The Presumption of Innocence

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Abstract: The Presumption of Innocence

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Despite its inclusion in most, if not all, criminal justice systems, there is no general consensus as to what constitutes the presumption of innocence. This study answers the question: What is the presumption of innocence? The study contributes to knowledge by providing a comprehensive definition of the presumption of innocence from both a theoretical and practical perspective.

The substantive chapters are thematic. Chapter two examines how the presumption of innocence fits within the existing legal framework. Chapters three and four discuss the two aspects of the presumption of innocence. The procedural aspect is a legal presumption that is applicable at trial, while the non-procedural aspect extends the presumption of innocence outside of trial to protect non-convicted individuals from being treated as if they have been convicted. Chapter five argues that everyone can benefit from the presumption of innocence, but the right only attaches once someone is 'charged'. Chapter six examines the duty to uphold the presumption of innocence concluding that the strongest duty falls to the fact-finder but the majority of the burden falls to public authorities. Finally, the seventh chapter attempts to reconcile the presumption of innocence with pre-determination detention.

The thesis concludes that the presumption of innocence is a human right with two aspects. These aspects keep innocent people from being treated as if they have been convicted of a crime. While the procedural aspect is operative at trial, the non-procedural aspect extends the presumption of innocence beyond trial. The outcome of the particular criminal case determines when the right to the presumption of innocence ends. Finally, the presumption of innocence may be reconciled with pre-determination detention only if the reason justifying the detention is not based within the criminal process.

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TABLE OF CONTENTS

TABLE OF CASES

International Court of Justice

International Criminal Court

Prosecutor v Lubanga (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Mr Thomas Lubanga Dyilo") ICC-01/04-01/06, A Ch (21 October 2008)

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Niyitegeka v Prosecutor (Judgement) ICTR-96-14-A, A Ch (9 July 2004)

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AP, MP and TP v Switzerland ECHR 1997-V

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John Murray v United Kingdom ECHR 1996-I

Nerattini v Greece App No 43529/07 (ECtHR 18 December 2008)

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Öztürk v Turkey (1984) Series A no 73

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Papon v France (No 2) App No 54210/00 hudoc (ECtHR, 25 July 2002)

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Petko Petkov v Bulgaria App No 2834/06 (ECtHR, 19 February 2013)

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Pierre-Bloch v France ECHR 1997-VI

Porter v United Kingdom App No 15814/02 (ECtHR, 8 April 2003)

Priebke v Italy App No 48799/99 (ECtHR 5 April 2001)

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Radio France and others v France ECHR 2004-II 119

Raimondo v Italy (1994) Series A no 281-A

Ringvold v Norway ECHR 2003-II 117

Asan Rushiti v Austria App No 28380/95 (ECtHR, 21 March 2000)

Sagat et al v Turkey App No 8036/02 (ECtHR, 6 March 2007)

Sahin v Turkey App No 29874/96 (ECtHR, 17 October 2000)

Salabiaku v France (1988) Series A no 141-A

Samoilă and Cionca v Romania App No 33065/03 (ECtHR, 4 March 2008)

Saunders v United Kingdom ECHR 1996-IV

Sekanina v Austria (1993) Series A no 266-A

Smirnova v Russia 2003-IX 241

Sunday Times v United Kingdom (No 1) (1979) Series A no 30

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Tirado Ortiz and Lozano Martin v Spain ECHR 1999-V 553

Telfner v Austria App No 33501/96 (ECtHR, 20 March 2001)

Tomasi v France (1992) Series A no 241-A

Toth v Austria (1991) Series A no 224

Ürfi Çetinkaya v. Turkey App No 19866/04 (ECtHR, 23 July 2013)

Viorel Burzo v Romania App Nos 75109/01 and 12539/02 (ECtHR, 30 June 2009)

Weber v Switzerland (1990) Series A no 177

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Wickramsinghe v United Kingdom App No 31503/96 (ECtHR, 9 December 1997)

Włoch v Poland App No 27785/95 (ECtHR, 30 March 2000)

YB and Others v Turkey App Nos 48173/99 and 48319/99 (ECtHR, 28 October 2004)

Aleksandr Zaichenko v Russia App No 39660/02 (ECtHR, 18 Feburary 2010)

Zollman v United Kingdom ECHR 2003-XII 361

European Commission on Human Rights

Austria v Italy (1961) 7 CD 23

Baragiola v Switzerland (1993) 75 DR 76

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Chapter 1. Introduction

The presumption of innocence presents a paradox. It is an ancient idea in criminal law and one that is deemed important enough to include in the modern human rights and international criminal law statutes. An overwhelming number of national, regional and international jurisdictions recognize the presumption of innocence in their criminal codes and statutes. However, while the presumption of innocence seems essential to criminal justice, its purpose, scope and the practicalities of how it achieves its purpose are largely undefined. This study answers the question: What is the presumption of innocence? This question will be answered by exploring where the presumption of innocence can be found in the law, what its purpose is, who the right-holders and duty-holders are, and the presumption's relationship to other rights. Answering these questions will determine a comprehensive definition of the presumption of innocence.

Statutes and criminal codes do not define the presumption and the theorists are widely divided. As a result, many different roles have been ascribed to the presumption of innocence. Some commentators take a narrow idea of the presumption of innocence and argue that it is a restatement of the burden of proof, limited only to defendants at trial. Others argue that the presumption of innocence has some purpose within the pre-trial process but not outside of the courtroom. Those with perhaps the widest view argue it is a right that encompasses and guides all of our interactions. Practical guidance through statutes and rules provide little help. The presumption of innocence is not defined and it is included in case law without discussion of why or how it is meant to operate.

This study looks at the presumption of innocence from both a practical and theoretical point of view to determine what the presumption of innocence is and how it operates within law. It approaches the right from an international criminal law and international and regional human rights perspective in an effort to develop a common and widely applicable definition of the presumption of innocence. From the theoretical standpoint, this study examines normative theorists and other legal scholars to determine whether theory and practice can come together to determine what the presumption is and how it works.

A. Research Question and Original Contribution to Knowledge

The goal of this study is to develop a working definition of the presumption of innocence and to understand its scope and purpose. The main research question of this project is: What is the presumption of innocence? There should be an easy answer. The presumption of innocence is contained in countless national, regional, and international documents, and by some accounts has existed for thousands of years. Surely there should be a definition that is well developed, clear, and useful. The presumption of innocence should have been developed over time through the various legal systems to result in a test, or a series of principles that can help guide anyone interested in determining what the presumption of innocence is, when it applies, and how it works. Unfortunately, it is not this straightforward.

Digging below the surface starts to tease out the many issues surrounding the definition of the presumption of innocence. One quickly becomes concerned with not only what 'presumption of innocence' means but also what is meant by the words 'innocence' and 'presumption'. Further, is the presumption of innocence a human right or is it something else? Is it merely a presumption? What is the purpose of the presumption of innocence? Is it limited to a particular area of the law? Who must apply the presumption of innocence and to whom must it apply? Under what circumstances is it applicable? What is the relationship of the presumption with other rights? How can the presumption of innocence and pre-determination detention co-exist within the same legal system?

The present study contributes to knowledge in both its topic and its breadth. By taking into account more jurisdictions and combining theory with practice, the definition developed within this study will be more comprehensive than previous works. Within academic literature, the presumption of innocence is usually discussed in one of two ways; either in a limited way with a focus on one or two jurisdictions or cases, or in a sweeping way that focuses on what the presumption should be but not how it is used in practice.[1] This study will bridge that gap and determine a definition

[1] For examples of sources limited to specific jurisdictions see: Andrew Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart 2010) (mainly limited to the United Kingdom with some discussion of the United States, South Africa and Canada); Schwikkard, PJ, *Presumption of Innocence* (Juta & Co 1999) (Mostly limited to South African and Canada); Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016) (limited to the United States). For examples of general normative arguments see, for example, Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268, 268-269. But see Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP

by examining a wide range of international and regional jurisdictions and testing that practice against the normative theories. By examining the presumption of innocence in practice at the international and internationalised criminal courts and tribunals and the regional human rights courts this analysis will be able to see common themes across jurisdictions, which should result in a definition of wider application. This will develop a new, comprehensive definition of the presumption of innocence based on both theory and practice that will hopefully be of use to practitioners and academics.

Examining theory and practice, this study uses a human rights and criminal law perspective to answer these questions and determine what is meant by 'presumption of innocence'. Defining the presumption of innocence is important because it is only through understanding the scope, definition, and use of the presumption that a determination can be reached as to whether it is being used properly by judges, defendants, prosecutors and academics. Further, and perhaps more importantly, defining the presumption's scope and application can help determine when the presumption of innocence is being infringed upon, eroded, or violated, enabling remedy to be gained and ensuring that the presumption of innocence may be protected. Without knowing the boundaries of the presumption of innocence it impossible to know whether the presumption of innocence is being protected, in what circumstances it is being deviated from and how the presumption works with the other fair trial rights. As a result, this lack of definition may allow the presumption of innocence to be applied or ignored in an almost arbitrary manner. This research aims to correct this and develop a working definition of the presumption so that it can be correctly applied and protected. Further, identifying what the presumption of innocence is now will help guide how it may change in the future.

The chapters are designed to answer the research questions thematically. Chapter 2 examines where the presumption of innocence fits within the existing legal framework concluding that while it is present win many areas of the law it is only relevant within the general context of criminal proceedings. The chapter also defines 'innocence' and 'presumption' within the context of the presumption of innocence and discusses the presumption of innocence's purpose. It argues that the presumption of innocence is meant to prevent people who have not been convicted of a crime from being treated as if they have. Thus, the presumption of innocence prevents

193

punishment and sanction without a conviction. Against that backdrop, Chapters 3 and 4 discuss the two aspects of the presumption of innocence. Chapter 3 focuses on the procedural aspect, discussing the presumption of innocence as a mandatory rebuttable legal presumption that is an instruction to the fact-finder at trial. As a corollary to this, the chapter explores the relationships between the presumption of innocence and the burden and standard of proof. The non-procedural aspect is examined in Chapter 4. Relying on the presumption of innocence's purpose, this chapter argues that the presumption extends outside of the courtroom and trial settings to protect non-convicted individuals from being treated as if they are guilty of a crime. This chapter specifically discusses ways in which treatment of individuals may affect their right to the procedural presumption of innocence during trial. The study then turns to who is benefited and burdened by the presumption of innocence. Chapter 5 argues that everyone has the right to benefit from the presumption of innocence's protections, but that the right is limited by when it attaches. The right is only operable when an individual is 'charged' with a criminal offence. While the right is relatively expansive in who it applies to, the duty to uphold the presumption of innocence may be more limited. Chapter 6 concludes that the strongest duty falls to the fact-finder. Public authorities have a duty but that duty's strength depends on how close they are to the investigation or case. Private entities however, have a much more limited duty because this duty must be weighed against their own rights, including the right to freedom of expression. Chapter 7 examines the contradictory concepts of the presumption of innocence and pre-determination detention. Both are included within criminal justice systems, but they appear to be irreconcilable. This chapter looks at whether and when these two concepts can be reconciled by considering the justifications for pre-determination detention in light of the presumption of innocence's purpose. The chapter concludes that it may be possible to reconcile pre-determination detention with the presumption of innocence but only in instances when the decision to hold someone in pre-determination detention can be removed from the criminal process. Finally, Chapter 8 concludes this study by drawing together the various chapters and discussing some themes that developed through the work.

B. The Presumption of Innocence in Practice

In this study, the practical application of the presumption of innocence is mainly found in the conventions, rules and case law of the International Criminal Court; the International Criminal Tribunals for the former Yugoslavia and Rwanda; the European Court of Human Rights; the Inter-American Court of Human Rights; the African Court on Human and Peoples' Rights; and the Human Rights Committee. These jurisdictions were chosen because of their international or regional reach and the amount of available case law. The criminal tribunals and courts were selected specifically because they encompass cases from a variety of regions and thus may give a understanding of how the presumption of innocence is used within those regions and internationally. The human rights courts were studied because they specifically include the presumption of innocence within their conventions and have provided some interpretation of this concept for their regions. As a result, the human rights courts can give some understanding of how the presumption of innocence is understood both regionally and on a national level within the participating states. Further, there is some reliance on the regional human rights bodies by the International Criminal Court in the area of the presumption of innocence.[2]

In an effort to develop as comprehensive a definition as possible, several other jurisdictions were examined but were found to lack sufficient case law or analysis about the presumption of innocence to materially add to this study. Examples include the International Military Tribunal; the International Military Tribunal for the Far East; the Extraordinary Chambers in the Courts of Cambodia; the Special Tribunal for Lebanon; the Special Court for Sierra Leone; and several national jurisdictions. While not as fully discussed as the other courts, these jurisdictions are used as examples when there is something specifically interesting about them with regard to the presumption of innocence.

Each of the studied jurisdictions provides some insight as to how the presumption of innocence is to be used and its scope, however none of these courts provide a full picture. The European Court of Human Rights has the most developed case law on this issue, however, even this case law is lacking. Often an accused person will complain of both a violation of their right to a fair trial under Article 6(1)

[2] See eg: *Prosecutor v Mbarushimana* (Decisions on Defence Request for an Order to Preserve the Impartiality of the Proceedings) ICC-01/04-01/10-51, PT Ch I (31 January 2011) para 9

and a violation of their right to the presumption of innocence under Article 6(2) of the European Convention on Human Rights.[3] If the European Court finds that there has been a violation under Article 6(1) they are unlikely to move on to the Article 6(2) determination because they argue that this issue has been 'absorbed' by the Article 6(1) finding and, thus, no further analysis is needed.[4] The only practicable way to determine how the presumption of innocence is used in practice is to look at the written materials. These documents however, are often disappointing because the rules, statutes, agreements and statements often refer to the presumption of innocence without defining what it means, what it is meant to protect against, or what kind of behaviour would cause a violation. The case law should fill in the gaps, but this too is not complete. Courts, such as the European Court of Human Rights will stop their enquiry once one violation of the accused's rights has been found, often without considering the presumption of innocence issue.

The presumption of innocence has its roots in history. The first recorded use of a law similar to the modern presumption of innocence is found in Hammurabi's Code, which is believed to have been enacted circa 1750 BCE.[5] Since that time the presumption of innocence has developed through the statutes and case laws of domestic jurisdictions. Now the presumption of innocence is present in most, if not all, national criminal codes and statutes, many international human rights treaties, the statutes of the regional human rights courts, and the international and internationalised criminal courts.[6] Despite its inclusion in so many jurisdictions, there

[3] Stefan Trechsel 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006) 164

[4] See e.g.: *Deweer v. Belgium* (1980) Series A no 35; *Demicoli v Malta* (1991) Series A no 210, para 34; *Funke v France* (1993) Series A no 256-A , para 45; Trechsel (n 3) 165. For a comprehensive look at how the Eurpean Court of Human Rights decides cases where more than one part of Article 6 is at issue see Ryan Goss, *Criminal Fair Trial Rights* (Hart 2014).

[5] Code of Hammurabi, as translated at Yale Avalon Project <avalon.law.yale.edu/ancient/hamframe.asp> accessed 16 April 2018, see Code of Laws 1-3 for examples of crimes, required proofs, and of consequences for accuser if their accusations are not proved.

[6] UN General Assembly, Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III) art 11(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR), art 6(2); Rome Statute of the International Criminal Court (17 July 1998) art 66; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 8(2) Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) art 35 new; UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 17(3); UN Security Council, Statute of

is no general consensus as to what the presumption of innocence means or how it is to be applied.

Recently this lack of consensus was exemplified at the regional level by the European Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present in criminal proceedings, which is part of the Stockholm Programme.[7] This directive stresses 'strengthening of the rights of individuals in criminal proceedings.'[8] The Directive itself is meant to 'enhance the right to a fair trial in criminal proceedings by laying down minimum rules concerning certain aspects of the presumption of innocence….'[9] and increase 'mutual trust and confidence between the different judicial systems and the perception that the rights of suspects or accused persons are not respected in every instance'.[10] While this signals a general recognition of the right to the presumption of innocence amongst citizens of European Union Member States, the need to set out minimum standards and require all Member States to come into compliance with these standards implies some lack of consensus as to how the presumption of innocence is to be implemented.

One of the challenges involved in defining the presumption of innocence from its use in practice is that it is found in so many areas of the law. National, regional and international jurisdictions all recognize the presumption of innocence. Examining the international and internationalised courts and tribunals and the regional human rights courts should give a good overview of what the presumption of innocence is and where it diverges and converges between jurisdictions. It should provide a good survey of where and what the presumption of innocence is and allow for development

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the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 21(3); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 20(3); UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 16(3)(a); African Charter on Human and People's Rights (published on 27 June 1981, entry into force 21 August 1986) 1520 UNTS 217 (African Charter) art 7(1)(b).

[7] European Council, Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens OJ, 2010, C, 115/1; European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings', COM (2014) 397 final (EU Road Map); European Commission, 'Green Paper, The Presumption of Innocence', COM(2006) 174 final.

[8] European Council (n 7); EU Road Map (n 7); European Commission (n 7).

[9] European Commission (n 7) 11.

[10] Ibid 1; European Commission, 'Commission Staff Working Document Executive Summary of the Impact Assessment', SWD(2013) 479 final, 19; María Luisa Villamarín López, 'The Presumption of Innocence in Directive 2016/343/EU of 9 March 2016' (2017) 18(3) ERA Forum 335.

of a definition of the right, particularly when considering that it is a human right which must be respected in all jurisdictions. However, this necessarily limits the information studied and will leave out the minutiae between different national jurisdictions. Because the goal is to determine whether there is an overarching definition of the presumption of innocence and if there is, what that definition might be, the special rules that particular national jurisdictions may have are more exceptions than the rule.

Another challenge in looking at the presumption of innocence in practice is that the relevant cases not be the best examples of the presumption of innocence being used. It is conceivable that the cases that might uphold the presumption of innocence best do not get to trial, because of issues identified by investigators or the prosecutor, which make trial not realistic, practicable or fair. Thus, there is potentially a wide range of cases that cannot be examined because they were dismissed or discontinued and thus records of how the presumption of innocence was used, or not used, in these cases do not exist. In national jurisdictions there are frequently no, or limited, written decisions in cases at the trial court level. This is particularly true in cases of acquittal or discontinuation within common law jurisdictions however, cases that end in either acquittal or discontinuation could offer some meaningful analysis about the presumption of innocence. It would seem that there is a good argument that those cases are upholding the presumption of innocence and could be examined to see whether the presumption of innocence means the same thing in those cases as in cases that are appealed.

There is also an issue with the regional human rights court decisions because regional human rights courts have limited jurisdiction and frequently can only be used after the appeals process within the national jurisdiction has been exhausted.[11] This limits the cases that the regional courts hear either because cases end somewhere in the appeals process or the potential applicant does not have the desire or resources to raise the issue at the regional court. Thus, regional human rights courts are only able to provide a small sample of the potential decisions that could develop regarding the right to the presumption of innocence within their jurisdiction.

[11] ECHR art 35; ACHR art 46; African Charter art 56.

C. The Presumption of Innocence in Theory

The theoretical work regarding the presumption of innocence tends to be normative in nature, that is, defining what the presumption of innocence should be rather than what it is in practice. These sources rarely cite to case law or the presumption's actual use, but rather discuss ideas of how the presumption should work and its theoretical scope. Theorists tend to see the presumption of innocence as either narrow or broad. Whether the presumption of innocence is narrow or broad determines when it applies and how it can be used.

The narrow interpretations argue that the presumption of innocence is limited in scope to the trial setting. Magnus Ulväng, Thomas Weigend, Larry Laudan, Richard Lippke, and Andrew Ashworth all argue for a narrow approach.[12] These interpretations range from the presumption of innocence being a rule of thumb for the fact-finder, to the presumption of innocence being a legal presumption at trial, to extending to the presumption of innocence to the pre-trial stage but still confined to the courtroom.

The narrowest of these views, held by Ulväng, is that the presumption of innocence is a 'rule of thumb.'[13] This means that the presumption of innocence is merely a guiding principle that can be applied or not applied depending on whether the fact-finder considers it applicable. This theory argues that the presumption of innocence in legislative texts lacks the specificity to make it a required rule.[14] Therefore, the person to whom the rule is directed is free to use the rule based on whether or not they generally have good reasons to follow the rule.[15] The effect of this interpretation is that the presumption of innocence becomes almost meaningless. In contrast, the most common narrow theories confine the presumption of innocence to the trial context and limit the implementation to the fact-finder.[16] Ashworth

[12] Magnus Ulväng, 'Presumption of Innocence Versus a Principle of Fairness' (2013) 42(3) NJLP 205; Weigend (n 1); Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (CUP 2006); Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333; Lippke (n 1) (OUP 2016); Andrew Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J Evid & Proof 241 241; Andrew Ashworth 'Four Threats to the Presumption of Innocence' (2006) 123(1) South African L J 63.
[13] Ulväng (n 12).
[14] Ibid 209-210.
[15] Ibid.
[16] See Laudan, *Truth, Error and Criminal Law* (n 12); Laudan 'The Presumption of Innocence' (n 12); Lippke (n 1); Weigend (n 1).

expands on these theories to argue that the presumption of innocence could be extended to pre-trial procedures and not necessarily limited to trial itself.[17]

Broad views of the presumption of innocence, such as those of Hock Lai Ho and Alwin van Dijk, argue that the presumption of innocence applies either in a wider context than merely the trial setting and/or should be exercised by more people than just the fact-finder.[18] Theorists who favour a more expansive view see the presumption of innocence as encompassing more than criminal trials, that is, extending into other aspects of the criminal process. Hock Lai Ho, for example, argues that the presumption of innocence, as a human right 'is the general right to due process' and thus encompasses all of the rights that make up a fair trial and that it has no independent meaning.[19] He asserts that this means that the presumption of innocence has an extensive role to play in ensuring a fair trial.[20] This however, renders the presumption meaningless by itself, as it can only be understood within the context of other due process rights.

Antony Duff would rather eliminate the narrow or broad debate by creating multiple presumptions of innocence that would work differently in each context.[21] By focusing on the normative roles that individuals play in their daily lives, this theory argues that there are different presumptions of innocence that operate in each normative context.[22] This theory acknowledges that there is a presumption of innocence at work in the pretrial context and a separate presumption of innocence in the trial context. There is however, yet another, different presumption of innocence, that is relevant to carrying on with daily life based on an idea of civic trust owed and enjoyed between individual citizens.[23] By defining different presumptions of innocence for different normative contexts, the concept of the presumption of innocence is specifically defined for each possible setting. Rather than providing one

[17] Ashworth, Int'l J Evid & Proof (n 12); Ashworth, South African L J (n 12).
[18] Hock Lai Ho, 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights* (Hart 2012) 266; Alwin van Dijk 'Retributivist Arguments against Presuming Innocence: Answering to Duff' (2013) 42(3) NJLP 249.
[19] Ho (n 18) 266.
[20] Ibid.
[21] Duff, 'Presumptions Broad and Narrow' (n 1)
[22] Ibid 268-269; Geert Knigge, 'On Presuming Innocence: Is Duff's Civic Trust Principle in Line with Current Law, particularly the European Convention on Human Rights' (2013) 42(3) NJLP 225.
[23] Duff, 'Presumptions Broad and Narrow' (n 1) 268-269.

blanket definition of the presumption, this theory allows for individually tailored definitions relating to many diverse and potentially unrelated contexts.[24]

D. Conclusion

This study's goal is to define the presumption of innocence. It does so by analysing the theoretical debates in light of the practice. Ultimately, the study concludes that the presumption of innocence is a human right with two aspects: a procedural aspect and a non-procedural aspect. Defining the presumption of innocence in this way should provide explanation of when the presumption is being upheld and when it is infringed upon. It should more clearly delineate who has a role with respect to the presumption and what that role entails. This should provide guidance on how the presumption of innocence may be used and where the presumption of innocence can be strengthened or develop in the future.

The present study examines these normative theories through the lens of the practical application of the presumption of innocence. This helps reconcile the seemingly diverse theories and bridges the gap between the theories and the practice. The purpose of the presumption of innocence is to prevent people who have not been convicted from being treated as if they are guilty of a crime. The resulting definition is that the presumption of innocence has two aspects: the procedural aspect and the non-procedural aspect. Thus, the presumption of innocence is both broad and narrow. The procedural aspect works within the courtroom as an instruction to the fact-finder: requiring proof, directing who must provide evidence, and dictating the specific circumstances under which a person may be convicted. The non-procedural aspect is less specific and generally prevents people from being treated as if they are guilty without a conviction. This aspect operates both inside and outside the courtroom. Thus, the presumption of innocence is both broad and narrow. The procedural aspect is narrowly applied in the courtroom where it has very specific application while the non-procedural aspect is more broadly applied.

[24] Ibid. But see Weigend (n 1) who argues that there is one wide presumption of innocence that is broadly construed.

Chapter 2. The Presumption of Innocence in Context

Determining the purpose of the presumption of innocence helps frame and contextualise the presumption of innocence as discussed in the subsequent chapters. This requires the consideration of several preliminary matters: the definitions of 'innocence' and 'guilt', consideration of what a presumption is, and where the presumption of innocence fits within law. Examining these issues will help identify the purpose of the presumption because they help contextualise the presumption in the wider field of law and start to define the presumption's boundaries and limitations. The purpose that is developed in this chapter supports and is supported by the rest of the chapters which provide a critical examination of how the presumption of innocence functions.

A. What is 'Innocence'?

The term 'innocence' as used in the phrase 'the presumption of innocence', must be defined to enable a complete understanding of this inquiry. Innocence is a deceptively simple word because while many believe they know what it means, it has many meanings that depend on whether the term is used colloquially or within a particular discipline. While the general idea of innocence connotes ideas of both naivety and/or blamelessness, the definition of innocence (and guilt) in relation to the presumption of innocence requires a specific definition. Without some context, innocence could be related to any number of ideas including, morality, religion, law, psychology, philosophy and fact, each of which would result in a different meaning of the term innocence.[1] Different disciplines have other meanings of innocence, but they are not of concern here.

There are several challenges in developing a working definition of innocence so that one may begin to understand the presumption of innocence. Perhaps most significantly, innocence is a concept that cannot be understood without also

[1] For discussions of 'innocence' and 'guilt' within different disciplines see for example Herbert Morris, *On Innocence and Guilt* (U California P 1976); Lois Oppenheim, 'Guilt' (2008) 56(3) JA Psychoanalytic Association 967; Rajen A Anderson, EJ Masicampo 'Protecting the Innocence of Youth: Moral Sanctity Values Underlie Censorship' (2017) 43(11) Personality & Social Psychology Bulletin 1503; Sharon Todd, 'Guilt, Suffering and Responsibility' (2001) 35(4) J of Philosophy of Education 18.

understanding guilt.[2] These terms are opposites and where guilt describes something, innocence describes its absence. Thus, they must be defined together. Another significant issue is that the words 'guilt' and 'innocence' are both frequently laden with moral value, which is relative to particular settings, conditions or persons.[3] When instilling guilt with this moral value, guilt is not simply doing something, it is doing something that is bad or wrong. In everyday terms, people often speak of 'feeling guilty' or feeling as if one has done something 'wrong'. As guilt's opposite, innocence is also endowed with moral value and thus is inherently 'good' because it is the state of being free from guilt. This is problematic however, because what is considered 'good' or 'bad', or 'right' or 'wrong', is necessarily dependent on the context and culture in which the action is done.[4] What might be considered 'bad' in one setting may be perfectly fine or even 'good' in another. This issue of adding moral value is not particularly relevant to the terms 'guilt' and 'innocence' in the context of the presumption of innocence. In this study guilt and innocence should be understood in a manner that does not attach subjective moral value to the terms.

Being grounded in criminal law and procedure, the presumption of innocence is concerned with two kinds of innocence: factual and legal.[5] The ideas encompassed by the terms factual innocence (or guilt) and legal innocence (or guilt) have different names depending on which scholar is describing them. For example, some scholars, including Larry Laudan, refer to the idea of factual innocence as 'material innocence'.[6] Likewise, the concept of legal innocence is also sometimes referred to as 'probatory innocence'.[7] The present study has chosen to use 'factual' and 'legal' in an effort to be as clear as possible and stress that factual innocence is not directly related to the law. Factual innocence is based on whether someone did something in a general, non-legal sense. It asks the question: Did someone do something? Legal

[2] Stefan Trechsel, 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006) 156; Andrew Stumer, *The Presumption of Innocence* (Hart 2010) 52.
[3] RA Duff, 'Responsibility, Citizenship, and Criminal Law' in RA Duff and Stuart Green *Philosophical Foundations of Criminal Law* (OUP 2011) 127
[4] For discussion of this issue see, for example, Jarrett Zigon, *Morality An Anthropological Perspective* (Berg 2008)
[5] For example: factual innocence and legal innocence are used by HL Packer ,'Two Models of the Criminal Process' (1964) 113 U Pennsylvania LR 1; Larry Laudan uses the terms 'material innocence' and 'probatory innocence' in Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333.
[6] Laudan 'Material or Probatory?' (n 5)
[7] ibid.

innocence however, depends on whether the elements of a crime are satisfied. The relevant question for legal innocence is: Can all of the elements of a particular crime be proven against a particular person? These types of innocence are related, but can be mutually exclusive. Both play a particular and specialised role in criminal law.

1. Factual Innocence (and Guilt)

Perhaps the most straightforward conception of innocence and guilt is factual innocence and factual guilt. These terms describe whether an individual is responsible for actions and whether an event actually happened in a general sense. Factual guilt and innocence are based in fact, rather than law. Simply stated, someone is factually guilty if they did something and factually innocent if he or she did not do that thing.[8] Factual innocence is not based on law and merely means that it is factually true that the individual did not do any particular action. A person can be factually innocent or factually guilty of any action. Thus, if a person took a sip of water they would be factually guilty of taking a sip of water. If they did not sip water they would be factually innocent.

When this idea is considered in the context of criminal law the action that the person did or did not do is a criminal act. A person is factually innocent of a crime if they did not actually engage in the behaviour that has been determined to be criminal. A person is factually guilty of a crime if they did engage in behaviour that is classified as criminal. Because factual innocence and guilt are based on what has happened in reality, a person's status of factually innocent or factually guilty of criminal behaviour is true regardless of whether they are ever suspected, accused, or prosecuted for the act.

