the Prosecution.[123] The Prosecution moved for leave to cross-examine the witnesses on the grounds of hostility.[124] The Trial Chamber granted this motion because it was persuaded that the witness was not prepared to speak the truth for the Prosecution, the calling party, and therefore cross-examination of the previous interview was necessary.[125]

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[120] *Id.* at ¶ 14.

[121] *Id.* at ¶ 25.

[122] *Id.*

[123] *Prosecution v. Limaj,* Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, Order of 25 April 2005, ¶ 3. [reproduced in accompanying notebook in Tab 15]

[124] *Id at* ¶ 4.

[125] *Id.*

The Court also considers the situation in *Krajisnik* where the calling party raises the problem of hostility and then the Trial Chamber decides how to deal with the issue.[126] There the court decided that its approach for dealing with the hostility of a witness would be determined on a case-by-case basis depending on the reasons a party may have to think a witness may prove to be adverse.[127]

For instance, in *Krajisnik*, the Prosecution had given a list of witnesses some of which the party believed may become hostile or adverse.[128] Therefore, the Trial Chamber had already been notified of the possibility of adversity and so the Prosecution was not seeking a remedy for cross-examination of the witnesses in order to impeach them rather they were asking for a solution by which to discount the possible hostility in the initial examination of the witness. The Trial Chamber granted the Prosecution the ability to ask the witnesses some leading questions in their initial testimony for certain issues but not all.[129] This method would ensure that the Prosecution could discredit the adversity of the witness, however, this is not a fixed solution and any remedy would have to be determined based on each specific situation.[130] Therefore, allowing leading questions in cross-examination is just one other way in which to discredit a party's own witness.

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[126] *Prosecutor v. Krajisnik*, IT-00-39-T, Transcript of 23 November 2004. [reproduced in accompanying notebook in Tab 10]

[127] *Popovic* at ¶ 25. [reproduced in accompanying notebook in Tab 16]

[128] *Prosecutor v. Krajisnik*, IT-00-39-T, Transcript of 23 November 2004, 8559. [reproduced in accompanying notebook in Tab 10]

[129] *Id.*

[130] *Id.*

V. SUMMARY AND CONCLUSIONS

The purpose of a trial proceeding is to promote equal trial rights to both parties. This includes the ability of each party to examine witnesses. While parties generally bring witnesses to the court, once sworn into the court, witnesses become one of justice which is to ensure that each party has equal access to the witnesses. While this process is to promote equal access to the witnesses, it has proven to create difficulty when accessing a witness by which a party may wish to gain evidence for cross-examination. International jurisprudence shows that the Trial Chambers has been given broad discretion in order to allow access to witnesses and to alleviate the hardships of gaining access to evidece for impeachment purposes.

A party may wish to impeach opposing counsel's witness or its own witness. Generally, a party can impeach opposing counsel's witness during cross-examination using the evidence that has already been admitted into court. However, impeaching one's own witness proves to be a complicated endeavor. Generally, parties are not to impeach their own witness because they are to ensure the credibility of their witnesses.

In certain circumstances, witnesses at international tribunals may become adverse to the calling party for various reasons. Therefore, the tribunals have developed ways in which to grant a calling party the ability to discredit its own witness. Over time, the ICTY first granted liberal access to one's own witness for impeachment and did not give much discretion to the Trial Chamber. However, later in *Popović*, the Appellate Chamber held that a Trial Chamber shall be granted much discretion by which to allow impeachment. Specifically, a party must seek permission of the Trial Chamber and state the scope of which the party wishes to discredit the

witness. The Trial Chamber then is able to assess the need for impeachment and can order the scope of evidence which may be discredited.

Cross-examination may be difficult in the international tribunals. There have been instances in which local counsel does not have the experience of cross-examination and so creating a obtaining evidence for cross-examination may be difficult. Also, the accused may wish to participate in cross-examination. While, in some cases, it may be beneficial for accused to assist because of their expertise, in other cases allowing the accused to participate may be inefficient.

There are additional concerns that must be addressed when accessing a witness. A party must seek the permission of opposing counsel before a witness is sworn into the court. Once the witness is sworn in, a party must seek permission of the Trial Chamber to have access to a witness. However, if the witness is under protective measures, the Victims and Witnesses Unit must be notified who will then notify and obtain consent of the witness in question. Access to anonymous witnesses is just as difficult and the Trial Chamber has much discretion as to when to grant access which can be problematic for cross-examination.

While international jurisprudence allows the impeachment of a witness, all of the above factors must be taken into account when preparing for cross-examination by which to impeach a witness. In the interest of trial efficiency, it may be beneficial to look at the alternatives that a Trial Chamber may grant in order to discredit a witness since impeachment may prove to be a cumbersome task.