2. Legal Innocence (and Guilt)

While factual innocence and guilt are general, legal innocence and legal guilt are terms specific to criminal law and procedure. Legal guilt means that there is enough evidence demonstrated to provide sufficient proof against the defendant to

[8] Larry Laudan, *Truth, Error, and Criminal Law* (CUP 2006) 12. Laudan 'Material or Probatory?' (n 5) 340; Pamela R Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 21(2) Crim L F 131, 137-140; Hareema, Mark, 'Uncovering the Presumption of *Factual* Innocence in Canadian Law: A Theoretical Model for the 'Pre-Charging Presumption of Innocence'' (2005) 28 Dalhousie L J 443

fulfil each of the elements of the alleged crime in the mind of the fact-finder.[9] Thus, legal innocence means sufficient proof was not obtained to make a finding of legal guilt. That is, legal guilt and legal innocence are concerned with the question of whether an individual can be legally held criminally responsible for an alleged crime. Legal guilt results in a conviction, legal innocence does not.

The first consideration of whether there can be legal guilt or legal innocence is whether there is a criminal law that applies to the particular action under consideration. The *nullem crimen sine lege* principle prevents criminal liability for behaviour that is not proscribed by law.[10] If behaviour is not illegal, then neither legal guilt nor legal innocence is relevant with regard to that behaviour. If the alleged behaviour is proscribed, then legal guilt and legal innocence are applicable ideas and the inquiry turns to what evidence is available and whether the fact-finder is sufficiently convinced of the evidence to sustain a conviction. When someone is accused of something that is morally wrong, but is not a crime legal guilt is not implicated.[11] For example, if an individual is publically accused of committing adultery, and he or she in fact committed adultery, but adultery is not a crime in the particular jurisdiction where the adultery and accusation occurred, then the accused person cannot be found legally guilty of adultery. This highlights the difference between factual and legal guilt. If they in fact were adulterous they are factually guilty of adultery, however, they will not be legally guilty as the action is not proscribed by criminal law.

Legal innocence and guilt are particularly germane to the outcomes of the criminal process. Aside from some limited jurisdictions, which permit more nuanced verdicts, most criminal legal systems can result in one of two main determinative outcomes, either guilty or not guilty.[12] Legal guilt usually results in a finding of

[9] Laudan 'Material or Probatory?' (n 5) 340. Laudan refers to this concept as "Probatory Guilt". ibid.; Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2) 156-7; Ferry de Jong and Leonie van Lent, 'The Presumption of Innocence as a Counterfactual Principle' (2016) 12(1) Utrecht L Rev 32, 41; Ferguson (n 8) 137-140.

[10] See for example International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 15; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR) art 7; UN General Assembly, Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III) (UDHR) art 11(2)

[11] Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2) 160.

[12] For example see Scotland's verdict of guilty but not proven or the plea of no contest (or *no lo contendre*) available in some American jurisdictions.

'guilty' because all of the elements of a crime are proven against an individual. This finding of legal guilt results in the individual being punished for the actions that were proven against them. Legal innocence, however, generally produces a finding of 'not guilty' and does not result in punishment. A not guilty verdict is not the same as finding someone factually innocent of the alleged crime. Because of the way the standard of proof works in criminal law, a not guilty verdict necessarily includes some factual ambiguity.[13] A finding of not guilty, or legal innocence, only means that one or more elements of the alleged crime was not proven to the appropriate standard, regardless of what actually happened during the incident in question.[14] Thus, a not guilty finding necessarily encompasses both factually innocent individuals and factually guilty individuals against whom there was not enough proof for conviction.

The fact-finder's role vis-à-vis the standard of proof at trial explains why a 'not guilty' verdict is not equivalent to factual innocence. The fact-finder is meant to determine whether there is sufficient evidence to find that each element of the crime has been proven to the appropriate legal standard.[15] However, the fact-finder necessarily lacks personal knowledge of the situation that is the subject of trial, meaning their understanding of it has to be supplied by the trial participants.[16] Further complicating the matter is that rules of criminal procedure may control the type of evidence that is introduced during trial and the manner in which it is presented.[17] The fact-finders must do their best to reach a decision, within the rules of criminal procedure, using the evidence available to them. Although injustices do occur, the high standard of proof in criminal law is meant to ensure that those who are found legally guilty actually committed the alleged crime in fact.[18] The same is not true however, for innocence. There is no minimum standard under which it can be safely determined that the individual is actually innocent of the alleged activity. The only

[13] For a thorough discussion of how the standard of proof works with the presumption of innocence see Chapter 3.
[14] Laudan 'Material or Probatory?' (n 5) 340; Laudan refers to this concept as "probatory innocence". *Ibid.*
[15] Yvonne McDermott, *Fairness in International Criminal Trials* (OUP 2016) 44; *Prosecutor v Mucić et al*. (Judgement) IT-96-21-T, T Ch (16 November 1998), para 600; Hock Lai Ho, 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights* (Hart 2012) 267-8.
[16] Andrew Ashworth 'Four Threats to the Presumption of Innocence' (2006) 123(1) South African L J 63, 72-73.
[17] ibid., 72-73.
[18] HL Ho, *A Philosophy of Evidence Law: Justice in Search for* Truth (OUP 2008) chapter 2; Rinat Kitai, 'Protecting the Guilty' (2002 - 2003) 6(2) Buffalo CLR 1163.

relevant finding when entering a not guilty verdict is that at least one element of the crime was not proven to the appropriate standard of proof. This is different from being actually innocent. Thus, a 'not guilty' verdict can be compatible with both a factually innocent defendant and a factually guilty defendant against whom the standard of proof was not met.[19]

Of course, whether someone is prosecuted and punished for a crime they actually committed is another question. There are instances where people are not convicted (or even suspected) of crimes they actually committed and alternatively, there are other instances when people are convicted of crimes they did not, in fact, commit.[20] Therefore, while it would be ideal, to ensure justice, for trials to determine factual guilt and innocence, this is not necessarily what is proven in a criminal trial. This is where legal innocence and legal guilt come in.

Ideally, a criminal conviction should only result when an individual is both legally (required for a conviction) and factually guilty (essential to make sure the right person is punished for the right crime). In a perfect world, people would only be convicted of things they actually did and there would be sufficient proof that they actually did those things. Likewise, in this ideal world, everyone not convicted would be both factually and legally innocent. Individuals who have not broken the law would not be accused of crimes and would never be convicted. However, no criminal justice system is perfect, and because the fact-finder's determination is limited to the evidence presented during trial, sometimes individuals who are factually innocent are found legally guilty and individuals who are factually guilty are found legally innocent.

The significance of legal guilt and legal innocence is in the treatment to which a person may be subjected. A determination of legal guilt however permits the person who has been found guilty to be treated differently form those who have not.[21] This

[19] Ho, 'The Presumption of Innocence as a Human Right' (n 15) 271.
[20] Laudan, *Truth, Error, and Criminal Law* (n 8) 11-12
[21] Rome Statute of the International Criminal Court (17 July 1998) (ICC Statute) arts 76, 77; UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) (ICTY Statute) art 24; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) (ICTR Statute) art 23; Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) (ECCC Statute) Chapter XI; UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) (STL Statute) art 24; UN Security Council, Statute of

treatment may include punishment, sanctions, and the limitation of certain rights. What type of treatment is permissible depends on the jurisdiction and the circumstances of the particular criminal behaviour. It suffices to say that legal guilt permits people to be treated differently from people who have not been found legally guilty.

B. What is a presumption?

All legal systems allow for presumptions. Presumptions can help save time and to assist the fact-finder in determining which facts are persuasive or what to do in when the evidence may be circumstantial. However, defining what constitutes a presumption is a somewhat controversial endeavour. The term, 'presumption,' itself has no agreed upon legal meaning.[22] Rather, it is used widely and in varied contexts to describe several different ideas.[23] This section discusses the three basic types of presumptions and some of the controversies surrounding each. A basic understanding of what a presumption is, and is not, will ultimately help focus the discussion on what the presumption of innocence entails.

Generally speaking, presumptions allow the fact-finder to draw inferences based on facts or circumstances present in the case under consideration.[24] As such, presumptions are tools for aiding argumentation and reasoning.[25] Further, presumptions help distribute risk by making rules based on circumstance rather than requiring specific evidence of an element or fact to be presented.[26] Thus, they identify the party bearing the burden of proof and can provide some evidence that can be used

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the Special Court for Sierra Leone (16 January 2002) (SCSL Statute) art 19.For a discussion on justifications and purpose of punishment see Thom Brooks, *Punishment* (Routledge 2012)

[22] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP 2010) 221. *See also* PJ Schwikkard, *Presumption of Innocence* (Juta & Co 1999) 22.

[23] Schwikkard, *Presumption of Innocence* (n 22) 22.

[24] John D Lawson, *The Law of Presumptive Evidence* (A.L. Bancroft & Co 1885) 555, rule 117; see Philippe Merle, *Les Presomptions en Droit Penal*, Thesis, 20 December 1968, Universite de Nancy, Faculte de Droit et Des Sciences Economiques, Librairie Generale de Droit et de Jurisprudence (Paris 1970); James C Morton and Scott C Hutchison, *The Presumption of Innocence* (Carswell 1987) 11

[25] Schwikkard, *Presumption of Innocence* (n 22) 22-23; Thayer, James B, 'Presumptions and the Law of Evidence' (1889) 3(4) Harv L Rev 141, 314; 9 Wigmore, Evidence §2491 (Chadbourn rev. 1981).

[26] Roberts and Zuckerman (n 22) 231; Gideon Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' in Gideon Boas and William A Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 23.

to meet the standard of proof.[27] Because a presumption is an inference based on information presented in the case it may only be used when there is an absence of evidence.[28] Thus, presumptions can either be triggered as a result of certain conditions (or facts) being present, or can exist without such triggering conditions.[29] Presumptions are generally of one of three basic types: 'irrebuttable presumptions of law, rebuttable presumptions of law, and presumptions of fact'.[30]

Presumptions of law are often considered evidentiary rules, created either by statute or judicial decision, which instruct the fact-finder to reach a particular conclusion based on the situation.[31] They can be either permissive or mandatory.[32] The fact-finder must follow a mandatory presumption if the necessary conditions are present. Some have argued that these rules' mandatory nature means that the rules are not evidentiary presumptions, but rather, substantive rules that are worded as presumptions.[33] A permissive presumption allows fact-finders to use their discretion as to whether they should follow the presumption when the conditions give rise to the opportunity to follow the presumption.[34] Permissive presumptions are similar to regular inferences, but they generally go a step further than a mere inference would allow.

Presumptions of law can also be either rebuttable or irrebuttable.[35] An irrebuttable presumption of law is a rule that the fact-finder must follow.[36] These presumptions state that the presence of one fact conclusively means that another fact must exist.[37] The conclusion drawn by an irrebuttable presumption cannot be

[27] Roberts and Zuckerman (n 22) 231
[28] C Collier 'The Improper Use of Presumptions in Recent Criminal Law Adjudication' (1986) 38(2) Stan L Rev 423, 423 footnote 1.
[29] An example of a presumption that exists without triggering facts is the presumption of sanity.
[30] Schwikkard, *Presumption of Innocence* (n 22) 23; see also Roberts and Zuckerman (n 22) 232; See generally, Wigmore (n 25)
[31] Roberts and Zuckerman (n 22) 239; Magnus Ulväng, ''Presumption of Innocence Versus a Principle of Fairness' (2013) 42(3) NJLP 205, 210; Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268, 269-70.
[32] Roberts and Zuckerman (n 22) 239; Morton and Hutchison (n 24) 13.
[33] Roberts and Zuckerman (n 22) 239; Morton and Hutchison (n 24) 13.
[34] Roberts and Zuckerman (n 22) 239
[35] Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193, 193-4; Duff, 'Presumptions Broad and Narrow' (n 31) 269
[36] Roberts and Zuckerman (n 22) 233
[37] John M Phillips, 'Irrebuttable Presumptions: An Illusionary Analysis, (1975) 27(2) Stan L Rev 449, 451; Roberts and Zuckerman (n 22) 233; Schwikkard, *Presumption of Innocence* (n 22) 24. Some argue that irrebuttable presumptions should not be called presumptions because

overcome by evidence to the contrary.[38] Hence, it is a mandatory legal rule. Therefore, the idea of an irrebuttable presumption is similar to mandatory presumptions. However, while all irrebuttable presumptions are mandatory, not all mandatory presumptions are irrebuttable. The difference lies in whether contrary evidence is permitted to overcome the presumption.

An example of an irrebuttable presumption is a rule that states that children under a certain age cannot possess criminal intent. This is a presumption that protects children from prosecution.[39] It is hard and fast and cannot be overcome by other evidence once the specific child's age is established. No matter what evidence is presented to the contrary, a child under a certain age cannot be held criminally liable for any behaviour they engaged in that would otherwise be proscribed because, a child below a particular age cannot legally form the requisite criminal intention.

A rebuttable presumption of law is an evidentiary rule establishing that a particular circumstance is true unless there is sufficient 'evidence to the contrary'.[40] Because these presumptions are rules that must be followed in the absence of contrary evidence they can affect the burdens of proof and persuasion at trial.[41] The result is that a burden develops on one party or the other to rebut, that is, to provide 'evidence to the contrary' against, the presumption.[42] If sufficient contrary evidence is provided to fulfil that burden, the fact-finder is no longer bound by the presumption and may decide the issue based on whether they are convinced by the evidence provided as to whether to follow the presumption or the contrary evidence in their decision making.[43]

A presumption of fact occurs when evidence would otherwise be doubted. The presumed fact may be found by the fact-finder because evidence of another fact was

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they reflect public policy rather than what may actually be the case in reality. See generally Schwikkard, *Presumption of Innocence* (n 22) 24.

[38] Phillips (n 37) 451; Roberts and Zuckerman (n 22) 233; Schwikkard, *Presumption of Innocence* (n 22) 24.

[39] Roberts and Zuckerman (n 22) 233; Schwikkard, *Presumption of Innocence* (n 22) 24.

[40] Wigmore (n 25); Lawson (n 24) 555; Collier (n 28) 423 at fn 1; Roberts and Zuckerman (n 22) 233; Morton and Hutchison (n 24) 14; Schwikkard, *Presumption of Innocence* (n 22) 24; 'Notes: Presumptions of Law as Evidence' (1908) 8(2) Colum L Rev 127, 128 citing *Coffin v United States* (1895) 156 US 432.

[41] Wigmore (n 25); Schwikkard, *Presumption of Innocence* (n 22) 24-25.

[42] Wigmore (n 25),

[43] Ibid.

convincingly proven.[44] Presumptions of fact are permissive, rather than mandatory,[45] and do not create a legal duty on the opposing party to come forward with contrary evidence.[46] Therefore, these presumptions do not have an effect on the burden of proof.[47] Many scholars argue that a presumption of fact is not a presumption at all and may be more of a reference to common sense or inference.[48] Courts may choose to make these inferences if it seems appropriate to do so. The use of the term 'presumption' to describe these inferences is based on a historic use of 'presumption'.[49]

Presumptions of fact are often used during criminal trials to prove intent. In the absence of direct evidence showing that the accused acted with a particular intent, the prosecution will rely on circumstantial evidence that tends to show the intent of the actor.[50] This creates a rebuttable presumption that the accused acted with the inferred intent. Absent a sufficient rebuttal, the burden and standard of proof are met regarding the mental element of the crime without the presentation of any direct evidence of that element.[51] This occurs because the mental element is subjective and may be extremely difficult, if not impossible, to prove with direct evidence.[52] In that way, it is said that presumptions of fact ''bridge the gap' between external, objective states of affairs and internal, subjective states of knowledge or intent that form the basis of all non-strict liability crimes.'[53]

As alluded to above, the foregoing discussion is a basic and general attempt to define presumptions based on 'traditional' discussions and definitions.[54] There is debate among scholars about which presumptions are really presumptions and which

[44] See Weigend (n 35) 193; Lawson (n 24) 555; Morton and Hutchison (n 24) 12; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J. Evid & Proof 241, 249-50; For a conversation on nuanced definitions of this type of presumption see Schwikkard, *Presumption of Innocence* (n 22) 24-25.
[45] Schwikkard, *Presumption of Innocence* (n 22) 26.
[46] Wigmore (n 25); Schwikkard, *Presumption of Innocence* (n 22) 26.
[47] Schwikkard, *Presumption of Innocence* (n 22) 26.
[48] Wigmore (n 25); Schwikkard, *Presumption of Innocence* (n 22) 24-25.
[49] Wigmore (n 25), Lawson (n 24) 555 *et seq*.; Simon Greenleaf, *A Treatise on the Law* (16th edn, Little, Brown & Co 1896) s 44. See also Morton and Hutchison (n 24) 12 arguing that presumptions of fact are actually just rules of common sense. Schwikkard, *Presumption of Innocence* (n 22) 24 – 25.
[50] Collier (n 28) 423
[51] Ibid.
[52] Ibid 424, fn 4.
[53] Ibid 423.
[54] Roberts and Zuckerman (n 22) 232

are something else. This debate is complicated by the taxonomic methods of classifying the different types of presumptions. Attempts to classify presumptions have led to significant disagreement in the academic community. Some argue that the only true presumption is a rebuttable presumption at law.[55] Another related argument is that presumptions of fact are not really presumptions.[56] These arguments are based on the notion that presumptions of fact are actually inferences used to describe the normal process of making inferences on the part of the fact-finder.[57] Further, they are not considered presumptions because they do not distribute risk or error in any way in the criminal process, but merely draw conclusions based on the evidence.[58] Irrebuttable presumptions could be equally stated as substantive rules that determine criminal liability.[59] This is because they are just rules that tell the fact-finder what law applies based on the factual circumstances present. This is not that different from a rule of evidence or procedure.

Some scholars would change the taxonomy altogether and argue that there is only one true type of presumption: legal presumptions of fact. This argument defines presumptions as: '1) rules of evidence which; 2) permit the fact finder to draw specified factual inferences which; 3) would not otherwise be warranted by the information available to the fact-finder.'[60] This theory asserts that presumptions are legal because they are created by law, but are 'of fact' because they allow for conclusions of fact to be made.

In a criminal trial a presumption's effect may be difficult to determine. As they deal with a lack of evidence, presumptions help solve situations where there is a procedural impasse and thus may allow for a just result.[61] However, the application of a presumption is an internal process on the part of the fact-finder.[62] It is often only if the fact-finder discusses their decision-making in a written decision that one can evaluate how and if a presumption was used. Further, because criminal evidence is evaluated as a whole, there is no way for the parties to know if a presumption has

[55] Duff, 'Presumptions Broad and Narrow' (n 31) 269-270
[56] Roberts and Zuckerman (n 22) 232; Wigmore (n 25), Lawson (n 24) 555 *et seq*.; Greenleaf (n 49) s 44. See also Morton and Hutchison (n 24) 12. Schwikkard, *Presumption of Innocence* (n 22) 24-25.
[57] Roberts and Zuckerman (n 22) 232.
[58] Ibid.
[59] Ibid 233; Duff, 'Presumptions Broad and Narrow' (n 31) 269-270
[60] See discussion in Roberts and Zuckerman (n 22) 231
[61] Morton and Hutchison (n 24) 11.
[62] Roberts and Zuckerman (n 22) 238-9.

been rebutted until the findings are reached at the conclusion of the trial.[63] Finally, the triggering facts that give rise to a presumption are often challenged during trial, calling into question whether it is appropriate to apply the presumption at all.[64] The courts offer little assistance in this area. The European Court of Human Rights, for example, considers that presumptions of law or fact are permissible provided they 'take into account the importance of what is at stake and maintain the rights of the defence.'[65] This discussion of the effects of presumptions at trial highlights the uncertainties surrounding presumptions and may show that in practice they have a weak application. Ideally, each party should try to produce positive evidence to support their position, rather than relying on a presumption to work in their favour. However, as will be discussed in the next chapter, the presumption of innocence may be a stronger presumption than others, as it directs the burden of proof away from the defence and instructs the fact-finder.

C. The presumption of innocence exists within national and international law

Despite the variety amongst national legal systems most, if not all, national jurisdictions provide for the presumption of innocence in their criminal codes and procedures.[66] In addition, the presumption of innocence is a part of international law. International law has three primary sources: treaty, custom and general principles.[67] These were identified as the sources of international law in Article 38 of the

[63] Ibid 238-9.
[64] Ibid 239.
[65] *Salabiaku v France* (1988) Series A no 141-A; *Radio France and others v France* ECHR 2004-II 119; *Janosevic v Sweden* ECHR 2002-VII 1 s 104; *Falk v Netherlands* ECHR 2004-XI 319; Alfredo Alluê Buiza, 'An Extensive but not very Stringent Presumption of Innocence (Art 6.2 ECHR)' in Javier García Roca, Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff 2012) 251-252; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 290.
[66] M Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke J Comp & Int'l L 235, 235-236.
[67] United Nations, Statute of the International Court of Justice, 18 April 1946 (ICJ Statute) art 38; Bin Cheng, *General Principles of Law* (CUP 1993); Javaid Rehman *International Human Rights Law* (Pearson Education Ltd 2003) 20-21; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1998-89) 12 Aust YBIL 82.

International Court of Justice's Statute.[68] The presumption of innocence is part of all three sources of international law.

Treaties are formal, written agreements between states.[69] The law of treaties describes the rules that are contained within a treaty and are binding on states parties to the particular treaty in question.[70] The presumption of innocence is included in many international treaties including the International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples' Rights, and the Rome Statute of the International Criminal Court.[71] That the presumption of innocence is included in treaties makes it a part of international law.

The presumption of innocence is also a general principle of law. While there is some guidance on how to determine when the other sources exist within Article 38, for example, custom requires 'general practice accepted as law', regarding general principles the statute merely states 'the general principles of law recognized by civilized nations'.[72] General principles of law arise from conditions similar to human rights, that is, inclusion and recognition in an overwhelming number of national jurisdictions.[73] Thus, general principles of law and human rights are rules that are generally accepted by the world community.[74] General principles of law serve a 'gap-filling function' by providing legal solutions when laws and treaties are ambiguous, and can be used to support decisions made about other legal rules.[75] Thus, general principles of law guide and aid governments engaged in legal interpretation to ensure that laws are interpreted in a manner respecting the general principles. An example is *res judicata*, which the International Court of Justice has deemed a general principle

[68] ICJ Statute art 38.
[69] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 69.
[70] Ibid 69-72.
[71] ICCPR art 14(2); ECHR art 6(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 8(2); African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217 (African Charter) art 7(1)(b); ICC Statute art 66.
[72] ICJ Statute art 38(1)(c).
[73] Cheng (n 67) 24-26; Simma and Alston (n 67) 102; Bassiouni, 'Human Rights' (n 66) 242.
[74] Cheng (n 67) 24-26; Thomas Weatherall, *Jus Cogens* (CUP 2015) 129-130; Bassiouni, 'Human Rights' (n 66).
[75] Cheng (n 67) 390; Weatherall (n 74) 129-30; Mark Klamberg, *Evidence in International Criminal Trials* (Martinus Nijhoff 2013) 28, 122.

of law.[76] *Res judicata* means that if a decision has been taken on a specific issue between two particular parties it cannot be litigated again.[77] It functions as a general principle of law because it aids governments in deciding whether litigation can continue in cases that may include issues that have already been answered by a court.

The presumption of innocence is a general principle of law because it is a right that has been supported over time and is currently included in most, if not all, national and international codes of criminal procedure. The earliest known example of the presumption of innocence can be found in Hammurabi's Code, which is thought to have been enacted in approximately 1750 BCE.[78] While the presumption of innocence is not explicitly named in the Code, the first three laws contained therein indicate that a finding of criminal responsibility required some evidentiary showing that the accused was guilty of the crime alleged.[79] This fundamental idea of the presumption of innocence has undergone significant changes in the nearly four thousand years since it was first introduced, but its enduring existence and overwhelming inclusion in national, regional, and international instruments is evidence that the presumption of innocence is a general principle of law and is a common value accepted by the global community.

The lack of discussion in international and regional documents and case law regarding the presumption of innocence's meaning or scope provides additional support for the idea that the presumption of innocence is a general principle of law. While international and regional human rights and criminal law agreements contain the presumption of innocence, the *travaux préparatoires* of these instruments have very little commentary about what it means or why its inclusion is important. This supports the idea that the presumption of innocence is a general principle of law

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[76] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)* (Merits) General List Nos 157 and 165 (2 February 2018); citing: Q*uestion of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections, Judgment) ICJ Reports 2016, 100 (17 March 2016) para. 58 and authorities cited therein.

[77] Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015) 58-73; Cheng (n 67) 336.

[78] Code of Hammurabi, as translated at Yale Avalon Project <avalon.law.yale.edu/ancient/hamframe.asp> accessed 16 April 2018, see Code of Laws 1-3 for examples of crimes, required proofs, and of consequences for accuser if their accusations are not proved. Stumer (n 2) 1; François Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Traditions' (2010) 58(1) Am J Comp. L 107, 111; de Jong and van Lent (n 9) 36.

[79] Code of Hammurabi (n 78) see Code of Laws 1-3 for examples of crimes, required proofs, and of consequences for accuser if their accusations are not proved.

because it appears from a lack of discussion and explanation that it is a term that is universally understood and accepted amongst the drafters of those instruments. Further, the case law of the various international and regional courts contains very little discussion or explanation of what the presumption of innocence means. Most of the case law discusses whether or not other rights or laws are being applied within the bounds of human rights, rather than whether the presumption of innocence itself has been violated.[80] This common usage, but lack of specific definition, supports the idea that the presumption of innocence is a general principle of law. It is intended to be a concept understood and used by many different courts, but it is generally, rather than specifically defined.

General principles of law are similar to customary law. The difference is in how they are determined. General principles are determined by whether the law is contained in most national and international treaties, constitutions, and systems. Customary law traditionally requires an additional element of *opinio juris*, which establishes whether there is uniform and consistent use across jurisdictions and legal systems.[81] *Opinio juris* is generally proven through government actions, government statements within their own legislatures or to foreign governments, and in intergovernmental conferences.[82] While *opinio juris* is technically still required for a rule to become customary law, it has been argued that a modern approach to customary law has lessened the importance of *opinio juris* and that customary law relies more on whether the law is present within the constitutions and legal systems rather than its consistency in use.[83] This has led many scholars to use the terms customary law and general principles of law interchangeably.[84]

The presumption of innocence is a part of customary law. It has widespread acceptance among national and international criminal justice systems, which is sufficient to show that it is a part of customary law under the modern approach. Further there is some indication of consistency of usage through the presumption of

[80] The majority of case law at the international criminal law level is in conjunction with decisions regarding pre-trial detention. Within these cases, is clear that the presumption of innocence is used to support whether or not pre-trial detention or the length of detention is appropriate. This is discussed in Chapter 7.
[81] Rehman (n 67) 19; Weatherall (n 74) 126-7.
[82] Rehman (n 67) 19; Simma and Alston (n 67) 89-90.
[83] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19(3) EJIL 491, 493; Simma and Alston (n 67) 88.
[84] See Klamberg (n 75) 28 ff; See also Cheng (n 67) 23, acknowledging that the line between these two concepts is not always clear.

innocence's application in the courtroom setting. For example, it is generally agreed that the presumption of innocence forces the burden of proof onto someone other than the accused.[85] Finally, the Human Rights Committee, in General Comment 24 recognises the presumption of innocence as a part of customary law.[86]

Commentators seem to be split between these two concepts and argue that the presumption of innocence should be classified as either a general principle of law[87] or as part of customary international law.[88] This argument however, is irrelevant in terms of how the presumption of innocence is used in international law. Both general principles and customary law are sources of international law, and a rule's inclusion in one or the other category, or both categories, means that it must be respected and upheld within the sphere of international law.

The presumption of innocence is also a human right.[89] Human rights arise from the common values of freedom, justice and peace that all nations share.[90] Human

[85] See discussion in Chapter 3. STL Statute art 16(3); ICC Statute art 66; ICTY Statute art 21(3); ICTR Statute art 20(3); SCSL Statute art 17(3); ECCC Statute r 87(1). UDHR art 11(1); American Declaration of the Rights and Duties of Man, OAS Doc. OEA/SER.L./V/I.4 (1948) art XXVI; ICCPR art 14(2); ACHRart 8(2); ECHR art 6(2); African Charter art 7(1)(b); Rinat Kitai, 'Presuming Innocence' (2002) 55(2) Okla L R 257 272; Haji N.A. Noor Muhammad, 'Due Process in Law for Persons Accused of Crime' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Colum UP 1981) 150; Liz Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76(4) MLR 681 683; McDermott (n 15) 44; Ana Aguilar García, 'Presumption of Innocence and Public Safety: A Possible Dialogue' (2014) 3(1) Stability: Int'l J of Sec & Dev 1, 3-4; Christoph Grabenwarter, *European Convention on Human Rights* (Beck, Hart 2014)167 para 156. John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence* (CUP 2012) 201; W Schabas and Y McDermott 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 1640, para 16; Ho (15) 260.

[86] Human Rights Committee, 'General Comment No 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant' (11 November 1994) UN Doc No CCPR/C/21/rev.1/add.6 (1994) para 8.

[87] Schabas and McDermott (n 85) 1233; Bassiouni, 'Human Rights' (n 66); PJ Schwikkard, 'The Presumption of Innocence: What is it?' (1998) 11 South African J Crim J L Just 396, 396.

[88] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 96-97; Salvatore Zappalá, 'The Rights of the Accused' in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statutes of the International Criminal Court* (OUP 2002) 1341.

[89] UDHR art 11(1), ACHR art 8(2), ECHR art 6(2); Hock Lai Ho, 'The Presumption of Innocence as a Human Right' (n 15) 259; Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2).

[90] UDHR Preamble.

rights cannot be easily restricted because they respect the core of individual dignity.[91] As such human rights are available to everyone and limit the power that governments can exert over individuals and how individuals may treat each other. That the presumption of innocence is based on common values of freedom and justice is obvious even if the presumption of innocence is merely a legal presumption. However, as the following chapters will show the human right to the presumption of innocence extends further than the courtroom and is still rooted in protecting freedom, justice and the rule of law.

The inclusion of the presumption of innocence in most international and regional human rights instruments is evidence that the presumption is a human right. Most tellingly, is the presumption of innocence's inclusion in the Universal Declaration of Human Rights, which begins the modern concept of human rights, and contains rights that were considered human rights at the time the Declaration was drafted.[92] Additionally, the presumption of innocence is contained in the regional human rights agreements and the International Covenant on Civil and Political Rights.[93] Further, the presumption of innocence is considered a fundamental right to people who are investigated within criminal procedure, as is evidenced by its inclusion in all of the international and internationalised criminal courts and tribunals, as well as most, if not all, national jurisdictions.[94]

Further evidence that the presumption of innocence is a human right is that it is to be enjoyed by everyone.[95] Because of their basis in the common values of peace and justice, human rights are to be enjoyed by everyone regardless of background, status, or other factors.[96] Although the presumption of innocence is only relevant within the general area of criminal law and procedure, this does not limit the type of people who may enjoy the presumption. Other human rights also are limited in that they are relevant within particular contexts. For example, while there is a human right to vote, the right itself is not relevant outside of the general context of elections.

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[91] Bassiouni, 'Human Rights' (n 66) 235-236; Howard Davis *Human Rights Law* (4th edn, OUP 2016) 4.
[92] UDHR art 11; Åshild Samnøy, 'The Origins of the Universal Declaration of Human Rights', in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff 1999) 14-20.
[93] ECHR art 6(2); ICCPR art 14(2); African Charter art 7(1)(b); ACHR article 8(2).
[94] Young Sok Kim, *The Law of the International Criminal Court* (William S Hein & Co 2007) 215.
[95] This idea is discussed in Chapter 5 of this study.
[96] UDHR art 2.

Similarly everyone may enjoy the presumption of innocence but it is only relevant in the general context of criminal law.

The presumption of innocence as a human right does not allow derogations in times of war or emergency. Support for its non-derogability in these situations can be found in the International Covenant on Civil and Political Rights and the Human Rights Committee's interpretation of the Covenant. Article 14(2) of the Covenant unequivocally states '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.' [97] This article does not include any qualifications and does not suggest any situations whereby the presumption of innocence can be limited. The Human Rights Committee further clarified this issue in two subsequent General Comments. General Comment 24, regarding reservations, states that a '[s]tate may not reserve the right to… presume a person guilty unless he proves his innocence'.[98] General Comment 29 regarding derogation during states of emergency specifically declares that the presumption of innocence cannot be derogated from and '[t]he presumption of innocence must be respected.'[99] Further, most of the conventions and agreements included in this study do not include derogations from the presumption of innocence.[100]

Despite the general disapproval against derogating from the presumption of innocence, not all regional rights instruments have entirely foreclosed the possibility. Neither the European Convention on Human Rights nor the American Convention on Human Rights specifically prohibits derogating from the presumption. Article 15 of the European Convention on Human Rights lists those articles that cannot be derogated from in times of emergency but omits Article 6(2) from that list.[101] Any derogation from the Convention justified under Article 15 is limited to the extent that it must be 'strictly required' by the situation and must also be consistent with the

[97] ICCPR art 14(2).
[98] General Comment 24 (n 86) para 8.
[99] Human Rights Committee, 'General Comment No 29: State of Emergency (Article 4)' (31 August 2001) UN Doc No CCPR/C/21/Rev.1/Add.11 (2001) paras 11, 16; See also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 88.
[100] Elies van Sliedregt, 'A Contemporary Reflection on the Presumption of Innocence' (2009) 80(1) RIDP 247, 259; Amnesty International, 'Amnesty International Response to the European Commission Green Paper on The Presumption of Innocence, COM(2006) 174 final' (June 2006) <www.amnesty.eu/static/documents/2006/AI_response_Green_Paper_Presumption_of_Innocence_June06.pdf> accessed 16 April 2018, 6. Supporting the idea that the presumption of innocence is non-derogable and making specific reference to General Comment 29 (n 99).
[101] ECHR art 15.

other international law obligations of the state party involved.[102] The American Convention on Human Rights contains a similar article in which it also lists the rights contained in the Convention that cannot be derogated from. Like Article 15 of the European Convention, the list contained in the American Convention also does not include the article containing the presumption of innocence on its list of non-derogable rights.[103] The American Convention also sets out restrictions on the derogation of convention rights, including mandating that an derogation must be 'strictly required' and must not violate other international law obligations.[104] It also adds the additional requirement that derogations must not involve discrimination on the basis of 'race, color, sex, language, religion, or social origin.'[105]

There are no known examples of derogations made of the presumption of innocence from the European or American Conventions on Human Rights. It could be argued that although neither Convention specifically forbids states parties from derogating from the presumption of innocence, such derogation is not permissible as doing so would be in conflict with their other international law obligations. This conflict leads to the conclusion that despite the fact that not all human rights instruments specifically prevent states parties from derogating from the presumption, it is a non-derogable human right.

One consequence of the presumption of innocence being a human right is that national governments must respect human rights when making and interpreting their own laws. Human rights are meant to be difficult to curtail and must be upheld and protected by governments.[106] This does not only mean that lawmakers must bear the human right of the presumption of innocence in mind when writing the presumption of innocence into their criminal codes, but that it must also be a guiding principle when writing laws on other aspects of criminal law and procedure as well.[107] For example, a lawmaker cannot create a crime that can result in a conviction based solely on an accusation, as that would clearly violate the procedural aspect of the presumption of innocence. As discussed in the next chapter the presumption of innocence at trial requires some proof against the accused, and removing that

[102] Ibid art 15(1).
[103] ACHR art 27.
[104] Ibid at art 27(1).
[105] Ibid at art 27(1).
[106] Shaw (n 69) 212.
[107] See discussion in Jeremy Horder, *Ashworth's Principles of Criminal Law* (OUP 2016) 94-95.

requirement would impermissibly curtail the individual's right to be presumed innocent. Another example is that lawmakers cannot write a law that allows for punishment to be enacted without a formal finding of guilt before a court. This type of law would violate the presumption of innocence by providing for an individual to be treated in the same manner as someone who has been found guilty requiring a conviction. Because the presumption of innocence is closely related to other fair trial rights such as the right to silence, the right to be present at trial, and the right to present a defence, if lawmakers were to change any of these other rights the presumption of innocence, as a human right, should also be a consideration while drafting that change.

D. The presumption of innocence only applies in criminal proceedings

While the presumption of innocence exists in both national and international legal systems, the application of the presumption of innocence is limited to criminal proceedings. This is partially because criminal proceedings are where the determination of legal guilt or legal innocence occurs and thus where a presumption of innocence would be relevant. That the presumption of innocence only applies in criminal proceedings also finds support in the language of the statutes and conventions studied. The criminal courts limit the presumption of innocence to criminal proceedings because those are the legal issues that they have primary jurisdiction over, and thus, the issues for which the presumption of innocence is provided. The regional human rights conventions and international human rights agreements support the idea that the presumption of innocence only applies in the context of criminal law and procedure because these documents specifically grant the right to those charged or accused with criminal offences.

While it is clear that the presumption of innocence applies to criminal proceedings, what constitutes criminal proceedings is more difficult to determine and depends on the jurisdiction in question. When a legal matter is before a specific criminal court or tribunal, such as the International Criminal Court or the *ad hoc* Tribunals, what is a criminal proceeding is determined by statute. This is because of their jurisdiction is only over very specific criminal matters. For national jurisdictions and courts of less limited jurisdiction, the inquiry becomes more difficult. Actions that may be part of criminal procedure or criminal law in one jurisdiction might be regulatory, disciplinary or administrative in another. In Europe, the European Court of

Human Rights has developed three criteria to help determine whether a law is properly categorised. Once an action is 'criminal' or part of criminal law or procedure, then the full due process required by criminal law must be provided to the accused, including the presumption of innocence.

1. The statutes dictate that the presumption of innocence only applies in criminal proceedings

The language used in international and regional human rights conventions and international criminal statutes supports the idea that the presumption of innocence applies in the general context of criminal law. The Universal Declaration of Human Rights provides that '[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law…'.[108] Similarly, the European Convention on Human Rights and the International Covenant on Civil and Political Rights state that the presumption of innocence applies to '[e]veryone charged with a criminal offence'. [109] The American Convention on Human Rights, *ad hoc* Tribunals, Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia provide that it is the 'accused' who can benefit from the presumption of innocence.[110] These documents all state that the presumption of innocence either applies to people who have been charged or accused, which necessarily implies that they are involved in criminal procedure.

Only the African Charter for Human and Peoples' Rights is less specific about the context in which the presumption of innocence applies. Article 7 of the African Charter states that '[e]very individual shall have the right to have his cause heard.'[111] This article then includes a number of subsections which specify what 'the right to have his cause heard' means. Subsection (b) provides '[t]he right to be presumed innocent until proved guilty by a competent court or tribunal'.[112] Although it uses the word 'guilty', which is inherently a criminal law idea, this still seems not to limit the applicability of the presumption of innocence to any particular type of law. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,

[108] UDHR art 11(1).
[109] ECHR art 6(2); ICCPR art 14(2).
[110] ACHR art 8(2); ICTY Statute art 21(3), ICTR Statute art 20(3), SCSL Statute art 17(3); Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) art 35 new.
[111] African Charter art 7.
[112] African Charter art 7(1), 7(1)(b).

which is an aid in interpreting and applying the African Charter and was written to 'further strengthen and supplement the provisions relating to fair trial in the Charter and to reflect international standards', clarifies this issue.[113] Section N6(e) states that the presumption applies to '[e]veryone charged with a criminal offence' and elaborates on some of the protections of the presumption of innocence that apply 'in any criminal case'.[114] This section also makes it clear that the presumption of innocence applies to for statements made about 'criminal investigations or charges'.[115] This makes it clear that the presumption of innocence applies to criminal proceedings.

Historically, there has been some debate about whether the presumption of innocence applies beyond criminal law. This discussion first arose during the negotiation of the Universal Declaration of Human Rights and appears to have been resolved during the drafting process. The discussion around the appropriate context of the presumption of innocence arises from the fact that a number of early drafts did not use the phrase 'charged with a criminal offence'.[116] However, the Commission's third session rectified this by including the charging requirement.[117] This had the dual effects of harmonizing the French and English versions and clarifying that Article 11 of the Universal Declaration related to criminal law.[118]

More recently, Antony Duff revived the argument of whether the presumption of innocence can apply outside criminal law. He theorizes that there are many presumptions of innocence that apply in different normative situations.[119] This means that there is room for a civic presumption of innocence that applies between citizens in everyday interactions.[120] This civic presumption of innocence, however, is separate and different from the presumption that applies in the criminal context. Duff's theory

[113] The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003) preamble.
[114] Ibid arts N6(e), N6(e)(1), (2), (3).
[115] Ibid arts N6(e), N6(e)(1), (2), (3).
[116] Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2) 155; David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001) 20.
[117] Commission on Human Rights, Summary Record of the Fifty-Fifth Meeting (2 June 1948) UN Doc. E/CN.4/SR.55, (2 June 1948).
[118] Ibid at 13; Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2) 155; Weissbrodt (n 115) 20.
[119] Antony Duff, 'Who Must Presume Whom to be Innocent of What?'(2013) 42(3) NJLP 170.
[120] Ibid 180.

is that private individuals owe a 'presumption of innocence' to each other in everyday interactions.[121] Based on a mutual civic trust, rather than law, this attempts to explain that individuals have a duty to approach each other with a general trust, unless or until there is a specific reason to not trust a particular person.[122] Duff describes the civic presumption as a theoretical tool used to describe normative human interactions, rather than a presumption that has been proven through practice.[123] While theoretical, if this civic presumption exists, because it is not based in law, it is a different entity than the presumption of innocence defined in this project.

2. What are criminal proceedings?

While the presumption of innocence only applies within the context of criminal law and procedure, there is no agreed upon definition of what constitutes 'criminal', and what qualifies as criminal law is not always apparent. For the purposes of the presumption of innocence, criminal law should be understood broadly and not merely limited only to legitimate or formal criminal procedures. The presumption of innocence applies to criminal proceedings quite simply because criminal law is the area of law in which guilt or innocence is at issue.[124] While liability or responsibility is determined in other legal procedures, civil liability is not the same as a legal determination of guilt. Thus, findings of civil responsibility do not implicate the presumption of innocence.[125]

The types of activities that fall within 'criminal law' are not universally agreed upon. Generally speaking, individual jurisdictions determine for themselves what sorts of activities will be prohibited as 'criminal' and what activities fall under other categories of law. Courts of limited criminal jurisdiction, such as the International Criminal Court and the international and internationalized criminal courts and tribunals, have a clear definition of criminal law as it pertains to their particularised context. The jurisdiction of these courts only extends over criminal matters, and those

[121] Ibid 180-182.
[122] Ibid 181.
[123] Ibid; Duff, 'Presumptions Broad and Narrow' (n 31).
[124] Stefan Trechsel, 'The Right to be Presumed Innocent' (n 2) 155; Grabenwarter (n 85) 166, para 153; Schabas, *ECHR Commentary* (n 65) 270-271.
[125] Human Rights Committee, 'General Comment No. 32: Right of Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) UN Doc No CCPR/C/GC/32 (2007); William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP 2016) 1002.

criminal matters are limited to specific crimes set out in their statutes.[126] There is no question, within the context of these courts, as to whether the presumption of innocence applies to the primary matters falling under their jurisdiction because they are specifically categorised as criminal in nature. Therefore, the presumption of innocence must be upheld when one of these courts or tribunals is adjudicating a matter.

In jurisdictions that hear more than one type of legal matter it is more difficult to determine which acts are criminal in nature and which are not. National jurisdictions may have specialized courts that only adjudicate particular types of cases or more general courts that determine a wide variety of issues falling into any area of the law. Moreover, national jurisdictions are free to sort or categorise their own laws in any way they choose.[127] Actions that may be defined as criminal in one jurisdiction may be classified as administrative, disciplinary, or regulatory in another. This is especially troublesome in instances where a law labelled as administrative, disciplinary or regulatory can result in an outcome that resembles punishment, such as heavy fines or time in jail.[128] Often, criminal procedure provides participants with a

[126] See ICC Statute arts 5-8 (providing the issues that the Court has jurisdiction over: genocide, crimes against humanity, war crimes); ICTY Statute arts 1-5 (providing the issues that the Court has jurisdiction over: grave breaches of the Geneva Conventions of 1949, violations of law or customs of war, genocide, crimes against humanity). ICTR Statute arts 1-4 (providing issues over which the Court has jurisdiction – genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II); SCSL Statute arts 1-5 (Providing issues over which the court has jurisdiction – crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of humanitarian law, certain crimes under Sierra Leonean Law); ECCC Statute arts 1- 8 (providing jurisdiction over crimes – certain crimes under Cambodian law, genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, destruction of cultural property, crimes against internationally protected persons).

[127] At the European Court of Human Rights, for example, member states are able to criminalise whatever behaviour they want so long as there is no interference with another right contained in the Convention. *Engel and others v Netherlands* (1976) Series A no 22; See also Schabas, *ECHR Commentary* (n 65) 278-9.

[128] Disciplinary proceedings in military court against soldiers is within the meaning of criminal law *Engel* (n 127). Careless driving deemed criminal even though it was regulatory under national law in *Öztürk v Turkey* (1984) Series A no 73. But see: disciplinary proceedings involving professional misconduct are not within the meaning of criminal law *Brown v United Kingdom* App No 38644/97 (ECtHR, 24 November 1998) (solicitor); *Wickramsinghe v United Kingdom* App No 31503/96 (ECtHR, 9 December 1997) (doctor). For more in depth analysis and examples see Harris, David J, Michael O'Boyle, Edward P Bates, Carla M Buckley, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP 2014) 373-4; Pieter van Dijk and Marc Viering (revisors), 'Chapter 10 Right to a Fair and Public Hearing' in Pieter Van Dijk, Fried van Hoof, Arjen Van Rijn, Leo

greater number of rights than other types of law and contains time-consuming due process requirements. These extra rights and additional procedures may motivate some national jurisdictions to reclassify actions that would normally be categorized as criminal in order to streamline procedure and prevent individuals from exercising their rights. This is an issue because it means that how a jurisdiction classifies an activity has a direct bearing on the extent to which a person involved in the matter may exercise their rights. It is possible for the same action to be committed in two different countries, both with identical laws governing that action, with the exception that one country proscribes that activity as part of its criminal code and the other country classifies it as an administrative matter. In such a situation the individuals prosecuted in the first country would be able to exercise their full due process and fair trial rights while those in the second country would not. This discrepancy is not necessarily negative for the person being charged in the latter country because if the law is viewed as administrative and not criminal there is less possibility of stigma arising from conviction or that he or she will be subjected to harsh punishments. It does, however, highlight how the fair trial rights of the accused can be impacted depending on how the action is characterised in the law of the relevant country.

A further issue arises when activities that appear criminal, and are punishable as if they are criminal, are classified under a different category of law. Regional human rights courts can help with determine whether laws are correctly categorised because they must reconcile member states' diverse legal systems. The European Court of Human Rights has developed a method to provide some consistency between the various legal systems of member states by looking beyond how the activity is categorised within the national law to the nature of the particular behaviour under scrutiny and its possible punishment.[129] This helps allow the regional human rights court to apply Convention rights more evenly and fairly between different national jurisdictions. It also assists in preventing countries from denying rights to individuals by calling activities that can be punished as severely as crimes something other than 'criminal'.

In an attempt to provide some consistency as to what type of activities should be classified as criminal in nature, the European Court of Human Rights has

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Zwaak (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006).

[129] *Engel* (n 127*)*.

developed three criteria to help determine when a particular member state's law should be considered 'criminal' within the meaning of the European Convention on Human Rights. Rather than focusing on the severity of the prohibited behaviour, the Court has set out three criteria to determine whether the Convention's autonomous meaning of 'criminal' has been met.[130] The three criteria necessary to identify a law as criminal were first applied by the European Court in *Engel and Others v Netherlands* and are: (1) the classification given to the law by the applicable state; (2) the nature of the offence; and (3) the possible punishment.[131] If the European Court determines that a law is criminal in nature, even if it classified differently, the accused is entitled to all of the fair trial rights listed in Article 6.[132] The first consideration must be about how the national jurisdiction classifies the prohibited activity because the inquiry will end if the forbidden act is already classified as criminal.[133] This is logical because associating the prohibited action with domestic criminal law means that the national jurisdiction is already committed to guaranteeing that the accused will enjoy all of the fair trial protections, including the benefit of the presumption of innocence.

If a national jurisdiction does not identify the action being reviewed as criminal, the European Court of Human Rights moves onto the second and third criteria, which are considered alternatively and cumulatively.[134] A law can be considered criminal in nature if either criterion is met, however it is also possible for these criteria to be considered together, when neither is sufficient on its own, to permit a finding that the law being scrutinized is really criminal in nature. To fulfil the second criterion, 'the nature of the offence', the Court examines the purpose of the law to determine whether the law itself is really criminal in nature.[135] Under this

[130] Ibid; *Öztürk* (n 128) para 53; van Dijk and Viering (n 128) 546.
[131] *Engel* (n 127). For commentary on this case see Harris, O'Boyle, Bates, and Buckley (n 128) 373; van Dijk and Viering (n 128) 543 et seq.
[132] *Engel* (n 127); van Dijk and Viering (n 128) 543 et seq.; Harris, O'Boyle, Bates, and Buckley (n 128) 373.
[133] *Minelli v Switzerland* (1983) series A no 62, para 28, *Campbell and Fell v United Kingdom* (1984) Series A no 80, para 70; *Öztürk* (n 128) para 51; *Demicoli v Malta* (1991) Series A no 210, para 32; Harris, O'Boyle, Bates, and Buckley (n 128) 373-374; van Dijk and Viering (n 128) 544.
[134] *Öztürk* (n 128) para 53; *Bendenoun v France* (1994) Series A no 284, para 47; *Lutz v Germany* (1987) Series A no 123, s 55; *Jussila v Finland* ECHR 2006-XIV 1; van Dijk and Viering (n 128) 546, 548-549; Schabas, *ECHR Commentary* (n 65) 277.
[135] *Özturk*, para 53; *Lauko v Slovakia* ECHR 1998-VI, para 58; van Dijk and Viering (n 128) 546.

prong, the law must apply to the general public and be designed to be punitive and have a deterrent effect, rather than to compensate for some loss.[136] These requirements help clearly define what is 'criminal' versus 'civil' in nature. For the third prong, involving the 'the possible punishment', the court examines how punitive the maximum possible consequence of the law could be.[137] The more punitive the possible outcome the more likely it is to be considered punishment and criminal in nature. Thus, the repayment of funds or compensation for harm would be civil, while payment of a fine would take the law closer to being criminal.[138] Of course, if the punishment could result in imprisonment, the law would almost necessarily be criminal in nature. Imprisonment is exclusively a criminal law sanction and is the most severe punishment that member states of the European Convention on Human Rights can employ for criminal convictions.[139] Thus, a law not classified as 'criminal' in a national jurisdiction must be both criminal in nature and punitive in its effect in order to require the Convention's Article 6 fair trial rights provisions.

The application of this process does not result in the reclassification of the domestic law but merely requires that the accused be given the full benefit of his or her fair trial rights during the proceedings.[140] The European Court of Human Rights introduced this approach to stop countries from classifying laws that would normally be criminal or carry criminal penalties as administrative, disciplinary, or regulatory

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[136] *Lauko* (n 135) (Law must apply to the general public); *Bendenoun* (n 134) (the law should not be directed at a particular group); *Weber v Switzerland* (1990) Series A no 177, para 33 ('Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct.'); *Janosevic* (n 65) para 68 (law must be punitive); *Porter v United Kingdom* App No 15814/02 (ECtHR, 8 April 2003) (providing that surcharges are not punitive); *Öztürk* (n 128); *EL, RL, and JO-L v Switzerland* App No 20919/92 (ECtHR, 29 August 1997) paras 42, 46 (a finding of guilt is not necessary to determine whether the law is punitive in character); *Tre Traktörer Aktiebolag v Sweden* (1989) Series A no 159, para 46; *Pierre-Bloch v France* ECHR 1997-VI para 58 (both of these later cases state that even if the end result is severe, if it is compensatory or correcting in nature it does not qualify as punitive); van Dijk and Viering (n 128) 544-547; Harris, O'Boyle, Bates, and Buckley (n 128) 374; Schabas, *ECHR Commentary* (n 65) 277-278.

[137] Schabas, *ECHR Commentary* (n 65) 278; van Dijk and Viering (n 128) 548-551; Harris, O'Boyle, Bates, and Buckley (n 128) 376; *Engel* (n 127) para 82; *Weber* (n 136) (up to three months' imprisonment); *Janosevic* (n 65).

[138] *Lauko* (n 135); *Morel v France* ECHR 2003-IX 297; *Matyjek v Poland* App No 38184/03 (ECtHR, 24 April 2007) (lustration proceedings); *Malige v France* ECHR 1998-VII; *Hamer v Belgium* ECHR 2007-V 45 A fine is not: *Inocencio v Portugal* ECHR 2001-I 435; *Tre Traktörer Aktibolag* (n 136). Cf *Porter* (n 136).

[139] Engel (n 127) para 82; *Ezeh and Connors v United Kingdom* ECHR 2003-X 101, para 126; van Dijk and Viering (n 128) 549.

[140] van Dijk and Viering (n 128) 544.

violations. The Court felt that this sort of classification is contrary to the purpose of the European Convention.[141] Further, by establishing criteria to determine when a law is 'criminal' the European Court is able to reconcile the diverse legal systems of the member states in an effort to allow for consistency and fairness, at least with regard to the application of the European Convention on Human Rights, between the different countries.[142]

This approach is consistent with the presumption of innocence. The presumption of innocence is meant to protect individuals from being treated as if they are guilty without first being convicted of a crime. If the prohibited activity tends to be criminal in nature or if the outcome of the hearing could result in sanctions that resemble criminal punishment, then the presumption of innocence should be applicable regardless of whether the state classifies it as such.

E. What is the presumption of innocence meant to protect?

The purpose of the presumption of innocence is to prevent people who have not been convicted of a crime from being treated as if they are legally guilty.[143] As will be discussed in the following chapters, the presumption of innocence achieves this purpose through both a procedural and non-procedural aspect. These two aspects of the presumption of innocence protect people from being treated as if they are guilty both during the trial process and outside of the trial context. The non-procedural aspect prevents treating people as if they are guilty by preventing punishment without a conviction and by preventing statements or adverse media attention that publicises the guilt of individuals who have not been convicted.[144] The procedural aspect also prevents people who have not been convicted from being treated as if they are guilty by forcing criminal procedure to determine legal guilt.[145] This helps to ensure that the

[141] *Engel* (n 127); van Dijk and Viering (n 128) 543; Harris, O'Boyle, Bates, and Buckley (n 128) 373.
[142] Harris, O'Boyle, Bates, and Buckley (n 128) 373.
[143] Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984) U.N. Doc. HRI/GEN/1/Rev.1 (1984), para 7; *Krause v Switzerland* (1979) 13 DR 73; Schabas and McDermott (n 85) 1645-1646, para 27; Weigend (n 35) 196; Ashworth, Int'l J. Evidence and Proof (n 44) 246-7; Paul Mahoney 'Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.' (2004) 4(2) JSIJ 107, 120; Kitai 'Presuming Innocence' (n 85) 287.
[144] See Chapter 4.
[145] See Chapter 3.

convictions, and the subsequent treatment that convicted people receive, are properly justified.

Often, and perhaps most obviously, the treatment that people receive post-conviction is punishment. While the presumption of innocence is concerned with preventing punishment that is not justified, the presumption of innocence is not limited to punishment prevention. The presumption of innocence seeks to prevent all people who have not been convicted of crimes from being treated as if they had. What qualifies as punishment depends on the particular legal regime, so the treatment to be prevented should be understood in a broad way including punishment, punishment-like treatment, and stigmatisation.[146] This purpose can be seen throughout the historical uses of the presumption of innocence and is deeply tied to controlling the power that government can exert over individuals.

Even in ancient legal codes and texts the idea that the government should be cautious when punishing people is evident. The legal themes that evolved into the presumption of innocence have been traced back as far as the Code of Hammurabi.[147] Although not called a presumption of innocence, and not as developed as it is today, the ideas that it was wrong to punish innocent people, that guilt required some element of proof, and that the proof should come from someone other than the accused, were present in this historical legal code.[148] Further, in Roman law, dating back to at least AD 212, the presumption of innocence was evident in the need for proof and the acknowledgment of the dangers of convicting the innocent.[149] This preference against punishing innocent people, even if it meant that a guilty person would go free, is an idea that is echoed in the modern common law presumption of innocence.[150]

The modern ideas of the presumption of innocence, found in both the inquisitorial and accusatorial systems, are based on the idea of controlling

[146] Kitai 'Presuming Innocence' (n 85) 287.
[147] Code of Hammurabi (n 78).
[148] Code of Hammurabi (n 78) specifically code of laws 1-3.
[149] Stumer (n 2) 1. For the dangers of convicting innocent people see Watson A (ed), *The Digest of Justinian*, vol 4 (Mommsen T and Krueger P (eds lat), U Penn Press 1985) 846, 960, 966, 968; Quintard-Morénas (n 78) 111.
[150] Stumer (n 2) 3; Quintard-Morénas (n 78) 119.

government's ability to punish.[151] This principle first entered into English law in the fifteenth century and was most famously expressed by Blackstone in the eighteenth century when he wrote, '[i]t is better that ten guilty persons escape than that one innocent suffer.'[152] This expression describes the presumption of innocence as ensuring that people are treated as if they are legally guilty only if they have committed a crime. This maxim holds that this must be the case even if it allows some guilty people to escape punishment. It therefore acknowledges the vast power that the government has and that the presumption of innocence is a limit on that power.

Furthermore, the *Declaration des droits de l'homme et du citoyen* arising out of the French Revolution in 1789, states that '[e]very man is presumed innocent until he has been declared guilty.'[153] This is the first specific reference to the presumption of innocence found in a modern inquisitorial system.[154] The rights expressed in the *Declaration* were specifically meant to limit the power that the government had over individuals in an effort to prevent the overbearing type of government that lead to the Revolution.

Preventing government overreach with regard to punishment is echoed in the early development of international criminal law. The trials at Nuremberg and Tokyo also respected the presumption of innocence's purpose of ensuring that authority to punish is not overreached. It would have been easy for the governments who were dealing with the alleged war criminals to engage in summary punishments and show trials. While Churchill suggested that the summary execution of Nazi officials was the best way to proceed following the end of World War II, and Stalin wished to hold trials with pre-determined outcomes, Roosevelt and Truman both insisted that punishment would only be legitimate if it resulted from a trial during which the accused were afforded at least some fair trial rights.[155] This was reinforced by Robert

[151] Stumer (n 2) 3; Matthew Hale, *Historia Placitorum Coronæ* (1736) 289, 290; Quintard-Morénas (n 78) 116. Both the inquisitorial and accusatorial systems started to reintroduce the legal ideas behind presumption of innocence in the 15th century.

[152] William Blackstone, *Commentaries on the Laws of England* (4th ed, 1770) 352.

[153] Art 9 *Declaration des droits de l'homme et du citoyen* of 1789 '[t]out home ètant presume innocent jusqu'à ce qu'il ait été declare coupablé' translated to 'Every man being presumed innocent until he has been declared guilty'. Schabas and McDermott (n 85)1635, para 1; Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 454-455.

[154] Schabas and McDermott (n 85) 1635, para 1; Sluiter, Friman, Linton, Vasiliev, Zappalà (n 153) 454-455.

[155] Richard Overy, 'The Nuremberg Trials: International Law in the Making', in Phillipe Sands (ed) *From Nuremberg to the Hague* (CUP 2003) 2-4; Theodor Meron (ed) *The Making*

Jackson, a United States' Supreme Court Justice and the Chief Prosecutor from the United States during the Nuremberg Trial, when he stated about those trials 'we accept that [the defendants] must be given a presumption of innocence' despite the fact that the presumption was not included within the Nuremberg Charter.[156] Although the presumption of innocence was not specifically included in the Nuremberg or Tokyo Charters, there was recognition that the accused must have some presumption of innocence, that convictions could not be obtained without proof, and that the accused did not have to prove their own innocence.[157] These provisions provided some assurance that the governments trying the accused individuals did not assume their guilt and punish them too readily.

Likewise, the inclusion of the presumption of innocence within modern human rights law reflects the same purpose of controlling the ability to punish and specifically to arbitrarily imprison people. The Universal Declaration of Human Rights and the European Convention on Human Rights were both drafted in response to the atrocities that occurred during World War II, and demonstrate a motivation to prevent governments from being able to commit similar atrocities in the future.[158] During the drafting of the Universal Declaration of Human Rights the presumption of innocence was specifically included to help prevent the summary punishments and show trials seen in the Middle Ages and Nazi Germany whereby the government could punish individuals for mere accusations.[159] The European Convention on

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of International Criminal Justice: The View from the Bench: Selected Speeches (OUP 2011) 77-78; M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harv Hum Rts J 11, 12; Minute by the Secretary of State for Foreign Affairs, 'Treatment of War Criminals' (22 June 1942) National Archives, Cab 66/25/44, 2-3.

[156] Opening Address for the United States at IMT, in Nazi Conspiracy and Aggression (Washington DC, US Gov Printing Office 1946) I, at 117; as quoted in Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003) 84.

[157] Ibid; Overy (n 155) 2-6; Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945); Charter of the International Military Tribunal for the Far East (19 January 1946) International Crimes (Tribunals) Act (1973) as printed in Neil Boister and Robert Cryer (eds) *Documents on the Tokyo International Military Tribunal* (OUP 2008); Zappalà *Human Rights* (n 156) 84.

[158] William A Schabas (ed), *The Universal Declaration of Human Rights*, vol 1 (CUP 2013) lxxiii; ECHR Preface; UDHR preface.

[159] Summary Record of the Fifty-Fourth Meeting [of the Commission on Human Rights], Held at Lake Success, New York, on Tuesday, 1 June 1948, at 2:30 p.m. (1 June 1948), as reprinted in William A Schabas (ed) *The Universal Declaration of Human Rights*, vol 2 (CUP 2013) 1707; Sitting 5th September 1949, Report presented by Mr. P.H. Teitgen (5 September

Human Rights was similarly drafted against this backdrop, and in fact, the presumption of innocence provision was originally modelled after that of the Universal Declaration.[160] The common theme throughout these historical and modern legal texts with regard to the presumption of innocence is to prevent innocent people from being treated as if they are guilty unless they are convicted. By preventing this kind of treatment, the presumption of innocence assists in maintaining the balance between criminal law and individual freedoms by limiting when the government can apportion punishment.[161]

One way that the presumption of innocence protects the accused against the abuse of power is by forcing the state to conduct a careful evaluation of the evidence and determine whether the particular individual is legally guilty of the crime they are suspected of having committed.[162] In a somewhat narrow approach, Thomas Weigend argues that through this role the presumption of innocence is necessary to help suspects avoid the social-psychological consequences of being stigmatized as a criminal and no longer treated as a 'trustworthy citizen.'[163] The consequences of conviction can be far reaching and result in long-term stigmatization of the individual being punished by communicating that the individual is not trustworthy.[164] Therefore, punishment should only result when it can be justified, that is when the individual has committed a crime.[165] The presumption of innocence in the trial setting helps ensure that those who are convicted and punished are both factually and legally guilty, and thus deserving of punishment. Therefore, the presumption of innocence helps protect people from abuses of power and oppression by preventing punishment and stigmatisation without a legitimate reason.

A similar argument is that the presumption of innocence helps protect the innocent from being convicted because it redistributes risk in the criminal trial by

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1949), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol I (Martinus Nijhoff 1985) 192.

[160] Schabas, *ECHR Commentary* (n 65).

[161] HL Packer, *The Limits of the Criminal Sanction* (Stanford UP 1968) 169; Stumer (n 2) xl; Ashworth, Int'l J Evidence and Proof (n 44) 246-7; RM Dworkin, 'Principle, Policy and Procedure' in C Tapper (ed) *Crime, Proof and Punishment* (Butterworths 1981); PJ Schwikkard, *Presumption of Innocence* (n 22) 14-15.

[162] Weigend (n 35) 196; Schwikkard, *Presumption of Innocence* (n 22)14-15.

[163] Weigend (n 35) 196.

[164] Ashworth, South African L J (n 16) 71-2.

[165] Ashworth, Int'l J Evidence and Proof (n 44) 247-8.

helping redress the imbalance of power between the government and the accused.[166] Thus, in addition to assisting an individual accused of a crime, it also helps overcome the idea that government is 'inherently coercive' and victimizing to the individual.[167] By virtue of being accused of a crime, an accused person is already at a disadvantage because of the structure of criminal procedure.[168] The government writes criminal laws, decides whether and with what crimes an individual will be charged, conducts the investigation, has enough money and resources to investigate leads, and has specialist lawyers who can try the case in front of a specialist court. The accused is necessarily disadvantaged as he or she will rarely have access to the same tools when preparing his or her defence. The accused has no control over whether charges are brought against them, are not privy to all aspects of the government's investigation, and often lack the access and resources to effectively gather evidence. The presumption of innocence makes it more difficult for the government to convict accused individuals by establishing a fairly high standard that must be met before a guilty verdict can be reached. This begins to redress the inherent imbalance in a system that is seemingly overwhelmingly stacked against defendants.[169] The presumption of innocence also helps curb restrictions on individual liberties arising during the investigation and trial process when trying to determine the 'truth' about what occurred in the particular situation.[170] Therefore, by helping create a more level field for the accused in the criminal trial process, 'the presumption of innocence [is] seen as [being] 'of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality.''[171]

Legal scholars who take the narrowest approaches argue that the presumption of innocence has a more specific purpose than to prevent people from being treated as if they are guilty without a conviction. The most commonly discussed purposes are

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[166] Ashworth, South African L J (n 16) 73-4; Weigend (n 35).
[167] Schwikkard, *Presumption of Innocence* (n 22) 14-15 *quoting* RH Gaskins, *Burdens of proof in modern discourse* (Yale UP 1992) 81.
[168] Schwikkard, *Presumption of Innocence* (n 22) 14 -15; P Roberts, 'Taking the Burden of Proof Seriously' (1995) Crim L R 783, 786; Morton and Hutchison (n 24) 3; Weigend (n 35) 196.
[169] Schwikkard, *Presumption of Innocence* (n 22) 14-15; Morton and Hutchison (n 24) 3.
[170] Weigend (n 35) 196.
[171] Schwikkard, *Presumption of Innocence* (n 22) 14 -15 quoting *State v Mbatha* [1996] 2 LRC 208, 218 (South Africa); Roberts (n 168) 785; for a similar sentiment in international law see Sitting 5th September 1949, Report presented by Mr. P.H. Teitgen (5 September 1949), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol I (Martinus Nijhoff 1985).

to: prevent conviction without proof;[172] direct the burden of proof onto the prosecutor;[173] prevent arbitrary punishment or detention;[174] and help courts discover the truth.[175] These potential purposes seem more specific as they are tied more directly to procedural rights, and thus may appear more legitimate. These arguments however, are not describing why the presumption of innocence exists, but rather, how it works. As is discussed in later chapters, the presumption of innocence does most of these things – it prevents arbitrary detention, requires proof provided by the government for a conviction, and can help courts determine the truth – however, all of that is what the presumption does, not why it does it or why it is necessary. Further, by doing these things, and contributing to fair trials, the presumption of innocence contributes to the rule of law.[176] The purpose of the presumption of innocence however, is to help balance government powers with individual rights and freedoms with respect to the ability to punish or sanction.

Other scholars argue that the presumption of innocence has a wider and more general purpose. They argue that the purpose of the presumption of innocence is to promote fairness or act as an umbrella right for due process rights generally.[177] Hock Lai Ho for example, argues that the presumption of innocence is not a 'discrete standard of fair trial' in itself, but instead 'is the general right to due process'.[178] This purpose of providing due process inextricably links the presumption of innocence to the formal rules of criminal procedure. Under this understanding of the presumption of innocence all of the necessary components of a fair trial must be included under the presumption of innocence because a person must be presumed innocent unless they are proven guilty during a fair trial.[179] This argument is similar to that offered by Magnus Ulväng who argues that the presumption of innocence is not an individual right but rather a rule of thumb or general principle that goes to the deep structure of

[172] Stumer (n 2) xxxvii.
[173] Morton and Hutchison (n 24) 2-3.
[174] Blackstone (n 152) Bk IV, Ch 27, 358. For explanations of this rationale see RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 196; Morton and Hutchison (n 24) 4-5.
[175] Schwikkard, *Presumption of Innocence* (n 22) 14 -15; Laudan, *Truth, Error, and Criminal Law* (n 8).
[176] Schabas, *ECHR Commentary* (n 65) 265; Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros (eds) *The Trial on Trial*, vol 1 (Hart 2004) 2; Stumer (n 2) 27.
[177] Ho, 'The Presumption of Innocence as a Human Right' (n 15); Ulväng (n 31).
[178] Ho, 'The Presumption of Innocence as a Human Right' (n 15) 266.
[179] ibid. 267-268, 273.

criminal procedure.[180] For him the presumption of innocence works similarly to the *Rechtstaat* principles or human rights, more as guidelines and deep structural norms than rules that create duties or prescribe conduct.[181]

The purpose of the presumption of innocence however cannot be as general as Ho and Ulväng claim. As with the more narrow purposes, a description of the presumption of innocence as a general or structural right that does not carry individual duties or benefits describes how the presumption works rather than why it exists. That the presumption of innocence is a deep structural component to criminal justice or procedure is closer to providing a purpose, the purpose of support or structure, but does not quite explain why the presumption exists or what protection it offers. This is partially because there is no reason why the presumption of innocence could not be structural and have the purpose of preventing individuals from being treated as if they are guilty. It is possible for those two things to coexist, however the presumption of innocence would have to be more than merely structural to fulfil that purpose. Another reason that the purpose of the presumption of innocence cannot be so general is that these arguments almost equate the presumption to the general principle of fairness.[182] While the presumption of innocence is a part of fairness they are not the same. For one, the general principle of fairness is understood to be at the root of criminal justice, and is not specifically mentioned within the documents that create and support a particular justice system.[183] The presumption of innocence however, is specifically mentioned. Further, the presumption of innocence cannot have such a general purpose because when it is mentioned in a specific criminal justice statute, it usually conveys some specific instructions to the fact-finder and/or prosecutor. For example, several of the criminal law statutes examined here include that the judge must be convinced of guilt to a particular standard before a conviction can be secured.[184] Finally, not all due process rights can be included in a general principle of the presumption of innocence because the presumption is almost always contemplated as a separate right within the documents conveying due process rights. It is either contained in a separate article from the rest of the due process rights or identified as

[180] Ulväng. (n 31) 212.
[181] Ibid.
[182] Anne Ruth Mackor & Vincent Geeraets, 'The Presumption of Innocence', (2013) 42(3) NJLP 167, 168.
[183] For a discussion of fairness see McDermott (n 15).
[184] ICC Statute art 6(2)(c); ICTY Statute art 21(3); ICTR Statute art 20(3); STL Statute art 16(3).

an individual right under the general due process rights afforded to accused persons. Thus, while the presumption of innocence might be contained within due process or fair trial rights, not all of those rights are contained within the presumption of innocence.

F. Conclusion

Taking into consideration the placement of the presumption of innocence within criminal law generally, where guilt and innocence are at issue, it is important to know what 'innocence' means. Innocence cannot be defined without also defining 'guilt' as they are opposites. Criminal justice systems are concerned with two types of innocence and guilt, that is, factual and legal. Factual guilt is when someone does some action whereas factual innocence is when someone did not do an action. Factual guilt and innocence are based in fact, and thus, it describes any action or non-action even those not related to criminal law. Legal guilt and innocence however, are based in law. Legal guilt is when all of the elements of a crime can be proved against an individual, whereas legal innocence is when one or more elements cannot be proven. Because they are based on proof and elements of crimes, they are independent of factual guilt and whether or not something happened in fact. It would be ideal if factual guilt and legal guilt always coexisted when a person is convicted of a crime. Likewise, it would be ideal if factual innocence and legal innocence always coexisted. Unfortunately, this is not always the case. Thus, legal innocence cannot be equated with actual innocence. As a result, criminal law refers to legal innocence as being 'not guilty'. The presumption of innocence is primarily concerned with legal innocence, but factual innocence has some relevance. The importance of determining what definitions of innocence are relevant to the presumption of innocence is that whether someone is considered innocent or guilty determines how he or she may be treated.

A conviction, that is a finding of legal guilt, allows an individual to be subject to punishment, sanctions and limitations on their rights and privileges. These limitations and punishments are reserved for those who have been convicted and should not be inflicted on those who have not been found legally guilty. The presumption of innocence helps prevent people who do not have a conviction from being punished or otherwise treated as if they are guilty. The presumption does this through two different aspects. These aspects and the way the presumption of

innocence prevents people from being treated as if they are guilty are discussed in the following chapters.

The presumption of innocence has the purpose of preventing people from being treated as if they are guilty without a conviction. This purpose is derived from the presumption's placement within criminal law and the relevant definition of innocence. That the presumption is placed within criminal proceedings is evident because criminal law is where guilt and innocence are at issue. Further, the statutes, agreements and conventions place the presumption of innocence in the general realm of criminal law. What qualifies criminal law depends on the particular jurisdiction. Specific criminal courts can define criminal law and procedure for themselves, while the human rights courts must be more flexible to accommodate the criminal justice systems of their states parties. To help determine whether national laws are correctly categorised as criminal or non-criminal in nature, the European Court of Human Rights has developed three criteria to help determine whether any particular law is criminal and thus, whether the protections of the presumption of innocence are applicable. While these criteria are only applicable for states parties to the European Convention on Human Rights, the use of these criteria does provide for some consistency in the due process and criminal fair trial protections that member states must provide and is compatible with the presumption of innocence.

Chapter 3. The Procedural Aspect of the Presumption of Innocence

In the courtroom setting, the presumption of innocence is, and acts as, a presumption. The purpose of this chapter is to show that the presumption of innocence is a mandatory rebuttable legal presumption. As a presumption it causes the onus of proof to be on the prosecutor and not the accused. Further, it operates by forcing the fact-finder to find for the accused unless the proof against the accused reaches a particular standard. Finally, the presumption can only be waived by a guilty plea, which requires specific knowledge on the part of accused persons.Within the literature, there is some discussion of whether the presumption of innocence is an actual presumption. Some argue that it does not meet the qualifications for a presumption while others classify it as a rule of thumb or an overarching human right.[1] A review of the case law however, reveals that courts are using the presumption of innocence as a presumption. Its role within the courtroom is to act as a presumption; to direct the fact-finder to make a finding of not guilty unless the standard of proof is met.

A. The presumption of innocence is a mandatory rebuttable presumption of law

Whether the presumption of innocence is actually a presumption is a debatable issue.[2] Some say that it is a rebuttable presumption of law because it exists unless there is sufficient evidence to allow for a decision of guilt.[3] Others argue that it is not actually a presumption.[4] For example, Roberts and Zuckerman argue that the presumption of innocence is better thought of as a 'complex legal and political doctrine rather than simply as a rule of evidence'.[5] Others have argued that the presumption of innocence is not a presumption but rather just another way of stating

[1] Magnus Ulväng, 'Presumption of Innocence Versus a Principle of Fairness' (2013) 42(3) NJLP 205; Hock Lai Ho, 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights*, Hart (Oxford 2012).
[2] For a general discussion see PJ Schwikkard, *Presumption of Innocence* (Juta & Co 1999) 22; Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193, 194; See Ulväng (n 1).
[3] Weigend (n 2) 193.
[4] See eg ibid.
[5] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP 2010) 231.

the burden of proof and assigning that burden to a party other than the accused.[6] This argument reflects a policy consideration of avoiding convicting innocent people of crimes.[7] Relying on Thayer and Wigmore's definition of presumption, these scholars argue that presumptions require a preliminary fact in order for the presumption to be triggered.[8] The presumption of innocence, however, is a starting point, rather than a conclusion, and does not seemingly rely on any facts to become operative.[9] In this way, scholars argue that the presumption of innocence is not actually a presumption, but rather, a restatement of the burden of proof that allocates the responsibility of meeting that burden.[10]

Accepting that presumptions exist, the presumption of innocence is a mandatory rebuttable presumption of law. When one considers the way the presumption of innocence is described in statutes, that a person must be presumed innocent unless his or her guilt is proven to a particular standard of proof, it is more clearly stated as a presumption.[11] Significantly, the use of the word 'must' or 'shall' when stating the presumption shows it is mandatory. That mandatory character of the presumption of innocence is further reinforced by its inclusion as a right in most criminal law statutes and human rights agreements.

The presumption of innocence however, is rebuttable because it is overcome when the proof of guilt exceeds the necessary threshold required in the jurisdiction in which trial is taking place. That is, the standard of proof must be met in order to make a finding of guilt. Before the standard of proof is reached, a fact-finder must presume

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[6] James C Morton and Scott C Hutchison, *The Presumption of Innocence* (Carswell 1987) 14. See also Ho (n 1); Schwikkard (n 2) 25; Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016); Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333, 360.

[7] Schwikkard (n 2) 22-23.

[8] Morton and Hutchison (n 6) 14; Weigend (n 2) 194.

[9] Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268, 269-270.

[10] Morton and Hutchison (n 6) 14.

[11] See American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 8(2) (ACHR); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 art 6(2) (ECHR); Rome Statute of the International Criminal Court (17 July 1998) art 66(1) (ICC Statute); UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 21(3) (ICTY Statute); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 20(3) (ICTR Statute); Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea (27 October 2004) art 35 (new) (ECCC Statute); UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 16(3) (STL Statute); UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) art 17(3) (SCSL Statute).

that the accused is legally innocent leaving the fact-finder with no choice but to enter a not-guilty verdict if the standard is not met. Once the proof reaches the required standard the presumption of innocence is overcome and the fact-finder is free to decide in a way other than that prescribed by the presumption. At this point, the fact-finder may find the accused guilty. Thus, the presumption of innocence is a legal presumption as the court must accept as true that the accused is legally innocent and therefore must make a finding of not guilty unless the proof reaches the relevant standard.[12]

Some argue that the presumption of innocence is not a true presumption because there is no specific condition or fact that must be present for the accused to gain the protection of the presumption.[13] They support their argument by claiming that the applicability of the presumption to everyone charged with a criminal offence makes the presumption evidentiary in nature. [14] The lack of some preliminary fact supporting the accused's innocence means that an accused is being presumed innocent even in the absence of any evidence supporting that conclusion. The commentators espousing this view believe that presumptions should only become operative when some evidence supports the presumption and that in the absence of any evidence supporting the innocence of the accused he or she should not be so presumed. [15]

This approach is flawed in a number of ways. First, there is a condition that must exist before the presumption becomes operable. The presumption does not apply until criminal proceedings commence against a particular individual. Therefore, the threshold condition to the applicability of the presumption of innocence is that the suspect has become the target of the criminal justice process. Second, this argument focuses on outcomes and assumes some guilt on the part of the suspect because that is the usual outcome in most criminal cases. It is precisely this attitude that the presumption of innocence helps protect against and why it is necessary that the presumption be applied in the courtroom. The argument that the presumption of innocence does not reflect reality confuses the type of innocence that the presumption is concerned with. While most accused people may be factually guilty of an offence, they are all legally innocent because legal guilt cannot be established without a

[12] Duane Mowry, 'The Doctrine of Reasonable Doubt' (1902) 55 Central L J 263, 266-267.
[13] Rinat Kitai, 'Presuming Innocence' (2002) 55(2) Okla L R 257, 265.
[14] Ibid.
[15] Ibid.

finding of guilt in court. Further, the position that the presumption does not reflect reality neglects to consider the fact that criminal law is particularised to the individual. Thus, even if most of those on trial are factually guilty, it does not mean that the individual before the court in any given case is factually guilty. It may be that they are the factually innocent person, and for them the presumption of innocence would reflect fact.

Ultimately, it does not matter whether the presumption of innocence is or is not a true legal presumption because its effect is the same – the fact-finder must find the accused not guilty unless enough evidence is present to meet the required standard of proof. The courts treat it as a presumption and they believe it is an idea that cannot be overcome without the standard of proof being met at trial.

B. The presumption of innocence is mandatory - The relationship between the presumption of innocence and the burden of proof

The presumption of innocence is a human right that must be upheld by the court to protect accused individuals. As a human right it is mandatory in nature. The most obvious demonstration of the mandatory nature of the presumption of innocence is its relationship to the burden of proof. The presumption of innocence requires that the crime alleged against the accused must be proven by someone other than the defendant.[16] This reflects a general principle of law that the party bringing the action

[16] Kitai (n 15) 272; Ho (n 1) 260; Haji NA Noor Muhammad, 'Due Process in Law for Persons Accused of Crime' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 150; Liz Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76(4) MLR 681, 683; Yvonne McDermott, *Fairness in International Criminal Trials* (OUP 2016) 44; Ana Aguilar-García, 'Presumption of Innocence and Public Safety: A Possible Dialogue' (2014) 3(1) Stability: Int'l J of Sec & Dev 1, 3-4; Christoph Grabenwarter, *European Convention on Human Rights* (Beck 2014) 167. John D Jackson and Sarah J Summers, *The Internationalisation of Criminal Evidence* (CUP 2012) 201; W Schabas and Y McDermott, 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd ed, CH Beck 2016) 1640; STL Statute art 16(3); ICC Statute art 66; ICTY Statute art 21(3); ICTR Statute art 20(3); SCSL Statute art 17(3); ECHR art 6(2); ACHR art 8(2); Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) rule 87(1); Universal Declaration of Human Rights GA Res 217 A(III) UN Doc A/8810 (1948) art 11(1) (UDHR); American Declaration of the Rights and Duties of Man, OAS Doc. OEA/SER.L./V/I.4 (1948) art XXVI (American Declaration); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14(2) (ICCPR) ; African Charter on Human and People's Rights (published on 27 June 1981, entry into force 21 August 1986) 1520 UNTS 217, art 7(1)(b) (African Charter).

to court has the burden of proof.[17] For common law and international courts, this burden falls to the prosecutor.[18] Generally, in civil law courts this onus generally falls to the prosecutor but there is an added responsibility on the court itself to determine the truth.[19] Because the prosecutor retains the burden of proof in the common, civil and international law systems, it has been argued that the prosecutor having the burden of proof is a general principle of law.[20] This idea is supported within the international law context, where the burden of proof required for conviction never shifts to the defence.[21]

It is the legal presumption, or procedural, aspect of the presumption of innocence that prevents the burden of proof from falling on the defendant for any inquiry that may prove or disprove their guilt. Because of the presumption of innocence, the defendant has nothing to prove from the case's outset. If the prosecutor

[17] Schabas and McDermott (n 16) 1636; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 289-90; Dov Jacobs, 'Standard of Proof and Burden of Proof', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalá (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 1141; *Prosecutor v Mucić et al*. (Judgement) IT-96-21-T, T Ch (16 November 1998) para 599.

[18] *Prosecutor v Kayishema et al.* (Judgement (Reasons)) ICTR-95-1-A, A Ch (1 June 2001) para 107; *Prosecutor v Ntakirutimana et al.* (Judgement) ICTR-96-10-A and ICTR-96-17-A, A Ch (13 December 2004) para 157; *Prosecutor v Ndindilyimana et al.* (Judgment and Sentence) ICTR-00-56-T, T Ch II (17 May 2011) para 107; *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06, T Ch I (14 March 2012) para 92; *Prosecutor v Kenyatta* (Decision on the Prosecution's Application for a Further Adjournment) ICC-01/09-02/11, T Ch V(B) (3 December 2014) paras 48-55; *Prosecutor v Bemba* (Judgment Pursuant to Article 74 of the Statute) ICC-01/05-01/08, T Ch III (21 March 2016) para 215; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) r 87(A) (ICTR RPE); *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 2 (1947) 102; ICC Statute art 66; STL Statute art 16(3); Muhammad (n 16) 150; Sluiter et al (n 17) 1139; John RWD Jones and Dr Miša Zgonec-Rožej, 'Rights of Suspects and Accused' in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon* (OUP 2014) 184; Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003) 91.

[19] Muhammad (n 16) 150; Zappalà (n 18) 91; Schabas and McDermott (n 16) 1641; DJ Harris, M O'Boyle, EP Bates, CM Buckley, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP 2014) 461; Gideon Boas 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' in Gideon Boas and William A Schabas (eds), *International Criminal Law: Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 2 3.

[20] Schabas and McDermott (n 16) 1641.

[21] ICC Statute art 67(1)(i); *Prosecutor v Ngirabatware* (Judgement and Sentence) ICTR-99-54-T, T Ch II (20 December 2012) para 49; *Kanyarukiga v Prosecutor* (Judgement) ICTR-02-78-A, A Ch (8 May 2012) para 167; *Prosecutor v Hategekimana* (Judgement and Sentence) ICTR-00-55B-T, T Ch II (6 December 2010); William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP 2016) 1009-1010.

cannot meet the standard of proof the defendant will be found not guilty even if the defendant provided no argument or evidence on his or her own behalf.[22] Thus, even when the *ad hoc* Tribunals neglected to provide a rule in their statutes assigning the burden of proof to the Prosecutor, the burden of proof still necessarily fell away from the defendant because they have the presumption of innocence.[23]

This aspect of the presumption of innocence is reflected in 'no case to answer' motions at the international and internationalised tribunals. Despite not having a rule allowing for a motion of 'no case to answer', the International Criminal Tribunal for the former Yugoslavia heard motions on this issue in the *Tadić* and *Čelebići Camp* cases.[24] Both were rejected on their merits, but the Tribunal's willingness to hear these motions demonstrates that the presumption of innocence stands for the proposition that the defence has nothing to prove and if the prosecution does not meet their burden, the court should dismiss the case.[25] These motions resulted in the introduction of Rule 98 *bis*, which allows for defendants to file motions of acquittal. Motions for acquittal can even be heard on a *propio motu* basis by the Court, if the Court believes that the prosecution has not successfully discharged their burden.[26]

Similarly, the International Criminal Court also allows for 'no case to answer' motions, without a rule allowing for this type of motion in the Statute or Rules of 'Evidence. 'No case to answer' motions were created by Trial Chamber V(A) during the *Ruto and Sang* case in what is known as 'Decision Number 5.'[27] The Trial Chamber permitted this type of motion because it is 'consistent with the statutory framework' of the Court, is common in domestic jurisdictions, and was used at the International Criminal Tribunal for the former Yugoslavia.[28] The Court specifically recognized that this motion flows from the presumption of innocence and the

[22] Larry Laudan, *Truth, Error and Criminal Law: An Essay in Legal Epistemology* (CUP 2006) 89.
[23] Zappalà (n 18) 91.
[24] *Prosecutor v Mucić et al.* (Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case) IT-96-21-T, T Ch (18 March 1998).
[25] Zappalà (n 18) 91-92.
[26] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) r 98 *bis* (ICTY RPE).
[27] *Prosecutor v Ruto et al.* (Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)) ICC-01/09-01/11, T Ch V(A) (3 June 2014); *Prosecutor v Ruto et al.* (Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11, T Ch V(A) (5 April 2016).
[28] *Ruto* Decision No. 5 (n 27) paras 10-11.

requirement that the onus of proof is on the prosecutor.[29] Ultimately, the 'no case to answer' motion in *Ruto and Sang* was successful, resulting in the charges against the accused being vacated.[30] The creation of a 'no case to answer' motion at the International Criminal Court and the successful motion during the *Ruto and Sang* case underscores the presumption of innocence's role in requiring the prosecution to bear the burden of proof.

The idea that the presumption of innocence keeps the burden of proof away from the accused is so strong that some scholars argue that the presumption of innocence is merely a restatement of the burden of proof.[31] This, however, cannot be the case.[32] The presumption of innocence is a presumption and as such it is an instruction to the fact-finder. One of the results of the presumption is that the accused cannot have the burden of proof, but the presumption of innocence is more than a restatement of where the burden falls. Requiring proof, and who must provide that proof, is not the same as presuming innocence. As a presumption it is a direction to the fact-finder to find the accused innocent unless the standard of proof is met.[33] Thus it works in conjunction with both the burden and standard of proof. It is related to both, but not the equivalent of either.

This does not mean that the defence should not participate in the case. Defendants can and should challenge the credibility of the prosecution's witnesses and evidence in an effort to demonstrate that the prosecution has not met their burden. In doing so they can raise doubts in the minds of the fact-finder in an attempt to secure an acquittal. This, however, does not shift the burden of proof to the defence.[34] First, the defence is not required to make arguments that the provided proof is insufficient. The defence is equally refrain from making any argument and trust that the fact-finder properly will evaluate the evidence to determine whether the standard

[29] Ibid at paras 12-13.
[30] *Ruto* Decision on Defence Applications (n 27).
[31] Laudan Material or Probatory (n 6); Lippke (n 6).
[32] Liz Campbell, James Chalmers and Anthony Duff, 'Preface: The Presumption of Innocence' (2014) 8(2) Crim L & Phil 283, 283; Zappalà (n 18) 85; *Barberà, Messegué and Jabardo v Spain* (1988) Series A no 146, para 77.
[33] Discussed in section C of this chapter.
[34] ICTR RPE r 87(A); *Ntakirutimana* (n 18) para 159; *Kayishema* (n 18) para 117; *Prosecutor v Nchamihigo* (Judgement and Sentence) ICTR-01-63-T, T Ch III (12 November 2008) para 13; *Prosecutor v Musema* (Judgement and Sentence) ICTR-96-13-A, T Ch I (27 January 2000) para 213; *Niyitegeka v Prosecutor* (Judgement) ICTR-96-14-A, A Ch (9 July 2004) paras 60-61; *Prosecutor v Rwamakuba* (Judgement) ICTR-98-44C-T, T Ch III (20 September 2006) para 32.

of proof has been met. Second, when the defence makes these types of arguments, the prosecution must still prove all elements of the alleged crime to the appropriate standard in order to achieve a conviction. The defence is merely highlighting areas in which that standard may not have been met. A rejection of an accused's argument that the standard of proof has not been met on the basis of a credibility challenge does not overcome the presumption of innocence or require a conviction.[35] It merely states that the fact-finder does not agree with the defence's argument regarding that particular fact. The fact-finder may still determine that the prosecutor did not meet the required standard of proof with regard to other elements or as a cumulative whole.

1. Affirmative Defences

If the presumption of innocence prevents the defendant from bearing the burden of proof then affirmative defences can seem something of a contradiction. Affirmative defences are different from arguing that the prosecution has not met the burden of proof, questioning the credibility of witnesses and evidence, or pointing out that there may be some places where the standard of proof has not been met. Instead, they argue that the defendant cannot be found guilty because there is an excuse or explanation that prevents them from forming the requisite *mens rea*.

Affirmative defences require some form of proof, the amount of which depends on the jurisdiction. First off, there is a burden on the defence to raise an affirmative defence if they are going to rely on one during trial.[36] However, the amount of proof that is needed beyond this is generally limited and is certainly less than the standard of proof required for guilt. Affirmative defences merely serve to raise a doubt in the mind of the fact-finder.[37] Importantly, raising a defence in no way shifts the burden required to prove guilt, nor does it lower the standard of proof the prosecutor must meet for a conviction. Thus, an affirmative defence does not affect the presumption of innocence because it does not change the relationship between the defendant and the burden of proof required for a conviction.

Although the accused is not required to show that an affirmative defence meets a certain evidentiary standard it may be required to provide some evidence that the circumstances of the affirmative defence exist. Thus, the accused can carry some

[35] *Hategekimana* (n 21) para 163.
[36] Schabas ICC Commentary (n 21) 1010.
[37] Ibid.

burden of proof for affirmative defences. One example is the defence of insanity where the accused must prove the elements of such a defence to a relatively low standard of proof such as either the balance of probabilities or preponderance of the evidence standard.[38] Attention has been paid to such 'reverse onuses' and whether these violate the presumption of innocence growing out of the belief of some commentators that the presumption of innocence is nothing more than a restatement of the burden of proof.[39] However, there is no obligation to raise an affirmative defence and no set minimum evidentiary threshold that must be met to raise a defence.[40] Further, requiring the accused to give notice of any affirmative defence on which they play not rely does is not shift the burden of proof, but the burden of production. The prosecutor must still prove that the accused was responsible the alleged crime.

The International Criminal Court has some of the clearest rules regarding burden shifting. There the burden of proof can never shift to the accused.[41] This rule underwent some discussion during the drafting process, as there is significant divergence on this within national jurisdictions.[42] However, the Court does have other rules that require the accused to give notice to the prosecutor that they plan to rely on certain defences at trial.[43] It could be argued that the requirement to give notice of defences shifts the burden of proving the defence to the accused, rather than the defence merely raising doubts that the standard of proof has been met. However this does not shift the burden of proof to the accused, but merely allows the Prosecutor to

[38] McDermott (n 16) 44; Schabas and McDermott (n 16) 1642; Jacobs (n 18) 1141; *Prosecutor v Mucić et al.* (Judgement) IT-96-21-A, A Ch (20 February 2001) para 582, 603; for a detailed discussion on how the burden of proof shifts when a defendant claims insanity in general see Timothy H Jones, 'Insanity, automatism, and the burden of proof on the accused' (1995) 111(3) L Q Rev 475.

[39] Pamela R Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 21(2) Crim L F 131, 135-6; I Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) (dec) Crim L R 901, 901; Roger A Shiner, 'Corporations and the Presumption of Innocence' (2014) 8(2) Crim L & Phil 285.

[40] Rules of Procedure and Evidence, International Criminal Court (as amended 2013) r 79 (ICC RPE); ICTY RPE r 67(B); Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) r 112(B) (STL RPE).

[41] Article 66 provides that the onus to prove the accused's guilt is on the Prosecutor. Article 67 provides that the defendant has a right to not be subjected to a reverse onus of proof. Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45(3) Colum J Transnat'l L 635, 669-670; Jacobs (n 18) 1141.

[42] Håkan Friman, 'IV. Rights of Persons Suspected or Accused of a Crime' in Roy S Lee (ed) *The International Criminal Court* (Kluwer Law International 1999) 252.

[43] ICC RPE r 79.

investigate the accused's claims in their investigation of both sides of the allegation.

Other international and internationalised tribunals have conducted similar inquiries about the relationship between affirmative defences and burden shifting. The International Criminal Tribunal for Rwanda's treatment of the alibi defence is an illustrative example of how defences do not shift the burden of proof to the defence and thus do not run counter to the presumption of innocence. Unlike other defences, the accused is not defending his or her actions by raising an alibi, but merely arguing that the standard of proof has not been met because the defendant was not present at the crime scene.[44] In cases where the accused's direct responsibility for the crime is alleged, if there is credible evidence that the accused was not present at the alleged crime then the standard of proof necessarily cannot be met. International criminal law does not impose a burden on the defence to prove an alibi, but merely requires him or her to raise the possibility of its existence and present 'evidence tending to show that he was not present at the time of the alleged crime.'[45] Such evidence need not be conclusive, it only must raise a doubt in the mind of the fact-finder as to whether the prosecutor has proven that the defendant is the person who committed the crime. This is one of the few times when the difference between the burden of proof and the burden of production is important.[46] There is no set standard of proof for alibi, rather the issue is whether it raises doubts as to whether the accused was present at the time of the crime.[47] Even when the defence is raised, the burden remains on the prosecution to prove that the elements of the crime are proven to the relevant standard despite the evidence tending to show an alibi.[48] This is because the existence of an alibi or the implication that an alibi might be present can be enough to prevent the prosecutor from meeting the standard of proof.

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[44] *Mucić* (n 17) para 581; *Musema v Prosecutor* (Judgement) ICTR-96-13-A, A Ch (16 November 2001) para 200; *Nahimana et al. v The Prosecutor* (Judgement) ICTR-99-52-A, A Ch (28 November 2007); *Kamuhanda v Prosecutor* (Judgement) ICTR-99-54A-A, A Ch (19 September 2005) para 38.

[45] *Prosecutor v Kayishema et al.* (Judgement) ICTR-95-1-T, T Ch II (21 May 1999) para 233; *Prosecutor v Kunarac et al.* (Judgement) IT-96-23-T, T Ch (22 February 2001) para 625; *Musema* Appeals Judgment (n 44) para 202; see also *Nahimana* (n 44) para107; ICTR RPE r 67(a).

[46] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 173.

[47] *Musema* Appeals Judgment (n 44) para 205; *Musema* Trial Judgment (n 34) para 108.

[48] *Musema* Appeals Judgment (n 44) para 202; *Kayishema* (n 45) para 234.

Rejection of an alibi, as with all defences, does not undermine the accused's presumption of innocence.[49] It merely means that the defence did not meet their burden to provide sufficient evidence of the alibi. This may seem like the presumption of innocence has been violated or overcome because by not believing the alibi the court is making a statement on the veracity of the defence's claims. However, even if the alibi fails, the prosecutor still must prove each element of the crime to the proper standard of proof including the element that the accused is the person responsible for the crime.[50] The alibi defence can only negate, or call into question, the prosecutor's proof against the defendant. The Court's rejection of the defence can never be construed as constituting evidence that can be used to convict the defendant. Thus, the fact-finder can reject the alibi but still find that the prosecutor has not proven it was the defendant who was responsible.

Ultimately, defences do not contribute to proving the guilt or innocence of the accused and therefore are not a reverse onus of proof on the accused mandating that the accused disprove their own guilt. They can be excuses for behaviour or they can cast doubt on the proof against them, but regardless of the affirmative defence, the offence must still be proven by the prosecution to the relevant standard of proof to obtain a conviction. The defences merely provide doubt as to whether that standard has been met or may mitigate the behaviour of the accused if the standard of proof is met. The presumption of innocence prevents a finding of guilt so long as the standard of proof has not been met, regardless of whether or not the court accepts an affirmative defence presented by the accused.

2. Judicial Notice

The compatibility of judicial notice with the presumption of innocence is a source of on-going debate in international criminal law. The international and internationalised criminal tribunals and courts allow for judicial notice.[51] As in domestic courts, international and internationalised criminal courts take judicial

[49] *Semanza v Prosecutor* (Judgement) ICTR-97-20-A, A Ch (20 May 2005) para 93; *Zigiranyirazo v Prosecutor* (Judgment) ICTR-01-73-A, A Ch (16 November 2009) paras 38-39.
[50] *Karemera et al. v Prosecutor* (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice) ICTR-98-44-AR73(C), A Ch (16 June 2006) para 49.
[51] ICC Statute art 69, ICTY RPE r 94; ICTR RPE r 94; STL RPE r 160; Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) r 94 (SCSL RPE).

notice of facts in an effort to save time and other resources.[52] Judicial notice is taken when a fact is common knowledge or cannot reasonably be disputed and has the effect of not requiring the noticed fact to be proved in the present trial.[53] This practice may violate the presumption of innocence because it reduces the prosecutor's burden to provide proof against the defendant and reduces the defendant's ability to question the veracity of the proof against them.

All international and internationalised criminal tribunals, except the International Criminal Court, allow for judicial notice to be taken of 'adjudicated facts', which are facts that were found in other proceedings.[54] This can cause issues for the defendant when judicial notice is taken of a fact from an earlier trial as he or she did not have the opportunity to challenge the fact when it was initially presented. This can be seen as reversing the burden of proof because the only way the defence can counter the presumed fact is by producing evidence.[55]

There seems to be a distinction between judicially noticed facts that lend themselves to showing that a crime occurred in a general sense and facts that show that the individual accused was responsible for that crime. This was an issue at the International Criminal Tribunal for Rwanda. Rule 94 of the Tribunal's Rules of Procedure and Evidence provide that judicial notice of facts that are in common knowledge can be taken by the Tribunal but not inferences that could stem from those facts.[56] Further, the Tribunal must ensure that taking judicial notice does not interfere with the accused person's right to fair trial or presumption of innocence.[57] During the

[52] McDermott (n 16) 44-46; Schabas and McDermott (n 16) 1646-1647; Schabas ICC Commentary (n 21) 1010.
[53] McDermott (n 16) 44-46; *Bemba* Trial Judgment (n 18) paras 219-220.
[54] McDermott (n 16) 44-46; see for example: *Prosecutor v Karadžič* (Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts) IT-95-5/18-PT, T Ch (5 June 2009); *Karemera* (n 50); *Prosecutor v Slobodan Milošević* (on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts) IT-02-54-AR73.5, A Ch (28 October 2003).
[55] At the ICTY an adjudicated fact becomes a 'rebuttable presumption', which can be questioned and tested by the defence; *Milošević* (n 54) and *Prosecutor v Slobodan Milošević* (Dissenting Opinion of Judge David Hunt to the Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts) IT-02-54-AR73.5, A Ch (28 October 2003); McDermott (n 16) 44-46; But see *Prosecutor v Norman et al.* (Fofana - Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts) SCSL-04-14-AR73, A Ch (16 May 2005) para 32 where it was held that judicially noticed facts cannot be challenged at the Special Court for Sierra Leone.
[56] ICTY RPE r 94; *Norman* (n 55) paras 42, 54; *Semanza* (n 49) para 92.
[57] *Karemera* (n 50) para 47.

Karamera, et al. case, the Tribunal took judicial notice of the fact that there were widespread or systematic attacks on civilians who were perceived to be Tutsi and that those attacks resulted in a large number of Tutsi deaths.[58] Further, the Tribunal took judicial notice that genocide was committed against the Tutsi ethnic group in Rwanda between 6 April 1994 and 17 July 1994.[59] In the Prosecutor's Interlocutory Motion, the Tribunal held that facts taken in judicial notice necessarily bear on the guilt or innocence of the accused or they would not be relevant to the trial.[60] The Court argued that this is in accordance with the presumption of innocence because it does not shift the burden of persuasion but merely relieves some of the burden of production.[61] The prosecutor is still required to prove the defendant's guilt beyond a reasonable doubt before a conviction can be secured. The Appeals Chamber however, could take judicial notice of facts that tend to prove guilt of the accused in the accused's case. In that situation, the Tribunal must use caution when taking notice because it shifts the burden of production with regard to rebuttal evidence to the accused. It must be ensured that this shift is consistent with the rest of the accused's rights within the particular circumstances of the specific case.[62]

Further, the Court limited the areas in which judicial notice could be taken, excluding any facts that bear upon the 'acts, conduct, and mental state of the accused' or facts relating directly or indirectly to the accused's guilt.[63] The court excluded those facts for two reasons. The first is that it strikes the proper balance between the accused's rights and the Tribunal's interest in expediting the proceedings of the cases before it.[64] The second is that facts proven about an individual in a case other than their own raises a concern about the reliability of those facts as the concerned individual could not contest those facts at the time, as they were not on trial.[65] Thus, judicial notice appears to be allowed for facts that tend to show that a crime occurred without attributing responsibility to a specific person therefore that a genocide or widespread killings occurred can be, and were, included in judicial notice. However,

[58] Ibid at paras 26-32; *Semanza* (n 49) para 20.
[59] *Karemera* (n 50) paras 33-38; *Semanza* (n 49) para 20; Schabas and McDermott (n 16) 1646-1647.
[60] *Karemera* (n 50) para 48.
[61] Ibid at para 49.
[62] Ibid at para 52.
[63] Ibid at paras 50, 53.
[64] Ibid at paras 51-52.
[65] Ibid.

facts tending to show that a specific individual was responsible for or participated in such crimes should not be part of judicial notice as those facts go to the specific guilt or innocence of the accused.

This method of taking judicial notice acknowledges that something happened to the victims without stating who was responsible for that event. While it does reduce the prosecution's burden of proving that a crime occurred, it does not implicate the defendant in any way. It is possible to recognize that victims of a particular crime exist without implicating the guilt of the individual.[66] This is only acceptable when dealing with mass crimes because these crimes can involve multiple prosecutions for the same incident and thus, it has already been proven in previous cases that something happened to many people. In the instance of mass crimes the situation is far more general as the victims are treated as a group. For crimes committed against specific individuals, judicial notice that a crime occurred would not be acceptable. First, the existence of a crime has not been proven in other cases. It is essential in the Rwandan Tribunal that the facts that were judicially noticed were proven in previous cases.[67] Further, in the context of non-mass crimes, even if an accused is alleged to have committed a crime against several people each of which is addressed in separate trials, evidence of the existence of a crime in the first trial cannot be taken as judicial notice in the last trial because in this instance there are specified individual victims. Just because one person suffered an injury that was the result of a crime, does not mean that others did. Finally, mass crimes are often witnessed through the media and other groups in an international forum. Because of this observation, whether something occurred is not really a question, rather, the first question is whether what has occurred is a crime. Once it is determined that a crime was committed based on the victims' experience of what happened, the only question that remains is whether the individual before the court bore criminal responsibility for these crimes.

The International Criminal Tribunal for the former Yugoslavia also allowed judicial notice of facts that had been previously proven before the Tribunal. There the judicially noticed facts were not as sweeping as those allowed by the Rwandan Tribunal and allowed for a greater safeguard of the rights of the accused. At the

[66] *Situation in the Central African Republic* (Decision on the "Notification by the Board of Directors in accordance with Regulation 50(a) of the regulations of the Trust Fund for Victims to undertake activities in the Central African Republic") ICC-01/05, PT Ch II (23 October 2012) para 10.
[67] *Karemera* (n 50).

Yugoslavia Tribunal, the judges held that judicial notice creates a presumption that the noticed fact is accurate and does not have to be re-proven at trial.[68] So long as it is rebuttable, the Court held that it does not contravene the accused's rights.[69] Notably Judge Hunt disagreed, and said that judicial notice is a rebuttable presumption in favour of the prosecutor, which necessarily places a burden of proof on the accused.[70] However, the overall use of judicial notice at the Tribunal reflected the idea that judicial notice created a rebuttable presumption that would not violate the presumption of innocence because, while it made the burden of proof easier, it did not remove the burden of proof.[71]

Interestingly, the Special Court for Sierra Leone also allowed for judicial notice of facts established at one trial to be conclusively proven at another trial. Significantly, the rebuttal protections to the future defendants, which were allowed at the Yugoslavia Tribunal, were not permitted at the Special Court for Sierra Leone. At the Special Court, once judicial notice was taken it was considered conclusive and could no longer be subject to question by the parties or future parties.[72] This approach seems to provide greater potential to violate the rights of the accused, as he or she is not able to even question the credibility of the fact established in the previous trials. While saving the court time, it appears to impermissibly reduce the prosecutor's burden of proof, as all ability of cross-examination or argument against the judicially noticed fact is removed.

While judicial notice is permitted at the International Criminal Court it has a far more limited application than the other international and internationalised tribunals and courts. Under the Rome Statute, the only time judicial notice may be taken is when a fact is of common knowledge.[73] As a result, judicial notice of facts that occurred in previous cases, as was seen in the Rwandan and Yugoslavian

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[68] *Milošević* (n 54); *Prosecutor v Krajisnik et al.* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*) IT-00-39&40, T Ch I (28 February 2003) para 15.
[69] *Milošević* (n 54); *Krajisnik* (n 68) para 15; Schabas and McDermott (n 16) 1646-1647.
[70] *Milošević* Dissenting Opinion of Judge David Hunt (n 55).
[71] See eg: *Prosecutor v Slobodan Milošević* IT-02-54-AR73.5 (Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber's Decision dated 28 October 2003 on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts) IT-02-54-AR73.5, A Ch (31 October 2003); *Milošević* (n 54); *Krajisnik* (n 68) para 15; Schabas and McDermott (n 16) 1646-1647.
[72] *Norman* (n 55) para 32.
[73] ICC Statute art 69(6); Schabas ICC Commentary (n 21) 1010.

Tribunals, is not permitted. This is partly because the International Criminal Court handles situations from many different countries. The facts proven in one case necessarily cannot be subject to judicial notice in another case because each situation dealt with by the International Criminal Court is distinct. This practice is further supported by the Prosecutor's policy of focusing on only a few actors alleged to be responsible for the actions, rather than having the aim of prosecuting most of the responsible actors.[74] Judicial notice across cases in the same situation would hardly be worthwhile because often the defendants are few and are tried in the same case. If there are separate trials from individuals in the same situation, taking judicial notice could save the Court time, but it would need to be balanced against the fair trial rights of the accused.

Judicial notice reduces the prosecutor's burden of proof and limits the defence's ability to test the credibility and veracity of the judicially noticed fact. This has implications on the presumption of innocence, but the two ideas are compatible so long as the accused can challenge judicially noticed facts in his or her own trial, particularly when the judicial notice is the results of facts proven in a prior case. With the exception of the Special Court for Sierra Leone, that is the general approach of the other international criminal courts and tribunals. However, to guarantee that the fair trial rights of the accused are given maximum protection, judicial notice should be limited to the approach pursued by the International Criminal Court. Judicial notice is not without its utility. Recognizing that a crime was committed, without identifying a particular perpetrator, can provide acknowledgment that people have suffered without determining who was responsible for that suffering. This can help the victims find justice while protecting the accused's right to be presumed innocent.

[74] Office of the Prosecutor, International Criminal Court, 'Paper on some policy issues before the Office of the Prosecutor' (September 2003) 3 <www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f.../030905_policy_
paper.pdf> accessed 17 April 2018; Office of the Prosecutor, International Criminal Court, 'Statement of ICC Prosecutor, Fatou Bensouda, regarding her decision to request judicial authorization to commence an investigation into the Situation in the Islamic Republic of Afghanistan' (3 November 2017) <www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement> accessed on 17 April 2018 (stating that focusing on the most responsible actors is the 'Office's policy and practice'.

3. The Right to Silence and Adverse Inferences

The presumption of innocence as a legal presumption is directly linked to the right to silence and the right not to incriminate oneself. Some commentators believe that the latter two rights are derived from the presumption of innocence.[75] This is because they help ensure that the defendant is not bearing the burden of proof through coercion or a requirement that the accused present evidence against him or herself.[76] It is for this reason that although the right to silence and the right to not incriminate oneself are separate rights, they are interrelated and for the purposes of the presumption of innocence are discussed together.

The link between the right to silence or the right not to incriminate oneself and the presumption of innocence means that the protections of the presumption of innocence are at least somewhat present in pre-trial proceedings.[77] This is clearly the case before the international and internationalised criminal courts and tribunals although it is less evident in international human rights law, which limits the applicability of the right only to a person that has been 'charged' with a crime.[78] It seems that the presumption of innocence, at least with regard to its relationship to the right to silence and the right not to self-incriminate, extends to the time period before

[75] For the articles related to the right to silence and not to incriminate oneself see ICTY Statute art 21(4)(g); ICTR Statute art 20(4)(g); ICC Statute art 67(1)(g); *Heaney and McGuinness v Ireland* ECHR 2000-XII 419, para 40; *Saunders v United Kingdom* ECHR 1996-IV; Geert-Jan Alexander Knoops, *Theory and Practice of International and Internationalised Criminal Proceedings* (Kluwer Law International 2005) 28-29; Paul Mahoney, 'Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.' (2004) 4(2) JSIJ 107, 121-2; McDermott (n 16) 46-47; Bernadette Rainey, Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey, *White and Ovey the European Convention on Human Rights* (6th ed, OUP 2014) 282; Harris et al. (n 19) 461-2.

[76] *Allan v. the United Kingdom* ECHR 2002-IX 41, paras 50-51; *Saunders* (n 75); See discussion in Karel de Meester, Kelly Pitcher, Rod Rastan, Göran Sluiter, 'Investigation, Coercive Measures, Arrest, and Surrender', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 246; Rainey et al. (n 75) 283; Harris et al. (n 19) 422.

[77] Geert Knigge, 'On Presuming Innocence: Is Duff's Civic Trust Principle in Line with Current Law, particularly the European Convention on Human Rights' (2013) 42(3) NJLP 225, 226-227; Schabas ICC Commentary (n 21) 1006; De Meester et al. (n 76) 246; Zappalà (n 18) 90; ICC Statute art 55(2)(b); *Prosecutor v Lubanga* (Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses) ICC-01/04-01/06, T Ch I (20 January 2010) para 68, citing *Funke v France* (1993) Series A no 256-A.

[78] *Saunders* (n 75) paras 67-75; Pieter van Dijk and Marc Viering (revisors), 'Chapter 10 Right to a Fair and Public Hearing' in Pieter Van Dijk, Fried van Hoof, Arjen Van Rijn, Leo Zwaak (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006) 593-4; De Meester et al. (n 76) 246.

charges are filed. That is because suspects may be questioned before being charged and must have these basic protections even in the absence of formal charges.[79] In Europe, this may not be an issue because of the specific but expansive definition of 'charge' used by the European Court of Human Rights.[80]

The scope of the right to silence and the right to not incriminate oneself depends on the jurisdiction. The statutes of the International Criminal Court and Special Tribunal for Lebanon both mandate that whether the accused exercised his or her right to silence cannot be used when determining the accused's guilt or innocence.[81] The International Criminal Tribunal for Rwanda found that adverse inferences could not be taken against the accused if they exercise their right to silence.[82] One reason that these courts do not allow adverse inferences to be taken when an accused exercises his or her right to silence is because the statutes of the international criminal courts and tribunals are specialized and must address the rights of the accused in some detail, whereas the human rights conventions are concerned with human rights generally. Further, the human rights instruments tend to include the rights to silence or the protections against self-incrimination as a part of either the presumption of innocence or the rights of the accused generally.[83]

While most criminal law statutes and conventions contain both the presumption of innocence and the right to silence as separate rights, the European Convention on Human Rights does not include a right to silence. Rather, this right has been read into Article 6 through the presumption of innocence.[84] The reason that this is part of the presumption of innocence is that requiring the accused to testify reverses

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[79] De Meester et al. (n 76) 246; *Saunders* (n 75) paras 67-75.

[80] See Chapter 2 for a discussion of the autonomous meaning of 'charged' within the European Court of Human Rights. For a general discussion of the autonomous meaning of 'charged' within the European Court of Human Rights see: Schabas ECHR Commentary (n 17); van Dijk and Viering (n 78).

[81] ICC Statute art 55(2)(b) and art 67(1)(g); STL statute art 15(b).

[82] ICC Statute art 67(1)(g); STL Statute art 15(b); *Prosecutor v Niyitegeka* (Judgment and Sentence) ICTR-96-14-T, T Ch I (16 May 2003) para 46; McDermott (n 16) 46-47.

[83] ICCPR art 14(3)(g); ACHR art 2(g); *Funke* (n 77) para 44; Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5 (2016 EU Directive) paras 24-25 (recognizing that the right to silence is a part of the presumption of innocence); The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003) art N(6)(d).

[84] *Funke* (n 77); *Saunders* (n 75) para 69; *Heaney and McGuinness* (75) para 40; Schabas ECHR Commentary (n 17) 301, 319; van Dijk and Viering (n 78) 626; De Meester et al. (n 76) 245-246.

the burden of proof because the accused necessarily possesses information that is not available elsewhere.[85] The current law, stemming from the case law of the European Court of Human Rights, allows for some restriction of the right to silence through the limited use of adverse inferences.[86] Unlike the presumption of innocence, the right to silence provided through the European Court and Convention on Human Rights is not absolute. Rather, the European Court of Human Rights protects from 'improper compulsion' to give a statement or incriminate oneself.[87]

The case law of the European Court of Human Rights addressed the question of whether an accused's guilt can be derived from their silence. Before a court can use the accused's silence to create an inference against them regarding their guilt, the prosecution must still present a *prima facie* case against the accused.[88] Once a *prima facie* case has been presented, an inference of guilt may only be drawn from an accused's silence if the evidence against the accused is so strong that the inference taken is no more than the next step or 'common sense' inference arising from the facts.[89] A conviction involving such an inference cannot be based 'wholly or mainly' on the suspect's silence, but an adverse inference may be drawn against the accused if it makes sense depending on the circumstances of the particular case.[90] In *Murray v The United Kingdom* this was held not to have 'the effect of shifting the burden of proof from the prosecution to the defence so as to infringe on the principle of the presumption of innocence.'[91] However, it should be noted that the decisions allowing adverse inferences are based on Article 6(1) rather than the presumption of innocence in Article 6(2) of the European Convention on Human Rights.

The European Court of Human Rights has introduced other safeguards to protect the accused from adverse inferences resulting from their silence largely based on whether the accused was appropriately warned before he or she chose to remain silent. These safeguards include: an accused must be given a warning about how remaining silent may affect their case;[92] only a judge can determine whether an

[85] Schabas ECHR Commentary (n 17) 300.
[86] *Averill v. the United Kingdom*, 2000-VI 203, para 47; Mahoney (n 75) 122.
[87] *John Murray v United Kingdom* ECHR 1996-I, para 46 GC; Harris et al. (n 19) 423.
[88] *Telfner v Austria* App No 33501/96 (ECtHR, 20 March 2001); Rainey et al. (n 75) 461-2.
[89] *Telfner* (n 88) paras 15-20; *Condron v United Kingdom* ECHR 2000-V 1; *John Murray* (n 87); Rainey et al. (n 75) 284-6; van Dijk and Viering (n 78) 594.
[90] *John Murray* (n 87) para 47; *Condron* (n 89) para 58.
[91] *John Murray* (n 87).
[92] *Condron* (n 89) para 59.

adverse inference is appropriate;[93] and judges must explain the inferences taken and the reasons behind them.[94] Further, an important factor in deciding if an adverse inference is appropriate is whether the suspect had access to a lawyer and what legal advice was given.[95] That is, if the suspect's lawyer counselled their client to remain silent for a legitimate reason, an adverse inference should not be taken against the suspect.[96] Further, courts must use 'particular caution' before applying an adverse inference to a suspect's case based on the accused's silence.[97] These safeguards focus on whether the accused was warned that his or her silence could result in an adverse inference rather than preventing the adverse inference from occurring in the first place.

It is evident from the case law of the European Court of Human Rights that the ability to draw adverse inferences from silence shifts the burden of proof to the accused. The prosecutor is only required to present a *prima facie* case against the accused before an adverse inference can be taken. However, a *prima facie* case alone is not sufficient to support a guilty verdict. Therefore, the adverse inference may fill the gap between the case presented by the prosecutor at the *prima facie* standard and higher standard of proof required for a conviction. In essence, this means that the inaction of the accused directly leads to a guilty verdict. This disrupts the normal practice at trial where only the prosecution is required to act and the accused can be found not guilty even when he or she declines to participate in trial. When an adverse inference is drawn the accused is being punished for his or her non-participation suggesting a shift in the burden of proof.

The international and internationalised criminal courts and tribunals provide for more specific protections than the human rights courts with regard to adverse inferences.[98] Generally speaking the fact-finder can draw inferences from the

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[93] Therefore the inferences would only be common sense tipping points against the defendant rather than prima facie evidence. See *Telfner* (n 88).

[94] For these rules listed in more detail see Keir Starmer, 'The Human Rights Act 1998: Overview' in Keir Starmer, Michelle Strange, Quincy Whitaker (eds), *Criminal Justice, Police Powers and Human Rights*, (Blackstone Press 2001) 219.

[95] *John Murray* (n 87) places emphasis on the importance of legal advice while *Condron* (n 89) states that the content of said legal advice may be relevant. See also *Averill* (n 86); Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (Sweet and Maxwell 2012) 629.

[96] *Averill* (n 86); Ben Emmerson, Andrew Ashworth and Alison Macdonald (eds), *Human Rights and Criminal Justice* (Sweet and Maxwell 2012) 629 citing *Condron* (n 89).

[97] *Condron* (n 89) para 60.

[98] De Meester et al. (n 76) 246.

available evidence. However, this capacity is limited to the extent that an inference can only be drawn from circumstantial evidence if it is the only reasonable inference that can be taken.[99] This limitation is meant to allow convictions based on circumstantial evidence, but only when the evidence tends to prove the crimes alleged. However, this does not relieve the prosecutor of its burden or infringe on the presumption of innocence.[100] The prosecutor must still prove each element of the offence to the required standard. If that is through circumstantial evidence, the evidence must demonstrate that the inference that tends to show that the standard of proof has been met must be the only reasonable inference taken. Otherwise, if there is an equally or more plausible inference that could result from the evidence, the doubt must go to the accused.

Further, at some international courts the accused may have the right to make an unsworn statement. This right was introduced at the International Criminal Tribunal for the former Yugoslavia and is also a minimum guarantee in the International Criminal Court's Statute.[101] Interestingly, if an accused exercises this right he or she cannot be subject to cross-examination, as that would violate the presumption of innocence.[102]

The international and internationalised tribunals seem to ensure a strong presumption of innocence with respect to the right to silence. At these courts the accused's silence cannot be held against them, and they cannot be forced to give a statement. The relationship between the presumption of innocence and the right to silence is more complicated in the jurisprudence of the European Court of Human Rights. While the Court acknowledges that the accused has a right to silence that is derived from the presumption of innocence, domestic courts may take adverse inferences against the accused should he or she fail to give a statement or testify. The practice of taking adverse inferences appears to shift some of the burden of proof to the accused. The Court provides a number of safeguards to prevent inappropriate

[99] *Muhimana v Prosecutor* (Judgement) ICTR-95-1B-A, A Ch (21 May 2007) para 49; *Gacumbitsi v Prosecutor* (Judgement) ICTR-2001-64-A, A Ch (7 July 2006) para 72; *Ndindilyimana* (n 18) para 108; *Bemba* Trial Judgment (n 18) para 215.
[100] *Ndindilyimana* (n 18) para 108.
[101] ICTY RPE r 84 *bis*; ICC Statute art 67(1)(h); William A Schabas, 'Article 67', in Otto Triffterer (ed), *Commentary on the Rome Statute: Observers' Notes, Article-by-Article* (2nd edn, Beck 2008) 1247, 1257; McDermott (n 16) 48.
[102] *Prosecutor v Bemba* (Decision on Unsworn Statement by the Accused Pursuant to Article 67(1)(h) of the Rome Statute) ICC-01/05-01/08, T Ch III (1 November 2013) para 8.

adverse inferences from being taken but the majority of these safeguards take the form of warning the accused, which does not prevent an adverse inference from being taken. Whether the European Court of Human Rights upholds the presumption of innocence through its case law regarding the right to silence is debatable. The European Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings addresses this issue, stating that '[t]he exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned.'[103] However, this directive has yet to take effect and it remains to be seen how or whether the affected countries, which is limited to members of the European Union, will comply.

C. The Presumption of Innocence is Rebuttable - The relationship between the presumption of innocence and the standard of proof

The presumption of innocence, as a legal presumption, contributes to the requirement that proof must be introduced in criminal cases in order to secure a conviction. Unless enough evidence is provided against the accused, the accused must be acquitted because they are legally innocent.[104] The standard of proof is the amount of evidence required to overcome, or rebut, the presumption. While the rules for what constitutes sufficient or adequate proof varies between jurisdictions, the presumption of innocence mandates that some proof must be introduced before an accused can be convicted. The only way that the procedural aspect of the presumption of innocence can be overcome is if there is sufficient evidence to meet the standard of proof set by the relevant jurisdiction.[105] This means that without proof the presumption of innocence cannot be overcome and therefore individuals cannot be found guilty.

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[103] 2016 EU Directive (n 83) para 28.
[104] Ho (n 1) 267-8; McDermott (n 16) 44; International Law Commission, *Yearbook of the International Law Commission 1993*, vol II, part 2 (1994) UN Doc No A/CN.4/SER.A/1994/Add.1 (Part 2) 119; *Mucić* Trial Judgment (n 17) para 600.
[105] *Ntawukulilyayo v Prosecutor* (Judgement) ICTR-05-82-A, A Ch (14 December 2011) para 103; *Prosecutor v Ntagerura et al.* (Judgement) ICTR-99-46-A, A Ch (7 July 2006) para 175; *Prosecutor v Martić* (Judgement) IT-95-11-A, A Ch (8 October 2008) para 55; *Prosecutor v Halilović* (Judgement) IT-01-48-A, A Ch (16 October 2007) para 109; *Prosecutor v Dragomir Milošević* (Judgement) IT-98-29/1-A, A Ch (12 November 2009) paras 20, 231; *Ndindilyimana et al. v Prosecutor* (Judgement) ICTR-00-56-A, A Ch (11 February 2014) para 400; Ho (n 1) 269.

In order to secure a conviction, the evidence required for conviction must be proven to a particular standard. Lower standards of proof require less evidence to meet the required standard, whereas higher standards require more evidence. The standard of proof is the amount of proof required for the presumption of innocence to be overcome. The standard of proof does not need to be met for each piece of evidence, but for each element of the crime when the evidence is examined as a whole.[106] Thus, the standard of proof determines how easy or difficult it is to overcome the presumption of innocence and gain a conviction.

Modern standards of proof for criminal convictions are quite high. It is generally thought that the beyond a reasonable doubt standard, found in international criminal law and the common law, and the civil law's *intime conviction du juge*, require near certainty that the accused is guilty of the charges alleged.[107] A high standard of proof is designed to work with the presumption of innocence to prevent innocent people from being punished.[108] This is because the presumption of innocence acts as the starting point for the fact-finder's opinion of the accused's guilt as discussed below and a high standard of proof ensures that the presumption cannot be overturned without fairly conclusive evidence against the accused.

However, the presumption of innocence itself does not obligate a court or legal system to employ a high standard of proof. It merely requires that a standard exists and that fact-finders do not enter a finding of guilt unless that particular standard is met. There is quite a lot of controversy over what these standards require. Even different chambers of the same tribunal have debated about what exactly beyond reasonable doubt means.[109] These debates over what a particular standard of proof

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[106] Jackson and Summers (n 16) 202; *Bemba* Trial Judgment (n 18) para 215.

[107] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J Evid & Proof 241, 250-1; Jacobs (n 18) 1145-6; Schabas ECHR Commentary (n 17) 300. SCSL RPE Rule 87 (A). ; Jackson and Summers (n 16) 201; *Bemba* Trial Judgment (n 18) para 216; *Rutaganda v Prosecutor* (Judgement) ICTR-96-3-A, A Ch (26 May 2003) para 488; *Lubanga* Trial Judgment (n 18) para 111; *Prosecutor v Katanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07, T Ch II (7 March 2014) para 109; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1994) 254.

[108] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 123(1) South African L J 63, 72; Jackson and Summers (n 16) 203.

[109] Jacobs (n 18) 1140-1; *Prosecutor v Martić* (Judgement) IT-95-11-T, T Ch I (12 June 2007) n 19; *Mucić* Trial Judgment (n 17) para 600 *quoting Green v R* (1972) 46 ALJR 545; Rosalynd C E Roberts 'The *Lubanga* Trial Chamber's Assessment of Evidence in Light of the Accused's Right to the Presumption of Innocence' (2012) 10(4) JICJ 923. The ICC also seems to have a disagreement on this point see *Prosecutor v al Bashir* (Judgment on the

requires should only be a problem for the presumption of innocence in cases where it is a close call as to whether the standard of proof has been met. In theory, as soon as the standard of proof has been reached the presumption of innocence is overcome and a conviction may be entered against the accused. If however, the fact-finder thinks that the standard of proof has just barely been met, but that it depends on what precise definition of the standard of proof is applied, then the fact-finder should rule in favour of the accused, following the *in dubio pro reo* principle discussed below.

Somewhat incongruously, the presumption of innocence does not require a finding of innocence when an accusation is not proven to the relevant standard of proof, rather it merely prevents conviction.[110] This is the result of the different definitions of innocence. The presumption of innocence, as a legal presumption, is only concerned with legal innocence and not factual or moral innocence. Legal innocence exists when the prosecution fails to prove the elements of the crime alleged against the accused, regardless of whether the defendant actually committed the crimes with which he or she is charged. Ideally this would be the same as the accused's factual innocence vis-à-vis the accusation, but it is beyond the fact-finder's role or ability to ensure that this is so. When the court determines that there is not enough proof for conviction they are determining that the accused is legally innocent of the charges, which is expressed as 'not guilty'. However, the court is unwilling (and unable) to go beyond that determination to state that the accused is morally or factually innocent.

If the standard of proof is not met then the presumption of innocence, as a legal presumption, is not overcome. This results in the presumption of innocence remains intact and it creates two related results: 1) a conviction cannot be entered against the accused; and 2) the accused cannot be punished for the alleged criminal activity. If this finding is the result of a final determination, then the accused is acquitted. If an accusation or investigation is discontinued, the presumption of innocence remains in place as to those charges and the accused continues to benefit from it until such time as the allegations are tried to a final determination.

If the standard of proof is met at trial then the accused is convicted of the

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appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir") ICC-02/05-01/09, A Ch (3 February 2010) para 33; *Lubanga* Trial Judgment (n 18) para 92, 111; See discussion in Ulväng (n 1) 208; Laudan Material or Probatory (n 6) 352-3.

[110] *Ntakirutimana* (n 18) para 140.

charges. They can be referred to as guilty of those specific charges and can be punished. The presumption of innocence, with respect to the particular charges for which the individual is being punished would not extend to the sentencing phase because at that point, the accused has already been convicted.[111] It is important to note however, that the presumption of innocence does not end with respect to any other crimes alleged against the accused. As a presumption, the presumption of innocence is specific to the particular criminal accusation against the accused, thus, for future accusations the individual retains their right to the presumption of innocence for the new trial.

1. The presumption of innocence is an instruction to the fact-finder

Fact-finders must respect the presumption of innocence. Their duty with regard to the presumption of innocence is elevated beyond their status as public officials, and requires an extra duty that specifically arises during the criminal trial.[112] That is: they must find the accused innocent until proven guilty to the required standard of proof.[113] This is a direction to the fact-finder as to the decision they must make regarding the guilt of the accused unless there is sufficient proof to overturn the presumption.

As an instruction for the fact-finder, the presumption of innocence helps provide certainty, consistency, and fairness in criminal trial by providing the fact-finder with a starting point at the beginning of trial before evidence is submitted. Often, it is said that the fact-finder should have an 'open mind' when making decisions about the accused's guilt.[114] It has been argued that this means the fact-finder must approach each case with a completely open mind as to the guilt or innocence of the accused.[115] This may be true when they are evaluating the evidence

[111] Schabas and McDermott (n 16) 1639-40.
[112] Who has the duty to uphold the presumption of innocence is discussed in Chapter 6.
[113] UDHR art 11(1); ECHR art 6(2); ACHR art 8(2); African Charter art 7(1)(b); ICC Statute art 66; ICTY Statute art 21(3); ICTR Statute art 20(3); STL Statute art 16(3)(a); SCSL Statute art 17(3).
[114] 'Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984) U.N. Doc. HRI/GEN/1/Rev.1 (1984) para 7; William A Schabas, *The UN International Criminal Tribunals* (CUP 2006) 518-19; Laudan Material or Probatory (n 6) 350-1.
[115] Laudan Truth Error and Criminal Law (n 22) 96-106; Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros (eds), *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart 2007).

and determining whether the standard of proof has been met, however, at the beginning of a case nothing could be farther from the truth. The presumption of innocence means that a fact-finder 'should not start with the preconceived notion that the accused has committed the offence charged'.[116] This however requires more than merely a neutral fact-finder because of the presumption of innocence's function as a presumption. At the beginning of a trial, the presumption aspect of the presumption of innocence requires the fact-finder's decision to already be settled with regard to the question of the accused's legal guilt. All the fact-finder knows about the accused is the accusation and thus, there has been no proof or evidence submitted, the standard of proof is not met, and therefore the presumption has not been overcome. The requirements inherent in the presumption, including the need for sufficient proof meeting a certain evidentiary standard, create assurances that every fact-finder, at the beginning of the case, would find the accused innocent until such time that adequate evidence is introduced.

This assurance provides certainty that all fact-finders are starting at the same point – that the accused is legally innocent. A presumption of guilt would be as consistent as the presumption of innocence at the start of trial because all fact-finders would enter a trial with their mind made up that the accused is guilty. They would maintain this throughout trial unless something happened to change their mind (presumably proof of the accused's innocence, or the presence of some doubt about the accused's guilt is proved to a certain standard). A presumption of guilt has many of the same advantages as a presumption of innocence. It would provide a consistent starting point for the mind-set of the fact-finder at the outset of trial. It would also presumably provide instructions as to how that presumption could be overcome. Therefore, although the accused would be in a far more difficult position if he or she were presumed to be guilty, at least he or she would be aware of that standard and be able to prepare a defence designed to change the fact-finder's mind.

In the absence of a rule such as the presumption of innocence, or indeed, a presumption of guilt, there would be no instruction to the fact-finder as to where to start the case. Thus, it is more interesting to envision a neutral fact-finder starting trial with a completely open mind. This scenario would create inconsistency as to how fact-finders approached trials on two different levels: first different fact-finders would

[116] *Barberà et al.* (n 32) para 77; Mahoney (n 75) 120; Nowak (n 107) 254.

start with different opinions as to the accused's guilt, so each case would be highly dependent on the identity and mind-set of the fact-finder; and second, depending on the facts and the crimes alleged, there would likely be inconsistent starting points between different cases before the same fact-finder. There would be no way of knowing how the fact-finder would rule in any case at the accusation phase. Each case would be dependent on each fact-finder and their particular mood, emotions, and biases, and thus would contravene the rule of law. A fact-finder could start a trial thinking that the accused is guilty, innocent, maybe guilty, maybe innocent, or with no opinion whatsoever. The prosecution and the defence would have no way of knowing what the fact-finder was thinking at the start of trial and so would not be able to effectively provide enough proof to change their mind. This would likely result in more inconsistent and less accurate trial outcomes.

The open-mindedness of the fact-finder is relevant to the evaluation of the evidence and the question of whether the standard of proof has been met. Once evidence is presented, the presumption of innocence remains in place unless and until the fact-finder has determined that the standard of proof has been met. To do this this, the fact-finder must have an open mind about the evidence presented. To determine whether the standard of proof has been met the evidence must be evaluated for its strength and credibility. The fact-finder must determine that the evidence as a whole has satisfied each element of the alleged crime(s) to the appropriate standard of proof.

Thus, the presumption of innocence is not a restatement of the standard of proof. Even in a scenario where there is no presumption of innocence but there is a specific standard of proof, there would still be wide inconsistencies between fact-finders. If, in this scenario, the proof had to reach 'beyond a reasonable doubt' for a conviction, a fact-finder who believes that the accused is innocent from the start would require far more proof than a fact-finder who thinks the accused might be guilty and even more than the fact-finder who thinks the accused is probably guilty. In each situation enough proof could be provided to reach the standard of proof, but the amount required by each would be wildly different because each judge would begin the case with his or her opinion of the accused's guilt at a different starting point. Instead, the presumption of innocence provides the starting point for the fact-finder's opinion of the accused's guilt. This helps provide consistency and fairness in criminal proceedings.

2. in dubio pro reo

In dubio pro reo, a general principle of law, is part of the presumption of innocence as a legal presumption.[117] *In dubio pro reo* instructs the fact-finder about what to do when the evidence would point either way, toward or away from the accused's guilt. Further, it tells the fact-finder how to act in close cases or situations where the evidence is unclear.

In *dubio pro reo* means that any instances of doubt regarding the evidence should be construed in favour of the accused.[118] This is regardless of whether the doubt is to the ultimate finding or in the factual findings.[119] Despite its reference to doubt, *in dubio pro reo* does not require the 'beyond reasonable doubt' standard of proof.[120] Further, it does not require a decision to be absolutely certain. It merely requires that the decision of guilt be based solely on the trial's evidence and that if there is a doubt as to any finding, it be construed in the accused's favour.[121]

The *in dubio pro reo principle* is related to the presumption of innocence's purpose of not punishing innocent people.[122] To do this it works in conjunction with the standard of proof to ensure that the right person is convicted of a crime that was actually committed. It forces the fact-finder to ensure that the standard of proof is met for each element of the crime by instructing the fact-finder as to what to do in cases of doubt or uncertainty. This helps bolster the presumption of innocence by providing reassurance that a legally guilty person is being punished because it forces the standard of proof to be entirely met rather than almost met. If this is combined with a high standard of proof, then conviction should only occur in cases of near certain legal guilt.

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[117] Aguilar-García (n 16) 3-4; Jacobs (n 18) 1144; Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993) 222; Nowak (n 107) 254; Judgment of 6 December 1988 *Barberà et al.* (n 32) paras 67-68; Schabas ECHR Commentary (n 17) 300; see also *Austria v Italy* (1961) 7 CD 23, para 179.

[118] *Prosecutor v Limaj et al* (Judgement) IT-03-66-A, A Ch (27 September 2007) para 21; *Barberà et al.* (n 32) para 77; van Dijk and Viering (n 78) 626-627; McDermott (n 16) 44.

[119] McDermott (n 16) 44; Jacobs (n 18) 1140; *Limaj* (n 118) para 21; For example see *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T, T Ch (2 September 1998) para 319; *Renzaho v Prosecutor* (Judgement) ICTR-97-31-A, A Ch (1 April 2011); *Prosecutor v Dusko Tadić* (Decision on Appellants Motion for the Extension of the Time Limit and Admission of Additional Evidence) IT-94-1-A, A Ch (15 October 1998) para 73.

[120] Jackson and Summers (n 16) 201; Christine van den Wyngaert, Christine (ed) *Criminal Procedure Systems in the European Community* (Butterworths 1992) 22, 129 and 173-4.

[121] Van Dijk and Viering (n 78) 626-7.

[122] Aguilar-García (n 16) 4.

I*n dubio pro reo* particularly comes up in cases where the evidence is circumstantial. Circumstantial, rather than direct evidence, tends to work together as pieces of a puzzle to prove guilt and may require some inference on the part of the fact-finder to link the pieces together. Direct evidence, on the other hand, shows that a crime was committed or that the accused committed that crime without requiring an inference.[123] As held at the International Criminal Tribunal for the former Yugoslavia, to find guilt from circumstantial evidence, it must be the 'only reasonable conclusion available. If there is another reasonable conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.'[124]

In jurisdictions where there is a judicial panel or jury that does not require a unanimous verdict for conviction the *in dubio pro reo* principle can have interesting consequences. International jurisdictions, and some national jurisdictions, do not require a unanimous verdict for a conviction.[125] It is unclear whether a less than unanimous verdict for guilt could mean that the standard of proof has been met. If there are one or more fact-finders who do not think it has been met, it seems that that doubt should be construed in the accused's favour.

In dubio pro reo may also extend the presumption of innocence, as it relates to the fact-finder, to pre-trial decisions. Courts and commentators however, are torn on this issue. Pre-Trial Chamber II of the International Criminal Court held that *in dubio pro reo* can apply to all stages of court proceedings.[126] Conversely, Pre-Trial Chamber I found that a denial of the confirmation of charges is not based on *in dubio pro reo* but rather on a failure to meet the evidentiary threshold set out in Article 61(7) of the Statute.[127] Any presumption of innocence at an earlier stage of the proceedings, including a recognition of *in dubio pro reo*, makes logical sense because

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[123] See discussion in Eyal Zamir, Elisha Harlev, Ilana Ritov 'New Evidence about Circumstantial Evidence' (2016-17) 41 L & Psych Rev 107, 109.
[124] *Prosecutor v Mpambara* (Judgement) ICTR-01-65-T, T Ch I (11 September 2006); see also *Mucić* Appeals Judgment (n 38) para 458; *Prosecutor v Stakić* (Judgement) IT-97-24-A, A Ch (22 March 2006) para 219.
[125] ICC Statute art 74(c); ICTY RPE r 98*ter*(c); ICTR RPE r 87(a); STL Statute art 23; SCSL Statute art 18; Ferguson (n 39) 157-8; G Maher, 'Jury Verdicts and the Presumption of Innocence' (1982) 3 *Legal Studies* 146.
[126] *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, PT Ch II (15 June 2009) para 31; Jacobs (n 18) 1137; Schabas ICC Commentary (n 17) 1006.
[127] Art 61(7) Rome Statute; *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09, PT Ch I (8 February 2010) para 43; Jacobs (n 18) 1137.

to not allow for the presumption of innocence would be a contradiction. It would be awkward and strange for a fact-finder to not uphold the presumption of innocence prior to trial and suddenly switch to upholding it during trial.[128] However, this may signal a difference between the procedural and non-procedural aspects of the presumption of innocence. Technically a presumption only needs to be upheld during trial, while the non-procedural aspect applies in other contexts. Further, not having the presumption exist during the pre-trial proceedings could be remedied by having different fact-finders at pre-trial and trial proceedings, such as between the different chambers in international criminal law, domestic cases where the jury is the trial fact-finder, and civil law cases where there is a different judge for the trial stage. Regardless, any presumption of innocence recognized by a pre-trial fact-finder would work with a lesser standard of proof than at trial because pre-trial matters do not directly decide the guilt or innocence of the accused.[129] Therefore, a finding against the accused in pre-trial matters would not overcome the presumption of innocence at trial by being used against a lesser standard of proof pre-trial.

3. strict liability

There is some question as to whether strict liability offences may be compatible with the presumption of innocence. Strict liability offences remove the need to prove the *mens rea* requirement of an offence.[130] Thus, for at least some of the elements of an offence, there is no standard of proof. Rather than violating the presumption of innocence, strict liability is an example of how the presumption does not require a high standard of proof.[131]

Strict liability is often considered necessary in situations where the accused must have known that a particular fact in question existed, even if there is no proof of that knowledge.[132] It can be argued that this occurs in international criminal law with regard to command responsibility. This is because command responsibility has the

[128] Stefan Trechsel, 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006).
[129] Schabas ICC Commentary (n 21) 1006.
[130] For an in depth discussion of strict liability see Andrew Simester, *Appraising Strict Liability* (OUP 2005).
[131] Ashworth Int'l J Evid & Proof (n 107) 153-4.
[132] Andrew P Simester 'Is Strict Liability Always Wrong?' in Andrew Simester (ed) *Appraising Strict Liability* (OUP 2005); RA Duff, 'Strict Liability, Legal Presumptions and the Presumption of Innocence' in Andrew Simester *Appraising Strict Liability* (OUP 2005); Schabas ECHR Commentary (n 17) 300.

mens rea of 'known or should have known'.[133] The 'should have known' *mens rea* does not require proof of actual knowledge and could theoretically allow a military commander who genuinely did not know that his subordinates were engaging in criminal behaviour to be held responsible for those crimes. A similar argument could be made regarding the 'should have known' *mens rea* of Article 6(e) of the Statute of the International Criminal Court, which describes the crime of genocide by forcibly moving children of one group to another.[134] However, 'should have known' requires some proof as it implies at least some type of negligence on behalf of the accused.[135] Thus, strict liability is not formally a part of international criminal law.[136] It is however, relatively common in national jurisdictions.

Sexual offences involving children as victims may be the most common example of strict liability in domestic jurisdictions. Often prosecutors are not required to prove that the accused knew how old the child was at the time of the offence. Instead, merely proving the age of the child satisfies the element of the crime.[137] While there are ages of children where it is obvious to anyone that the person in question is a child, for example a six year old could not be mistaken for a sixteen year old, this is particularly difficult to reconcile with the presumption of innocence when the victim is near the age of consent. In an instance where the victim is close to the statutorily required age of consent, such as a year or a few months younger, then it would be not necessarily be apparent under the circumstances that the victim was underage. In this instance it would not necessarily follow that the accused possessed the requisite intent to have sexual relations with a child because it is not necessarily obvious under the particular circumstances that the victim was a child. Regardless, this type of strict liability has been held to be in accordance with the presumption of innocence and is widely used in national jurisdictions.[138]

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[133] ICC Statute art 28.
[134] ICC Statute art 6(e); International Criminal Court, 'Elements of Crimes' (2011) <www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B 45BF9DE73D56/0/ElementsOfCrimesEng.pdf> accessed 16 April 2018, art 6(e).
[135] Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 Cal L Rev 75, 125-130.
[136] Ibid.
[137] Schabas ECHR Commentary (n 17) 300.
[138] Ibid; *G v United Kingdom* App No 37334/08 (ECtHR, 9 March 1987).

That is not the only permissible type of strict liability crimes allowed. The European Court of Human Rights allows strict liability at the discretion of national jurisdictions. This was demonstrated in *Salabiaku v France* in which an applicant went through French customs enforcement with a package containing drugs, which he claimed to have thought was a package he was expected to retrieve, the contents of which were unknown to him.[139] The European Court upheld the French Customs Code provision providing that a person is criminally liable when he or she is in physical possession of an item that he introduced to France without a customs declaration. By doing so, the Court held that states parties could punish behaviour that was merely an objective fact, regardless of the criminal intent or negligence on the part of the actor so long as the law otherwise complies with the European Convention.[140] This was justified because the domestic courts had found an 'element of intent' because the accused had been advised by an airline official to not take possession of the package unless it belonged to him.[141] This element of intent was implied because the code provided that a defendant could be acquitted if they could prove *force majeure* or that they did not know that the items were in their possession.[142]

The European Court of Human Rights is uneasy with the relationship between strict liability and the presumption of innocence. The Court requires an 'element of intent' and a 'genuine power of assessment' of the guilt of the accused when alleging strict liability crimes, however what those constitute in practice is unclear.[143] For example, in *Lingens and Leitgeb v Austria*, the Court held that although there was no need to prove intent in a defamation case, the requirement that the accused prove truth as a defence did not impermissibly shift the burden of proof in criminal defamation cases.[144] This means that while the prosecution did not need to prove intent, the defence could be acquitted if they provided proof that they could not have formed the intent to defame. This seems to absolve the prosecution of the standard of proof while requiring the defence to bear a burden.

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[139] *Salabiaku v France* (1988) Series A no 141-A; Stavros (n 117) 223. See also *Hoang v France* (1993) Series A no 243; *Radio France and others v France* ECHR 2004-II 119; *Phillips v the United Kingdom* ECHR 2001-VII 29.
[140] *Salabiaku* (n 139); Stavros (n 117) 223; Harris et al. (n 19) 463.
[141] Stavros (n 117) 223-4.
[142] *Salabiaku* (n 139); Rainey et al. (n 75) 285-286.
[143] Stavros (n 117) 224.
[144] *Lingens and Leitgeb v Austria* (1981) 26 DR 171; Stavros (n 117) 224.

Strict liability comes into conflict with the presumption of innocence because it calls into question what elements the standard of proof applies to. Further, by not requiring *mens rea* for certain important elements, such as whether the victim is under a particular age or whether someone intentionally possessed drugs, it necessarily helps the prosecutor meet the standard of proof for the relevant element. For the prosecutor to prove that the individual intended to possess drugs requires more proof than merely proving that the accused possessed drugs.

This may raise questions about fairness and justice, as it allows for a finding of criminal responsibility when the defendant lacked the intention of engaging in criminal behaviour. It may also trigger questions about whether the presumption of innocence as a human right is being respected during legislative drafting. As a legal presumption at trial however, the presumption of innocence is not violated by strict liability. As a presumption, the presumption of innocence requires some proof that the crime was committed by the accused to be provided by someone other than the accused. Further it is required that the provided proof must meet a particular standard. With regards to the presumption of innocence, the standard of proof can be high or low depending on the jurisdiction and elements of the crime.[145] A lower standard may not be ideal, and may cause some factually innocent people to be found guilty, but it does not violate the presumption of innocence.

D. Waiver

As with other rights, the presumption of innocence may be waived. This however, only occurs when the accused pleads guilty to a charge against him or her.[146] A guilty plea is a request on the part of the accused for the fact-finder to enter a finding of guilt.[147] While it could be considered an admission of the events as alleged by the prosecutor, it is actually bypassing the standard of proof. By requesting a finding of guilt the accused is stating that the prosecutor has, or could have, enough evidence for conviction and that the evidence is credible enough to have no need to

[145] Ashworth Int'l J Evid & Proof (n 107) 253.
[146] See e.g. *Prosecutor v Rutaganira* (Judgment and Sentence) ICTR-95-1C-T, T Ch III (14 March 2005) para 104; *Prosecutor v Serugendo* (Judgment and Sentence) ICTR-2005-84-I, T Ch I (12 June 2006); *Prosecutor v Rugambarara* (Sentencing Judgement) ICTR-00-59-T, T Ch II (16 November 2007) para 19.
[147] See for example *Prosecutor v al Mahdi* (Judgment and Sentence) ICC-01/12-01/15, T Ch VIII (27 September 2016); *Prosecutor v Erdemović* (Sentencing Judgement) IT-96-22-T, T Ch (26 November 1996).

challenge it through a formal trial. Thus, the accused is agreeing that the standard of proof is met.

There are particular requirements that must be met in order for a fact-finder to accept a guilty plea and enter a conviction against the accused. Those are that the accused must enter into the plea voluntarily and knowingly, and the plea must be unequivocal and factually based.[148] These requirements help protect the accused from waiving his trial rights for some reason other than that the guilty plea reflects the truth, and that the plea was not a result of undue pressure. This helps fulfil the presumption of innocence's purpose of preventing innocent people from being punished or treated as if they are guilty.

A guilty plea is the only manner in which the presumption of innocence can be waived. This is different from a confession. A confession may admit culpability, but it does not have the same safeguards as a guilty plea. A confession is a piece of proof against the accused. As a result, the confession's reliability and veracity can be questioned at trial. Additionally, a confession is usually a narrative from which the prosecutor can argue elements of the crime have been proven, whereas the guilty plea involves acknowledgement on the part of the accused that the specific elements of the crime have been proven, without requiring the prosecution to actually submit the evidence to the required standard of proof.

A guilty plea must have a factual basis as the accused is conceding to operative facts in the prosecutor's evidence file.[149] In the common law and international law systems this requires the accused to state which facts they are conceding to, but a full explanation of the alleged events is not required.[150] In civil law systems a proceeding resembling a mini-trial may be held in which the judge reviews the evidence in the case dossier and concludes after the review that sufficient evidence exists for the accused to be able to concede guilt. Further, like the waiver of other rights, the accused must be of sound mind and understand what they are giving

[148] ICC Statute art 64(8)(a); ICC RPE r 62*bis*; Jenia Iontcheva Turner and Thomas Weigend, 'Negotiated Justice', in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (eds) *International Criminal Procedure: Principles and Rules* (OUP 2013) 1381-1383; Jackson and Summers (n 16) 200; *al Mahdi* (n 147); *Erdemović* (n 147).
[149] *Prosecutor v Erdomović* (Separate and Dissenting Opinion of Judge Cassese) IT-96-22-A, A Ch (7 October 1997) para 11; Turner and Weigend (n 148) 1382; ICTY RPE r 62*bis*.
[150] *X v United Kingdom* (1972) 40 CD 64; *Deweer v. Belgium* (1980) Series A no 35; Stavros (n 117) 117.

up.[151] Guilty pleas must be unequivocal in their acceptance that the prosecutor could prove the case against them and that the accused has no legal defences to raise at trial.[152]

E. Conclusion - The presumption of innocence is a presumption

At trial the presumption of innocence is a legal presumption. It requires the fact-finder to assume a fact, that the accused is not guilty, unless all of the elements of the crime are proven to the relevant standard of proof. The presumption of innocence works with the burden and standard of proof but is a restatement of neither. As a presumption it mandates that the burden of proof cannot be placed on the accused, because the accused is never obligated to prove his or her innocence. Further it is the mental starting point for the fact-finder before the submission of sufficient evidence to reach the standard of proof. The procedural aspect of the presumption of innocence remains in place until there is sufficient proof to overcome the presumption.

There are some scholars who argue that the presumption of innocence either lacks practical use or is a rule of thumb to guide the fact-finder but is not necessary for the fact-finder to use in a rigid sense. Practice however, indicates that the presumption of innocence is a legal presumption. As expressed in judicial decisions and statutory law, the presumption of innocence requires fact-finders to find for the accused unless the standard of proof is met; the burden of proof cannot fall to the accused; and pleading guilty waives the presumption of innocence.

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[151] *Erdemović* Judge Cassese's separate and dissenting opinion (n 149) para 10.
[152] Turner and Weigend (n 148) 1381-1382; *Prosecutor v Serushago* (Sentence) ICTR-98-36-S, T Ch I (5 February 1999) para 29; *Prosecutor v Nikolić* (Judgement) IT-02-60/1-S, T Ch (2 December 2003) paras 53; *Prosecutor v Banović* (Sentencing Judgement) IT-02-65/1, T Ch (28 October 2003) para 17.

Chapter 4. The Non-Procedural Aspect of the Presumption of Innocence

The second aspect of the presumption of innocence concerns how the accused is treated before, during and after trial. This non-procedural aspect is much broader than the first aspect, however must still be tied to criminal procedure. This aspect describes things that occur outside of the actual trial that can affect how the accused is seen during trial. Thus, this aspect has a direct bearing on the rule of law and the legitimacy of the criminal justice process.

This chapter examines the non-procedural aspect of the presumption of innocence. It starts by discussing the fact that the presumption of innocence is more than a legal presumption and that it has application beyond trial. The subsequent sections provide examples of what type of behaviour the second aspect of the presumption of innocence prohibits and why it is important to proscribe this type of behaviour. The examples focus on statements of guilt by public authorities, actions by the media, and that accused people should not be treated in the same manner as people who have been found to be legally guilty. The chapter concludes that all of these behaviours that interfere with the presumption of innocence are concerned with either affecting the opinion of the fact-finder or undermining the legitimacy of the courts or criminal justice system. As a result the second aspect of the presumption of innocence is largely concerned with things that happen outside the courtroom that may affect a fair trial for the accused.

A. The presumption of innocence is more than a presumption

The presumption of innocence exists outside of the courtroom and requires duties beyond those imposed on the fact-finder during trial. This is because of the presumption of innocence's main purpose, which is to prevent people from being treated as if they are guilty when they have not been convicted of a crime.[1] The Human Rights Committee, in General Comment 13, stated that the presumption of innocence 'implies a right to be treated in accordance with this principle [of presuming guilt before the charge has been proven beyond reasonable

[1] See Chapter 2 of this study. PJ Schwikkard, 'The Presumption of Innocence: What is it?' (1998) 11 South African J Crim J L Just 396, 403; Trechsel Stefan, 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006) 156; Rinat Kitai, 'Presuming Innocence' (2002) 55(2) Okla L R 257, 272; Mark Klamberg, *Evidence in International Criminal Trials* (Martinus Nijhoff 2013) 119.

doubt]'.[2] Further, the European Commission of Human Rights found that '[i]t is a fundamental principle embodied in [the presumption of innocence] which protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court.'[3] The European Court of Human Rights and the International Criminal Court recognise that the presumption of innocence has two aspects – the procedural presumption and one that is broader and extends beyond the trial itself.[4] This is clear evidence that the presumption of innocence can exist outside of the trial context and it expands the understanding of the burden holder to public officials. It also offers a blanket prohibition on treating individuals who have not been convicted of a crime as if they are guilty, without a limitation as to where that treatment might occur.

That the presumption of innocence can apply pre-trial is not a unique idea. While some limit the presumption of innocence to a specific legal presumption at trial, many jurisdictions explicitly tie it to all pre-trial proceedings.[5] Limiting the presumption of innocence solely to trial would only make sense if the presumption of innocence is merely a legal presumption. However, the presumption of innocence has the purpose of preventing people from being treated as if they are guilty without a conviction. One way that the presumption of innocence manifests itself in pre-trial proceedings is in the application of the *in dubio pro reo* principle. This is certainly the case at the International Criminal Court where the Pre-Trial Chamber must be guided by at least the principle of *in dubio pro reo* during pre-trial decisions.[6]

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[2] Human Rights Committee, 'General Comment 13: (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (13 April 1984) U.N. Doc. HRI/GEN/1/Rev.1 (1984) para 7.

[3] *Krause v Switzerland* (1979) 13 DR 73; W Schabas and Y McDermott, 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 1645-1646, para 27.

[4] *Prosecutor v Gaddafi* (Decision on the Request for Disqualification of the Prosecutor) ICC-01/11-01/11, A Ch (12 June 2012) paras 24-26; *Allenet de Ribemont v France* (1995) Series A no 308, paras 33-35; *Viorel Burzo v Romania* App Nos 75109/01 and 12539/02 (ECtHR, 30 June 2009) para 156; *YB and Others v Turkey* App Nos 48173/99 and 48319/99 (ECtHR, 28 October 2004) para 43.

[5] See discussion in Kitai (n 1) 273.

[6] Raphael Kamuli *Modern International Criminal Justice* (Intersentia 2014) 54; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, PT Ch II (15 June 2009) para 31; *Prosecutor v Kenyatta et al.* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11, PT Ch II (23 January 2012) para 53.

The pre-trial presumption of innocence is different however from the legal presumption at trial. First, the procedural aspect only makes sense when making decisions of guilt, and that only happens during trial. This is because the presumption can only be overcome by a determination that there has been sufficient evidence provided by the state to meet the required standard of proof. This cannot happen in pre-trial decisions because those decisions are not determining whether the individual is guilty of a crime.

The presumption of innocence also exists in pre-trial proceedings because court officials cannot pre-judge the accused as guilty. Court officials have a duty to not pre-judge the outcome of the case or enter the case with a preconceived notion of guilt.[7] Surely, this would extend to all pre-trial proceedings, because the decisions made pre-trial, such as evidential hearings, can affect the outcome of the case. For example, if a pre-trial judge believes that the accused is guilty the judge may be less likely to exclude evidence from trial that would normally be excluded. If this happens, then that evidence could be seen by the fact-finder at trial, and could affect their decision as to the accused's guilt.

That the presumption of innocence can exist outside of trial procedure is further demonstrated in most of the statutes and rules of the international and regional courts and tribunals. It is most clearly found in the Rome Statute of the International Criminal Court where the presumption of innocence is a separate article from the minimum procedural rights set out in Article 67.[8] The 1996 Preparatory Committee Draft further supports the idea that the presumption of innocence extends beyond trial.[9] The *travaux préparatoires* address the idea that the presumption of innocence was meant to extend beyond trial as there was a disagreement during the negotiation of the Statute as to whether the presumption of innocence was to be placed in the 'General Principles' part of the Statute or the part entitled 'The Trial'.[10] Although it was ultimately decided to categorise it as part of 'The Trial', the fact that its

[7] *Barberà, Messegué and Jabardo v Spain* (1988) Series A no 146, para 77; *Lavents v Latvia* App No 58442/00 (ECtHR, 28 November 2002) para 125; Trechsel (n 1) 164-5; Ashworth, Andrew 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J. Evid & Proof 241, 244.

[8] Rome Statute of the International Criminal Court (17 July 1998) (ICC Statute) Article 66.

[9] General Assembly, Fifty-first Session, Report of the Preparatory Committee on the Establishment of an International Court vol 2 (1996), 1996 Preparatory Committee Draft, Article T, Note 2.

[10] Ibid vol. 1, para 179; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 1004-1005.

placement was recognised as an issue implies that the presumption of innocence may not strictly be a procedural right. Finally, Trial Chamber V(A) recognized that Article 14(2) of the International Covenant on Civil and Political Rights describes the presumption of innocence as a 'right.'[11] The European Convention on Human Rights, American Convention on Human Rights, *ad hoc* Tribunals, Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon, and Special Court for Sierra Leone all include their provisions on the presumption of innocence in the same article as the rest of the defence trial rights, but in a paragraph separated from the general list of minimum procedural rights.[12] Of the jurisdictions studied, only the African Charter on Human and Peoples' Rights lists the presumption of innocence among the minimum procedural guarantees.[13] Considering the presumption of innocence separately from the court or tribunal's general list of minimum fair trial rights is evidence that the presumption of innocence is different from those guarantees and can exist outside of trial.

One of the main arguments supporting a narrow interpretation of the presumption of innocence is that other rights act to protect individuals from the harms that are allegedly protected by a wider presumption of innocence.[14] These other rights include the rights to liberty, property and privacy.[15] Theorists following the narrow conception of the presumption of innocence believe that the presumption has no place outside of the context of trial. The theorists with the narrowest views, such as Lippke and Laudan, see the presumption of innocence as merely a legal presumption that has no application outside of trial itself, as presumptions are only within the duties of the

[11] *Prosecutor v Ruto et al.* (Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) ICC-01/09-01/11, T Ch V(A) (13 June 2013) para 32; Schabas, *ICC Commentary* (n 10) 1004-1005.

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR) art 6; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 8; UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 21; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) art 20; Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) art 35 new; Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) art 16; Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003)art 17.

[13] African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217, art 7.

[14] Thomas Weigend 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193, 198-9 .

[15] Peter DeAngelis, 'Racial Profiling and the Presumption of Innocence' (2014) 43(1) NJLP 43, 49.

fact-finder to uphold.[16] Commentators who hold a somewhat wider view believe that the presumption of innocence extends to pre-trial proceedings but only because it does not make sense for the court to have a presumption of innocence at trial but not while making pre-trial decisions.[17] For these theorists, there is no need to extend the presumption of innocence further because other rights provide the same protections. Thomas Weigend, for example, argues that rather than extending the presumption of innocence outside of the courtroom setting, a balancing test with respect to other rights could be used to protect individuals from being treated too poorly before a conviction.[18] This test would consider the severity of the alleged crime, the evidence against the person, and the degree of suspicion.[19] Weigend argues that where the crime is more severe and the evidence against the individual is particularly strong, there is greater justification for infringing on the accused's rights without implicating the presumption of innocence.[20] This conception of the presumption of innocence however, fails to fully consider the presumption's purpose to prevent individuals from being treated as guilty prior to a conviction. The idea that individual rights could be balanced against the seriousness of the crime and the strength of the evidence does not prevent people from being treated as if they are guilty without a conviction. An extreme example of a person alleged to have committed a very serious crime, such as murder, where the evidence points to guilt to near certainty, such as being found standing over the body with the weapon in hand, would justify a restriction of rights on par with guilt despite the fact that there has been no trial or conviction, and the investigation may not even be complete. Allowing for this kind of treatment of accused persons would permit treatment up to and including punishment, which would obviate the need to continue the investigation or trial. While it is true that there may be some overlap or interaction between a wide presumption of innocence and other rights, this redundancy does not mean that the presumption of innocence is not relevant outside of trial. Instead, overlap between the presumption of innocence and another right might indicate the boundaries of the two rights and place limits on investigation so that the investigation and pre-trial processes do not become

[16] See Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016); Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333.
[17] Schwikkard (n 1) 405; Trechsel (n 1).
[18] Weigend (n 14) 199.
[19] Ibid; DeAngelis (n 15) 49.
[20] Weigend (n 14) 199.

punishment or pre-punishment.[21] The presumption of innocence is required to ensure that there are no gaps through which individuals could be treated as guilty without a conviction. If this kind of treatment were permitted, then there would be no need for criminal trials or the presumption of innocence because one could be punished without conviction.

There are two components to not treating someone as if they are legally guilty in a non-trial context. The first involves not imposing unjustified sanctions on individuals and the second is reputational. The first component is rather obvious and goes with the presumption of innocence's purpose as a fair trial right. In the courtroom, the presumption prevents punishment without a conviction by providing the fact-finder with instructions about the circumstances that must be present before a conviction can be found against the accused.[22] Because those circumstances are the only circumstances which can result in a conviction, and a conviction is the only sanctioned road to punishment, then outside of the courtroom, the presumption of innocence also has a role in preventing unjustified punishments or sanctions for criminal acts. The second consideration is less obvious and mandates that people not encourage others to perceive or treat a particular individual as guilty.[23] It accepts that people have freedom of thought and that they may hold opinions about other people regardless of whether the other person has been convicted of a crime. However, it imposes some limit on the ability of the person holding that opinion to act on or express that opinion. A violation of the presumption of innocence can occur if the opinion becomes action and the person about whom the opinion suffers damage to his or her reputation as a result of that opinion.

Both considerations have to do with the presumption of innocence's relationship to fairness and justice. It is neither fair nor just that the treatment imposed on people who have been convicted of a crime should be inflicted on people who have not been convicted. Permitting punishment without a conviction eliminates one of the purposes of criminal procedure and reduces the importance of convictions. Both fairness and justice also relate to the reputation of the individual. People must not be treated as guilty so that the wider community will not believe them to be guilty.

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[21] Geert-Jan Alexander Knoops *Theory and Practice of International and Internationalised Criminal Proceedings* (Klewer Law International 2005) 48.
[22] See Chapter 3 discussing the procedural aspect of the presumption of innocence.
[23] See Trechsel (n 1) 156.

Not treating people as though they have been convicted of a crime can be different from treating people as if they are innocent. There is a whole range of behaviour between the treatment that an innocent person should receive and the treatment that is allowed toward a guilty person. Individuals that have not been convicted of anything may be treated with suspicion, doubt, or mistrust, but such treatment should not be equated to the treatment endured by someone who has been convicted of a crime. The presumption of innocence provides the upper permissible limit of such treatment by indicating how severe the treatment can get before it is deemed unacceptable. That is, a non-convicted person may not receive the same treatment as someone who has been found legally guilty. That limit will be different depending on the context and whether the treatment is imposed by public authorities or private individuals. What follows are accepted examples of the specific limits.

B. Public statements of guilt

Public authorities must refrain from making statements regarding the guilt of people who are accused, but not convicted, of crimes. General Comment 32 of the Human Rights Committee specifically states that public authorities have the duty to not make public statements of guilt against an accused person.[24] The regional human rights courts and the International Criminal Court have held that statements about an individual's guilt made by a public authority can violate the presumption of innocence when such statements are made before a finding of legal guilt.[25] Statements that comment on the guilt of an accused person will violate the presumption of innocence, although statements of suspicion will still be allowed. There are several reasons why statements reflecting the opinion that someone is guilty of a crime without he or she having been convicted will violate the presumption of innocence. The statement could show that the government has prejudged the case against the accused, exposure to the statement could cause the fact-finder's opinion to be tainted, the public may believe

[24] Human Rights Committee, 'General Comment No. 32: Right of Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) UN Doc No CCPR/C/GC/32 (2007) para 39.
[25] *Daktaras v. Lithuania* ECHR 2000-X 489, paras 41-42; *Viorel Burzo* (n 4) para 157; *Allenet de Ribemont* (n 4) para 36. The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003) (African Guidelines) art N(6)(e)(ii) (public authorities); *Krause* (n 3); *Allenet de Ribemont* (n 4) paras 35-6; *International Pen and Others v Nigeria* (Decision) Comm Nos 137/94, 139/94, 154/96 and 161/97 (31 October 1998); *Prosecutor v Mbarushimana* (Decisions on Defence Request for an Order to Preserve the Impartiality of the Proceedings) ICC-01/04-01/10-51, PT Ch I (31 January 2011); *Gaddafi* (n 4).

that the accused is guilty as result of the statement, and the statement itself could treat the accused as guilty of an offence.

1. Public authorities must not make statements of guilt

Public authorities are defined as anyone who works in government and in some cases extends to individuals exercising quasi-governmental authority. In national jurisdictions, public authorities encompass, but are not limited to, prosecutors, police, government ministers, judges, and legislators.[26] As is discussed in the following sections, the strength of a particular public authority's duty depends on his or her relationship to the case in question. It is less clear who qualifies as a public authority in an international jurisdiction as there is no 'government' in the same sense as in a national jurisdiction. At the International Criminal Court, the presumption of innocence is specifically a duty borne by all organs of 'the Court' and it appears that this is true at the other international courts and tribunals as well.[27] Both the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia have held that their Registry has a duty to uphold the presumption of innocence.[28] Further, the Registrar at the Special Court for Sierra Leone was required to be 'mindful of the need to ensure respect for human rights and fundamental freedoms and particularly the presumption of innocence' when creating

[26] *Allenet de Ribemont* (n 4) (holding that public authorities have a duty to not violate the presumption of innocence); *Allen v. the United Kingdom* ECHR 2002-IX 41 (judges are included in 'public official'); *Salabiaku v France* (1988) Series A no 141-A paras 15-16 (holding that the legislator is included in 'public authorities'); *GCP v Romania* App No 20899/03 (ECtHR, 20 December 2011) (public prosecutor and minister of the interior making statements of guilt); *Kuzmin v Russia* App No 58939/00 (ECtHR, 18 March 2010) (statement of guilt by candidate for public election)). *Daktaras* (n 25) paras 41-42; *Viorel Burzo* (n 4) para 157; *Allenet de Ribemont* (n 4) para 36; *Böhmer v Germany* App No 37568/97 (ECtHR, 3 October 2002) para 59 See van Dijk, Pieter and Marc Viering (revisors), 'Chapter 10 Right to a Fair and Public Hearing' in Pieter Van Dijk, Fried van Hoof, Arjen Van Rijn, Leo Zwaak (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006) 625; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1994) 254, para 36.

[27] ICC Statute arts 1, 66; *Prosecutor v Lubanga* (Decision on the Press Interview with Ms Le Fraper du Hellen) ICC-01/04-01/06, T Ch I (12 May 2010); *Mbarushimana* (n 25); Schabas and McDermott (n 3) 1640, para 15.

[28] See *Prosecutor v Lubanga* (Trial Transcript) ICC-01/04-01/06, T Ch I (9 November 2006) (web site ordered to be changed when wrongly listing an individual as accused, rather than a suspect before the Confirmation of Charges Hearing); *Prosecutor v Popović et al.* (Trial Transcript) IT-05-88-T, T Ch (9 November 2006) (The Tribunal declared statements 'inappropriate' and contrary to the presumption of innocence when Registry spokesperson said that denying the genocide in Bosnia would be 'shameful') respectively. See also discussion in Schabas and McDermott (n 3) 1640, para 15.

and adopting rules for detention.[29] While it may be somewhat obvious that individuals working for the court or tribunal are 'public authorities' for the purpose of international criminal justice, the sphere may extend beyond those who work directly for the court. At the international level, the term public authorities may also describe the United Nations and all of its constituent parts as well as employees of other related international organisations.[30]

At the international level a broad definition of 'public authority' should be utilised and the definition extended to include not only court personnel but also employees of the United Nations and other groups involved in investigating, peacekeeping, or oversight of the incident that resulted in a criminal accusation. Unlike national jurisdictions the international courts and tribunals must rely on other groups to help with their investigations and enforcement. Those groups that are relied on should not be exempt from the requirements of the presumption of innocence because to do so would lessen the presumption's impact and effect. That said, much like national public authorities, the further an international public authority is from direct involvement in the criminal procedure against the accused, the less likely their statements would have influence over the criminal process against the particular accused person. Including all of those individuals involved in the criminal process at the international level as public authorities would help to balance the power between international criminal justice and individuals.

2. What is a public statement of guilt?

Public statements of guilt are statements or judicial decisions that 'reflect an opinion that [the accused] is guilty before [the accused] has been proved so according to law'.[31] The statement does not necessarily have to be explicit but it 'suffices, even

[29] Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) r 33(c); Special Court for Sierra Leone, 'Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone ("Rules of Detention") (as amended on 14 May 2005) <www.rscsl.org/Documents/rulesofdetention.pdf> accessed 16 April 2018 preamble.

[30] Schabas, *ICC Commentary* (n 10) 1007; Schabas and McDermott (n 3) 1646, para 28.

[31] For example, *Austria v Italy* (1961) 7 CD 23; *Daktaras* (n 25) para 41; *Krause* (n 3); *Ismoilov and Others v Russia* App No 2947/0649 (ECtHR, 24 April 2008) paras 166-167; *Deweer v. Belgium* (1980) Series A no 35 paras 37, 57; *Allenet de Ribemont* (n 4) paras 35-36; *Böhmer* (n 26) para 59; *Fatullayev v Azerbaijan* App No 40984/07 (ECtHR, 22 April 2010) para 160; *Nešt'ák v Slovakia* App No 65559/01 (ECtHR, 27 February 2007) paras 88-89; *Prosecutor v Popović et al.* (Trial Transcript) IT-05-88-T, T Ch (26 March 2007) p 9463.

in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty.'[32] It is important, however, to distinguish between statements of guilt and statements that reflect that a person is under suspicion. Statements that reflect the idea that the accused is under suspicion, but do not state that the accused person is guilty, will not violate the presumption of innocence.[33] A continuing state of suspicion is necessary for criminal procedure to continue and thus it is accurate to state that someone is suspected of a crime if there is suspicion. A statement of guilt without a conviction however, implies that the person's responsibility for the alleged crime has been prejudged and can lead to the accused being treated as if they are guilty.

Judicial decisions reflecting an opinion that a person is guilty of a crime without a conviction first being secured violate the presumption of innocence.[34] This is not only because the judge, as a fact-finder, is not respecting the first aspect of the presumption but also because a judge's statement about the guilt of an accused both suggests that he or she has pre-judged the case that can cause the public to believe that the accused is guilty. In *Minelli v Switzerland*, Minelli was accused of defamation in a private prosecution.[35] The prosecution was time-barred but Minelli was ordered to pay costs, despite no finding of guilt. In its decision, the trial court said that 'the incidence of the costs and expenses should depend on the judgement that would have been delivered.'[36] The European Court of Human Rights held that this statement by the judge violated Minelli's presumption of innocence because by requiring the accused to pay costs, the trial judge essentially stated that the accused was guilty and

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This is supported by the finding *International PEN* (n 25); *Minelli v Switzerland* (1983) series A no 62, para 37; Trechsel (n 1) 164; Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993) 49, 68-69; David J Harris, Michael O'Boyle, Edward P Bates, Carla M Buckley, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP 2014) 460.

[32] *Daktaras* (n 25) para 41; *Allenet de Ribemont* (n 4) para 35; *Böhmer* (n 26) para 59; *Fatullayev* (n 31) para 160; *Ismoilov* (n 31) para 166; Nešťák (n 31) paras 88-89; *Popović* (Trial Transcript, 26 March 2007) (n 31) p 9463. This is supported by the finding in: *International PEN* (n 25); *Minelli* (n 31) para 37.

[33] *Garycki v Poland* App No 14248/02 (ECtHR, 6 February 2007); *Lutz v Germany* (1987) Series A no 123, para 62; *Leutscher v the Netherlands* ECHR 1996-II 436, para 31.

[34] *Allenet de Ribemont* (n 4) para 35; *Minelli* (n 31) paras 27, 30, 37; *Garycki* (n 33) para 66; *Deweer* (n 31) para 56; *Daktaras* (n 25) paras 41-44; *Matijašević v Serbia* ECHR 2006-X 127, para 45.

[35] *Minelli* (n 31).

[36] Ibid para 38.

applied a sanction despite the absence of a verdict.[37] Public statements of guilt by the fact-finder before or without a conviction must obviously be prohibited under the presumption of innocence.[38] These kinds of statements violate both aspects of the presumption.

Judicial decisions however, are not the only instances in which statements of guilt by public authorities are prohibited. All public authorities are prohibited from making any public statements of guilt about suspects or accused persons.[39] Most often, it seems these statements are made in the media or press releases. Statements by public authorities must not 'encourage the public to believe the suspect is guilty and prejudge the assessment of the facts by the competent judicial authority.'[40] Like all parts of the presumption of innocence, statements of guilt by public authorities must be linked to the criminal process. Statements of guilt made before a person is 'charged' may violate the presumption of innocence once the person is actually charged, so long as the statement relates to the specific charges against the accused.[41] If a statement of guilt is made, but no specifically related charges are brought against the person, the presumption of innocence will not be implicated. In the *Mbarushimana* case, the Prosecutor stated that Mbarushimana was a 'genocidaire', however Mbarushimana was not charged with genocide before the International Criminal Court or any other court.[42] As a result, the Court held that the statement was 'the result of an oversight, rather than an intended statement.'[43] Despite the fact that some charges were brought against the accused person, those charges were not sufficiently linked to the statement of guilt to implicate the presumption of innocence.

In order to determine whether a statement violates or interferes with the presumption of innocence the court will look to the context in which the statement was made. In particular, the identity of the person making the statement and the conditions under which the statement was made can determine whether the

[37] *Minelli* (n 31).
[38] Ibid paras 27, 30, 37; *Zollman v United Kingdom* ECHR 2003-XII 361; *Allenet de Ribemont* (n 4) para 35; *Garycki* (n 33) para 66; *Deweer* (n 31) para 56; *Daktaras* (n 25) paras 41-44; *Matijašević* (n 34) para 45.
[39] African Guidelines (n 25) art N(6)(e)(ii) (public authorities); Nowak (n 26) 254.
[40] *X v Netherlands* (1981) 27 DR 37; *Mbarushimana* (n 25) para 161.
[41] *Zollman* (n 38); *Allenet de Ribemont* (n 4).
[42] *Mbarushimana* (n 25), para 14.
[43] Ibid.

presumption of innocence has been violated.[44] The closer the statement of guilt comes to stating that an individual is actually guilty of a particular crime, the more likely it is to violate the presumption of innocence.[45] What matters most is the actual meaning of the statement, not its 'literal form.'[46] It is however, unclear how explicit statements of guilt need to be in order to violate the presumption of innocence.[47] If any more innocuous meaning can be attributed to the statement, it is very unlikely that a violation will be found. This makes the choice of terms used and the wording of the statement very important.[48] Statements of guilt are different from statements that convey the idea that someone is suspected of committing a crime. Statements of suspicion are permissible both before a final determination and in situations in which a final determination is never reached.[49] Whether a statement regarding the accused by a public authority will be deemed a statement of guilt or a statement of suspicion depends on both who is making the statement and how definitive the statement is regarding culpability. In order to determine whether a statement violates the presumption, courts will make great efforts to consider both the wording of the statement and the overall circumstances under which the statement was made.

One example of the importance of the statement's context and an innocuous meaning being attributed to a prosecutor's statement regarding an accused person can be found in *Daktaras v Lithuania*.[50] In this case, in a quasi-judicial decision to continue the charges against the accused, the prosecutor stated that '[t]he fact that H. Daktaras … intimidated the victim is fully proved by the evidence'.[51] The European Court of Human Rights held that the use of the word 'proved' was not the best choice

[44] *Gaddafi* (n 4); *Daktaras* (n 25) para 42; *Böhmer* (n 26) para 59; *Adolf v. Austria* (1982) Series A no 49, para 36-41; *Garycki* (n 33); *AL v Germany* App No 72758/01 (ECtHR, 28 April 2005) para 31; *Pandy v Belgium* App No 13583/02 (ECtHR, 21 September 2006) para 43; Harris, O'Boyle, Bates, Buckley (n 31) 466; Christoph Grabenwarter, *European Convention on Human Rights* (Beck, Hart 2014) 168, para 159.
[45] *Ismoilov* (n 31) para 166; *Nešt'ák* (n 31) para 89.
[46] *Viorel Burzo* (n 4) para 157; *Lavents* (n 7) para 126.
[47] Stavros (n 31) 69.
[48] *Gaddafi* (n 4); *Mbarushimana* (n 25); *Daktaras* (n 25) para 41; *Arrigo and Vella v Malta* App No 6569/04 (ECtHR, 10 May 2005); *Khuzhin and Others v Russia* App No 13470/02 (ECtHR, 23 October 2008) para 94; *Viorel Burzo* (n 4) para 157; *Garycki* (n 33) para 70; *YB* (n 4) para 49; *Fatullayev* (n 31) para 161-162; Stavros (n 31) 69.
[49] *Fatullayev* (n 31) para 160; *Mbarushimana* (n 25) para 11; *Butkevicius v Lithuania* ECHR 2002-II 349, para 52; *Nešt'ák* (n 31) para 89; *Sekanina v Austria* (1993) Series A no 266-A, para 30.
[50] *Daktaras* (n 25).
[51] Ibid para 42.

of words, however taken in the context of the specific motion the use of the word 'proved' did not violate of the presumption of innocence.[52]

Statements of guilt must also be considered in context as demonstrated in *Krause v Switzerland.*[53] In this case the European Commission of Human Rights found that a statement by the Swiss Chancellor that the applicant 'committed common law explosive offences and that she must accept responsibility for it' was not a violation of the presumption of innocence.[54] Rather, by taking the Chancellor's whole statement into account, and noting that he also stated that the applicant would need to stand trial and that the verdict of such a trial remained unknown, the Commission found that the Chancellor was informing the public about the prosecution.[55] It seems very clear from the words of the statement itself that the Chancellor meant to indicate that the accused committed the alleged offences. However, the Commission's examination of the statement's context allows for this alternative interpretation, which permits the investigation and criminal proceedings to continue as there is no identified violation of the presumption of innocence.

The Libya Situation at the International Criminal Court provides an example of a court taking a more innocuous reading of an apparent statement of guilt. In an interview with *Vanity Fair* magazine the International Criminal Court's Prosecutor called one of the suspects, Saif Gaddafi, a liar while reviewing statements made by Gaddafi about his knowledge of, and involvement in, the alleged incidents leading to his indictment.[56] The Pre-Trial Chamber held that the statement was 'inappropriate in light of the presumption of innocence.'[57] The Court stopped short of saying that the presumption of innocence was violated in this case, but stated that the statements could potentially be ascribed to the Court as a whole as the Prosecutor is an elected official of the Court.[58] The Court also found that the Prosecutor was not biased because he did not endorse or side with Libya nor did the statements imply that he could not carry out his duties.[59] According to this judgment a comment can be

[52] Ibid.
[53] *Krause* (n 3).
[54] Ibid. See also *X v Austria* (1970) 36 CD 79 for a similar situation and finding.
[55] *Krause* (n 3).
[56] Sands, Philippe, 'The Accomplice' *Vanity Fair* 22 August 2011 <www.vanityfair.com/news/2011 /08/qaddafi-201108> accessed 16 April 2018.
[57] *Gaddafi* (n 4) para 33.
[58] Ibid.
[59] Ibid para 35.

inappropriate with regard to the presumption of innocence but not violate it if the statement does not cast doubt on the Prosecutor's impartiality.

This is an interesting finding as it is difficult to believe that publicly calling the accused a liar does not show that the Prosecutor is biased against the accused. Further, it seems to conflate two related but separate rights – the right to the presumption of innocence and the right to an unbiased tribunal. Calling the defendant a liar obviously can taint the reputation of the accused, allow their veracity to be called into question, and, if it is raised about the particular charges against them, their innocence. Stating that the defendant is lying about his or her involvement in the situation is different from stating that he is guilty of the charged crimes. Obviously one can lie and not commit crimes against humanity or could commit a crime and not lie. In this case, the court ascribed a more innocuous meaning to the Prosecutor's statements than might have otherwise been ascribed. This seems to be an acceptable outcome with regard to the presumption of innocence but does raise questions about Gaddafi's ability to receive a fair trial to the extent that the truthfulness of any future testimony has already been called into question.

The International Criminal Court took a similar approach in a situation involving an even clearer statement of guilt by the Prosecutor. In *Prosecutor v Mbarushimana*, Pre-Trial Chamber I also ascribed an innocuous meaning to a statement made by the Prosecutor about the defendant. Here, the Prosecutor stated in a press release that Calixte Mbarushimana was the leader of *Forces démocratiques pour la liberation du Rwanda* and that members of that group committed more than three hundred rapes while the group was under his leadership.[60] In ruling that the presumption of innocence was not violated by the statement, Pre-Trial Chamber I held that it would have been 'desirable' for the Prosecutor to couch his statements in terms of allegations rather than facts because the statement as worded gives the impression that certain facts had already been proven before the Court.[61] The Court suggested that the Prosecutor could have achieved this by using terms such as 'there are reasonable grounds to believe' or 'alleged' in order to distance the idea of prejudged guilt from the accused.[62] When one examines the Prosecutor's statements with the elements of the alleged crimes, it could be argued that these statements imply that

[60] *Mbarushimana* (n 25) para 12.
[61] Ibid para 13.
[62] *Mbarushimana* (n 25) para 17.

most, if not all of the elements of rape as a crime against humanity were proven against the accused.[63] Thus, although the prosecutor did not state that Mbarushimana was guilty, he did essentially state that most, if not all, of the elements of a crime charged against him had been proven. The difference between what the Prosecutor said and calling the defendant guilty is minimal and yet there was no violation of the presumption of innocence because a more innocuous meaning could be ascribed to the statements.

In both *Gaddafi* and *Mbarushimana*, the Prosecutor implied that the accused was guilty of wrongdoing but in neither instance did the Court find a violation of the presumption of innocence. The Prosecutor's statement in the *Gaddafi* case calls into question the statements, testimony and arguments of the accused, but does not explicitly say that the accused is guilty of the alleged crimes. Lying is not a primary crime within the Court's jurisdiction, nor is it a required element of the crimes.[64] In *Mbarushimana*, the Prosecutor's statement more clearly suggests that the accused was guilty of some of the crimes alleged, but stops short of explicitly saying so. However, the Court looked beyond the statements made by the Prosecutor and focused on their context. This approach allowed the Court to find a more innocuous meaning for statements that would otherwise be fairly clear statements about the guilt of the accused. It also leaves open the question of what sort of statement, if any, would sufficiently implicate the presumption of innocence before the International Criminal Court will be find a violation.

It is clear that context is extremely important in determining whether a statement that comments on someone's guilt when he or she has not been convicted will violate the presumption of innocence. To constitute a violation, public statements of guilt must be specific and fairly explicit, because the relevant court will ascribe a more innocuous meaning to the statement if possible. In order to avoid violations, but still discuss the suspicions against the suspect or accused limiting language is used.

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[63] International Criminal Court, 'Elements of Crimes' (2011) <www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B 45BF9DE73D56/0/ElementsOfCrimesEng.pdf> accessed 16 April 2018 art 7(1)(g)-1 Crime against humanity of rape.

[64] The Court can prosecute people for lying under oath during proceedings before the Court itself, however this is not considered a crime for which the Court has jurisdiction. Rather, it is to prevent individuals from hindering the administration of justice. See ICC Statute art 70. The primary crimes before the court are genocide, crimes against humanity, and war crimes. See ICC Statute arts 6, 7 and 8 respectively.

As the International Criminal Court suggested in *Mbarushimana*, using words such as 'alleged', 'suspected', or 'accused' can all help keep statements regarding crimes that a particular person has been accused of from becoming a specific statement of guilt.[65] Limiting terms such as these are widely used and preserve the accused person's presumption of innocence while allowing others to comment on the situation and avoid charges of defamation.

3. How do public statements of guilt impact the presumption of innocence?

Public authorities' statements of guilt do not themselves violate the presumption of innocence. Instead, it is the effect that the statement has which determines whether the presumption is violated.[66] While courts are willing to discuss whether the presumption of innocence has been violated because of particular statements they offer far less discussion about why the statements violate the presumption or what impact those statements have on the right to be presumed innocent. The relevant courts have found four ways statements of guilt affect the presumption of innocence. The statement may: show prejudgment; potentially taint the fact-finder; cause the public to believe in the accused's guilt; and treat the accused as guilty. Each of these types of impact will be discussed below and will be related to the aspect of the presumption of innocence that is affected.

i. Shows prejudgment

Courts are primarily concerned that public statements of guilt show prejudgment of the facts on the part of the public authority. This is not limited to the fact-finder's statements or indications of prejudgment; all public authorities have a duty not to prejudge the facts of a criminal case. As was stated in General Comment

[65] Yvonne McDermott, *Fairness in International Criminal Trials* (OUP 2016) 42; *Situation in Libya* (Decision on OPCD "Requête relative aux propos publics de Monsieur le Procureur et au respect de la presomption d'innocence") ICC-01/11, PT CH I (8 September 2011); *Mbarushimana* (n 25); *Prosecutor v Popović* (Trial Transcript, 26 March 2007) (n 31); *Lubanga* (Trial Transcript) (n 28); *Lubanga* (n 27); *Zollman* (n 38); *Ismoilov* (n 31) para 160; Laurence Burgorge-Larsen and Amaya Úbeda de Torres, and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights* (Rosalind Greenstein (trans) OUP 2011) 664, para 25.36; Weigend (n 14) 201. It is important to note that many countries do have criminal prosecutions for defamation; van Dijk and Viering (n 26) 627.

[66] *Prosecutor v Uwinkindi* (Decision on the Prosecutor's Request for Referral to the Republic of Rwanda Rule 11 bis of the Rules of Procedure and Evidence) ICTR-2001-75-R11bis, Ref Ch (28 June 2011).

32: 'It is the duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.'[67] The reason this is so significant is that a prejudgment of the facts by any public authority can call into question or undermine the fairness of the criminal process.[68]

This was highlighted by the European Court of Human Rights in *Allenet de Ribemont v France*. The case involved a situation in which the French Minister of the Interior and two senior police officers, the head of the Crime Squad and the Director of the Paris Criminal Investigation Department, gave a press conference regarding the future of the French police budget.[69] During the press conference they discussed the theory of the case against de Ribemont, the responsibility of the parties to the case in detail, and called de Ribemont an 'instigator' of the alleged crime.[70] All of this occurred a few weeks before de Ribemont was actually charged with an offence.[71] The European Court found a violation of the presumption of innocence and indicated that one reason statements of guilt by public authorities are to be avoided is because they prejudge 'the assessment of the facts by the competent judicial authority.'[72] There is no explanation in the decision as to how the statement demonstrates prejudgment of the facts, nor is there any discussion about why this type of statement should be avoided under the presumption of innocence. It could be argued that if any public authority is prejudging a case's facts it could either result in a prosecution where the investigation is based on bias or it could be an indication that the case has been prejudged on a number of different levels of government, which could potentially trickle down to the fact-finder. Either would upset the balance of power between the government and individuals.

The International Criminal Court has expressed similar concerns about the relationship between pre-conviction statements of guilt and prejudgment of the facts. Although the Pre-Trial Chamber ultimately found in *Mbarushimana* that the context of statements made by the Prosecutor mitigated the impression that Mbarushimana

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[67] General Comment 32 (n 24); *Allenet de Ribemont* (n 4) para 41; *Khuzhin* (n 48) para 93; *Mbarushimana* (n 25) para 11; *Garycki* (n 33) para 70; *Butkevičius* (n 49) para 53; *Pandy* (n 44) para 43; citing *YB* (n 4); *Ismoilov* (n 31) para 161.
[68] *Fatullayev* (n 31) para 159-160.
[69] *Allenet de Ribemont* (n 4) para 10
[70] Ibid.
[71] Ibid.
[72] Ibid para 41.

was responsible for these alleged crimes, it also expressed concern that the Prosecutor's statements demonstrated pre-judgment of the facts.[73] The Prosecutor's statements in the *Gaddafi* case similarly show that public statements of guilt affect the presumption of innocence by suggesting that the facts have been pre-judged. The Court held that the Prosecutor's statements were 'inappropriate in light of the presumption of innocence' but did not demonstrate bias against the accused.[74] The importance of this determination lies in the special role that the Prosecutor has at the International Criminal Court. The Prosecutor must investigate all sides of an alleged crime including inculpatory and exculpatory evidence.[75] While the Prosecutor must prosecute individuals accused of crimes, they should do this without bias against the individuals. By expressing an opinion about the accused's guilt the Prosecutor essentially abdicated the responsibility it owed to the accused to neutrally investigate the crime.

The *Gaddafi* case also identifies some potential remedies for when a public authority's statement is inappropriate in light of the presumption of innocence but does not show bias and thus disqualification cannot be achieved. The Appeals Chamber suggests that either the Pre-Trial or Trial Chamber can take action short of disqualification to remedy this kind of statement by the prosecutor.[76] Potential remedies include: limiting the Prosecutor's ability to make public statements; ordering the Prosecutor to remediate the damage done by the statements; remind the Prosecutor about what constitutes appropriate communications to be issued by the Office of the Prosecutor; reprimand the Prosecutor for inappropriate behaviour; and subject the Prosecutor to misconduct proceedings.[77] These possible remedies reflect the Court's concern that the statements of the Prosecutor will reflect badly on the Court itself and its awareness that a failure to act could create the impression the Court supports the prejudgment. The Appeals Chamber states that this is a concern, at least in part because the Prosecutor is a high-ranking official at the Court and because statements made by the Prosecutor and the Office of the Prosecutor are frequently attributed to the Court itself.[78] If the Prosecutor were to make statements that clearly

[73] *Mbarushimana* (n 25) para 12.
[74] *Gaddafi* (n 4) para 33.
[75] ICC Statute Art 54(1)(a).
[76] *Gaddafi* (n 4) para 35.
[77] Ibid.
[78] *Gaddafi* (n 4).

implied that he had prejudged the case and they were attributed to the Court, it could also call into question the fairness and impartiality of the judges, the Court and the whole institution of the International Criminal Court. While the Prosecutor was not found to have violated the presumption of innocence nor was he found to be biased against the accused, the Appeals Chamber of the International Court found that the statements made by the Prosecutor in the *Vanity Fair* article could reflect badly not only on the Prosecutor and his office, but on the Court as a whole.[79] This helps show that public statements from someone other than the fact-finder could impute prejudgment onto the Court. It also suggests that there is a legitimacy and rule of law argument to be made. If the reputation of the whole court could be called into question by statements by a public official, then the public may not see that court as reputable and the decisions it makes may not be seen as credible or requiring respect.

Despite this, the Appeals Chamber stopped short of finding a violation of the presumption of innocence. They found that the statements were 'inappropriate' with regard to the presumption of innocence but that the Prosecutor could not be disqualified because the statements did not also show bias. By linking the remedy sought in the case directly to whether the presumption of innocence was violated and whether there was bias on the part of the prosecutor shows that prejudgment is the main concern. While the Appeals Chamber suggests further remedies that may be sought when the Prosecutor makes an inappropriate but not biased statement against the accused, it does not expound upon any other reasons why the prosecutor should not be permitted to make inappropriate statements or how inappropriate statements might impact the case, the accused, the public, or anything else.

The European Court of Human Rights also does not directly discuss how public statements of guilt show prejudgment, but it is clear that when other public authorities make statements of guilt it could be similar to the situation involving the Prosecutor at the International Criminal Court in that the statements could be attributed to the Court itself. Courts are required to be impartial rendering them helpless in the face of negative statements about individual cases. This inability to intervene can create the appearance that statements by public authorities regarding the guilt of an accused person can also be imputed to the court itself. Further, if some public authorities do prejudge the facts of the case, then it might be assumed that all

[79] Ibid para 33.

or most public authorities are prejudging the facts which would call into question the court's ability to be fair, uphold the procedural aspect of the presumption of innocence, and provide other necessary fair trial rights.

ii. Taints the opinion of the fact-finder

Another concern regarding public authorities making statements of guilt absent a conviction is that the statement might taint the fact-finder's opinion of the case before trial. This is more of an issue when the fact-finder is a jury, but judges are not immune to influence. When the fact-finder is a lay jury, the fear that the jury members' opinions will be tainted by negative statements made by public authorities stems from the fact that juries lack training and therefore may not be capable of separating statements made outside of the courtroom from the evidence presented during trial.[80] It has however, been found that it may be possible for a judge to correct any persuasive effect an out-of-court statement may have on the jury.[81] This suggests that there may be instances in which a judge can able to provide instruction to a lay jury in order to help ensure that the jury is only considering evidence presented at trial when reaching its decision. In turn, this implies that the particular circumstances of the statement in relation to the case are important in determining whether a jury can ignore out-of-court statements that implicate the guilt of the accused.

Unlike juries, judges have specialised training in how to evaluate evidence and to disregard out-of-court statements when reaching their decisions.[82] The International Criminal Tribunal for Rwanda found in *Munyagishari v the Prosecutor* that this is even true of national judges who have been exposed to public comments adverse to the accused who were transferred from the jurisdiction of the Tribunal back to the jurisdiction of the Rwandan domestic criminal courts.[83] In these cases, senior Rwandan officials, including the President of Rwanda and the Rwandan media, made

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[80] Nowak (n 26) 254, para 36.
[81] *Noye v United Kingdom* App No 4491/02 (ECtHR, 21 January 2003). Cf *Pullicino v Malta* App No 45441/99 (ECtHR, 15 June 2000); *Mustafa (Abu Hamza) v United Kingdom* App No 31411/07 (ECtHR, 18 January 2011).
[82] *Munyagishari v the Prosecutor* (Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals Against the Decision on Referral under Rule 11bis) ICTR-05-89-AR11bis, A Ch (3 May 2013) para 56; *Prosecutor v Hategekimana* (Judgement and Sentence) ICTR-00-55B-T, T Ch II (6 December 2010), para 50, 54; Nowak (n 26) 254, para 36.
[83] *Prosecutor v Munyagishari* (Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda) ICTR-05-89-AR11bis, Ref Ch (6 June 2012).

public comments that may have violated the presumption of innocence.[84] Notably, in the *Uwinkindi* case, the Tribunal found that Uwinkindi was previously found guilty in a Gacaca Court, his sentence and conviction were announced in public in Rwanda and placed on display in public for one month, and then, once the accused was arrested, a Rwandan pastor expressed his opinion that '[a]ll the people that feature on the International Criminal Tribunal for Rwanda arrest warrant are important enough…. Jean-Bosco Uwinkindi would be a big catch.'[85] The International Criminal Tribunal for Rwanda held that the case could transfer from the Tribunal to the domestic court in Rwanda because these activities would not have tainted the fact-finder's opinion of the case as they have specialised training.[86] The Tribunal further found that domestic Rwandan judges were capable of separating these statements from evidence presented in the courtroom as they were specially trained, are prohibited from making public comments regarding guilt or innocence before the end of trial, and are held to high ethical standards.[87] This is an interesting position for the Tribunal to hold. While it is true that judges have specialist training and that they should understand and uphold the rules of trial, a blanket statement about the ability of local judges to ignore public statements of guilt seems rather extreme especially in circumstances like Uwinkindi's. It would seem that whether a judge could ignore outside statements would depend on both the individual judge and the context in which the statements were made.

Whether an out-of-court statement would affect the fact-finder's opinion could be a matter of what kind of fact-finder is used within the particular jurisdiction. It seems that there is a general idea that juries are more susceptible to negative statements about the accused than judges. When the statement is from a public authority, the weight of the statement might be increased in the mind of a lay juror because public authorities are understood to have some standing in government. Judges however, are seen as less likely to be influenced by statements of guilt by public authorities. This is attributed to their specialist training. It is however, hard to imagine that the training would ensure that all judges are immune to statements of guilt under all circumstances.

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[84] Ibid para 50; For an example of when such comments do not violate the presumption of innocence see *Uwinkindi* (n 66) para 26.
[85] *Uwinkindi* (n 66) para 25.
[86] Ibid.
[87] *Munyagishari* (n 83).

iii. May cause the public to believe the accused is guilty

When a public authority makes a statement that an accused person is guilty it may affect public opinion about the accused individual or the criminal justice process. This differs from concerns that a statement will taint the opinion of potential jury members, and has more to do with affecting the public's relationship with the criminal justice system in a general sense. While this is a less cited reason to avoid public statements of guilt, it has interesting implications for the rule of law.

The European Court of Human Rights has held that public statements of guilt can encourage the general public to believe that the accused person is guilty of a crime.[88] Interestingly, in *Allenet de Ribemont v France* this was stated as the first reason why public authorities should avoid making declarations of guilt although there is no explanation of how statements of guilt are meant to encourage the public to believe that the accused is guilty, nor is there explanation as to why that must be discouraged. [89] Looking to the explanations of other courts may provide some answers.

Trial Chamber I of the International Criminal Court dealt with a similar issue during the *Lubanga* case. While the *Lubanga* case was on going, an employee of the Complementary and Cooperation Division of the Prosecutor's Office made a remark during a press interview about the veracity of the evidence and witnesses and said 'Mr Lubanga is going away for a long time.'[90] This statement was found to be prejudicial to the accused and to the proceedings as it 'tend(s) to prejudice the public's understanding of the trial' and 'bring(s) the Court into disrepute.'[91] The Trial Chamber was not so much worried that the public will believe that the Prosecutor's witnesses are telling the truth, or that Lubanga was guilty of the accused crimes, but that such statements might reflect poorly on the Court itself. Trial Chamber I's concern seems well founded. If the public believes that the Prosecution evidence is accurate based on statements to the press, and the Court finds otherwise, then the legitimacy of the Court could be called into question. Additionally, if the Court is seen as making statements discussing the accuracy and truthfulness of witnesses and

[88] *Allenet de Ribemont* (n 4) para 41; *Garycki* (n 33) para 70; *Butkevičius* (n 49) para 53; *Ismoilov* (n 31) para 161; *Khuzhin* (n 48) para 93; *Mbarushimana* (n 25) paras 11, 17; *Pandy* (n 44) para 43; citing *YB* (n 4).
[89] *Allenet de Ribemont* (n 4) para 41.
[90] *Lubanga* (n 27) para 8.
[91] *Lubanga* (n 27).

intermediaries that the public knows are not true, then the Court will be seen as unreliable. Further, the legitimacy and fairness of the Court could be called into question.

The African Commission on Human Rights dealt with a different kind of concern arising from statements which cause the public to believe that the accused is guilty of the charged offences. At issue were public statements of guilt being purposefully used to convince the public that the accused was guilty in order for the government to fulfil a political aim. In Communications 222/98 and 229/99*, Law Office of Ghazi Suleiman v Sudan*, the Commission found that the government declared three individuals accused of terrorism guilty of the allegations in an effort to convince the public that a coup had been attempted.[92] In this case the government organised publicity around the case specifically to convince the public that the arrested individuals were responsible for an attempted coup. The statements of guilt were found to be a violation of the accuseds' presumption of innocence because they declared the guilt of the accused individuals without first obtaining a conviction against them. The statements were clearly meant to convince the public of the accuseds' guilt and responsibility for the alleged attempted coup. The reason that the government wanted the public to believe that the individuals were guilty was to further the government's political aim.

The practice of looking to the context of the statement and finding that relatively clear statements of guilt do not violate the presumption of innocence implies that courts and tribunals are more worried that there may have been some prejudgement of the case or that the fact-finder might be tainted, than with the manipulation of public opinion. While there is recognition that the presumption of innocence prevents statements of guilt that might convince the public that the accused are guilty of the alleged offences, there is very little explanation of how that works or why such statements should be avoided. One idea is that statements which encourage the public to unnecessarily stigmatise accused individuals or carry out informal punishments, should be avoided, but the case law does not support this notion. It appears that the apprehension is more about how it would undermine the justice system if public officials' statements act to convince the general public of the accused's guilt. Further, if the subsequent trial were to result in an outcome other

[92] *Law Office of Ghazi Suleiman v Sudan* (Decision) App Nos 222/98 and 229/99 (3 May 2003) para 54-56.

than guilt after the public had become convinced that the accused is guilty it could also undermine the general trust in the rule of law and legitimacy of the criminal justice system. Finally, there seems to be some concern that the government could make public statements of guilt to further political aims. Instances like this may be rare, but if successful, can lower the trust that the public has in government and justice institutions. Statements of guilt by public authorities could have the affect of making the public distrust the courts and the criminal justice system. If they have made up their mind about the case based on a statement of the government or other public official and then the outcome is the opposite, the public may feel that the criminal justice system is faulty or not reliable. This undermines the trust in criminal procedure and the rule of law.

iv. treats the accused as guilty

The fourth and least cited reason that public authorities' statements of guilt can violate the presumption of innocence is because the statements treat the accused as guilty in the absence of a conviction.[93] This is a different issue than actually treating people as guilty, which will be discussed below. Here, the statements themselves imply some guilty or punishing treatment toward a person who has not been convicted of an offence. As was stated in *Krause v Switzerland*, '[i]t is a fundamental principle embodied in this Article which protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court. Article 6(2), therefore, may be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so.'[94] The European Court of Human Rights has linked statements of guilt made by public authorities with treating the accused as if they have been convicted although it failed to explain how a statement could treat a person as if they are guilty. [95]

In a way, any statement of guilt treats an accused person as if they are guilty. This is because public authorities are not meant to refer to people as guilty unless they have actually been convicted of a crime, thus, even referring to someone as guilty treats that person as if they are guilty because the statement gives the accused the

[93] *Pandy* (n 44) para 43; *Krause* (n 3); *Minelli* (n 31) para 38.
[94] *Krause* (n 3).
[95] *Minelli* (n 31) para 38.

label of 'guilty,' which is reserved for those who have been found legally guilty. The European Court of Human Rights has found a connection between statements of guilt and the treatment of individuals, however this reason that statements of guilt by public authorities will violate the presumption of innocence is not particularly convincing. It is difficult to see how the statements themselves treat the accused as if they are guilty rather than call for that type of treatment. This is rarely cited as a reason for how a public statement of guilt has violated the presumption of innocence.

4. Public statements of guilt and freedom of expression

Public authorities have a right to freedom of expression which is curtailed by the prohibition on public statements of guilt. Aside from limiting freedom of expression, imposing such a limitation is particularly an issue because it calls into question whether public authorities who have other duties related to the criminal justice system are able to carry out those duties. This section will discuss these issues with a particular focus on whether prosecutors can refer to the accused as guilty in the courtroom, whether public authorities can keep the public informed of on-going trials and investigations, and whether victims' advocates can assist victims before there is a finding of guilt.

Prosecutors are public authorities and can violate the presumption of innocence by making public statements regarding the guilt of the accused.[96] In some jurisdictions however, it is a natural part of criminal procedure for the prosecutor to argue to the fact-finder that the defendant is guilty at trial.[97] The prosecutor may even be allowed to specifically state that the defendant is guilty of the charges within the context of the courtroom setting. In *Daktaras v Lithuania* for example, the prosecutor stated in court that 'it has been established from the evidence collected in the course of the pre-trial investigation that the applicant is guilty of these crimes.'[98] The Court found that the prosecution could infringe on the presumption of innocence through statements made in court, particularly when the prosecution has a quasi-judicial role, however a violation was not found in *Daktaras*.[99] The European Court determined that whether the prosecutor's statements violated or infringed the presumption of

[96] See for example *Gaddafi* (n 4); *Daktaras* (n 25) para 13.
[97] See for example, *Gaddafi* (n 4) para 25; *Daktaras* (n 25); *Hentrich v France* (1994) Series A No 296-A; Stavros (n 31) 49.
[98] *Daktaras* (n 25) para 13.
[99] Ibid para 43; Trechsel (n 1) 179.

innocence would be determined from the particular context from which the statement was made.[100] A public out-of-court statement of guilt by the prosecutor is far more likely to violate the presumption of innocence than one made in a court setting. Courtroom statements are more expected from the prosecutor because of their role.[101] Despite the in court statements of guilt by the Prosecutor, the fact-finder understands that this is not a command to find guilt, but that it is the argument of the prosecutor. The fact-finder is free to engage in their role of evaluating the evidence to determine whether guilt will be found.

The prohibition on public statements about the guilt of an accused does not mean that public authorities cannot inform the public of on-going investigations or prosecutions. The right to impart information, as a part of the right to freedom of expression, must be weighed against the right to a fair trial.[102] Indeed, there is a great public interest in knowing what kinds of investigations are being conducted.[103] This may involve publishing the suspect's photograph, or stating that someone is suspected, that a person has been arrested or that they have confessed.[104] However when making these types of statements public officials must make clear that the named suspects are not considered guilty of the crimes alleged.[105] Thus, public officials can talk about specific incidents and victims of crime and what caused their victimhood, as a person's guilt does not need to be determined to accept that someone has been victimised. Of course, public authorities would need to be careful when discussing a specific incident to ensure that a particular person's guilt is not implicated.

Some public authorities have duties that require them to make public statements about an alleged crime or the suspicions they have about a particular person's involvement in a crime. For example, police or other investigators may have to make a public appeal for evidence or witnesses to a crime, prosecutors may comment about on-going cases or investigations, and other public officials may weigh

[100] *Daktaras* (n 25) para 43.
[101] Trechsel (n 1) 179.
[102] *Gaddafi* (n 4) paras 27-29; *Allenet de Ribemont* (n 4) para 38; *Garycki* (n 33); *YB* (n 4) para 47.
[103] Trechsel (n 1) 177.
[104] *YB* (n 4) (photographs permitted); *Krause* (n 3); *Mbarushimana* (n 25) para 11.
[105] *Allenet de Ribemont* (n 4) para 38; *X v Netherlands* (n 40); Trechsel (n 1) 177; Stavros (n 31) 68-69.

in to notify the public about the particular events for safety or other reasons.[106] Further, comment is appropriate in cases about serious crimes or crimes involving the government as it is in the public's interest to know about these types of cases.[107] Public authorities may notify the public about on-going criminal investigations and trials; however, when doing so they must respect and uphold the presumption of innocence.[108] In practice this means that while those officials can report on suspicions, arrests, and confessions, they cannot comment directly on anyone's guilt unless a court has made a finding of guilt.[109] The European Court of Human Rights held in *Allenet de Ribemont v France* that a senior police office calling the accused an 'instigator' of a crime was a declaration of the accused's guilt that both 'encouraged the public to believe him guilty' and 'prejudged the assessment of the facts by the competent judicial authority'.[110] Less definitive statements that are couched more in opinion, such as having 'no doubt' that an individual was involved in a particular criminal act, may also raise concerns about prejudgment.[111]

Public authorities that work with or on behalf of victims of crimes can be caught between their duties to the victims and their obligation to uphold the presumption of innocence of the alleged perpetrator of those same crimes. This issue has been raised at the International Criminal Court. At times the Trust Fund for Victims has sought approval for projects designed to benefit victims of alleged crimes that are to be carried out before the completion of the trial of the accused person being tried for those particular crimes.[112] Per Regulation 50 of the Regulations of the Trust

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[106] See eg *YB* (n 4) para 42.
[107] Grabenwarter (n 44) 164, para 159.
[108] *J v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 275 (27 November 2013); *Krause* (n 3); *Fatullayev* (n 31) para 159; *Allenet de Ribemont* (n 4) para 38; *Garycki* (n 33) para 69; Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White and Ovey the European Convention on Human Rights* (6th edn, OUP 2014) 287; Schabas and McDermott (n 3) 1645-6, para 27.
[109] *Allenet de Ribemont* (n 4); *Borovsky v Slovakia* App No 24528/02 (ECtHR, 2 June 2009); *Ismoilov* (n 31) para 161; *Butkevičius* (n 49) para 53; Schabas and McDermott (n 3) 1645-6, para 27.
[110] *Allenet de Ribemont* (n 4) paras 37, 41.
[111] *Butkevičius* (n 49).
[112] *Prosecutor v Kony et al.* (Decision on Notification of the Trust Fund for Victims and on its Request for Leave to Respond to OPCD's Observations on the Notification) ICC-02/04-01/05, PT Ch II (19 March 2008) 4; *Situation in the Democratic Republic of the Congo* (Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund) ICC-01/04, PT Ch I (11 April 2008) 9, 11; *Situation in the Central African Republic* (Decision on the "Notification by the Board of Directors in accordance with Regulation 50(a) of the regulations of the Trust

Fund for Victims, the Court left this issue open by stating that it is possible for projects of the Trust Fund for Victims to violate the presumption of innocence.[113] When seeking to conduct a project before the end of trial, the Trust Fund must file a notice with the Court, which then has forty-five days in which to grant approval for the project.[114] Projects are approved once the Court determines that there are victims of an incident, who should benefit from the Trust Fund's projects, without ascribing responsibility for the situation that caused the victimisation. This formulation highlights some tension between victims' services and the presumption of innocence. Within the international context, this practice respects victims by acknowledging that something happened to them, while respecting the presumption of innocence of those accused by not ascribing responsibility for the victimisation to a particular person before trial. The focus is on outreach and assistance rather than placing blame on individuals. This demonstrates an understanding that people can be victimised regardless of whether someone is held legally responsible for the actions that caused their suffering. Similar victim outreach programmes can exist within national jurisdictions and not violate the presumption of innocence.

While public authorities have duties that require them to discuss cases with the public or assist victims, they still must refrain from making statements of guilt about the accused. One narrow exception to this is when the prosecutor is carrying out his or her role in trial. This is an exception because it is seen as part of the unique role of the prosecutor to argue during trial that the accused is guilty, and doing so is not seen as prejudging the facts of the case because the fact-finder is free to appropriately weigh the evidence and statements. While the prohibition on making statements of guilt against suspected or accused people is a limit on public authorities' freedom of expression the limit is quite narrow. The statements that are to be avoided must be fairly specific in their content and the particular context will be taken into account. The presumption of innocence will not prevent investigators, prosecutors or victims' advocates from being able to carry out their other professional duties.

Out-of-court statements that imply the guilt of a person who has not been convicted can violate the presumption of innocence. Courts however, appear to be

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Fund for Victims to undertake activities in the Central African Republic") ICC-01/05, PT Ch II (23 October 2012) para 10; See also Schabas, *ICC Commentary* (n 10) 1009.

[113] International Criminal Court, 'ICC Regulation for Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3Annex art 50.

[114] Ibid.

reluctant to find such statements violate the presumption of innocence. When determining whether a violation has occurred, a court will look at the full context of the statement and decide whether it was an explicit statement of guilt. If a more innocuous meaning can be ascribed to the statement it is likely that the court will accept this meaning and not find a violation. There are several reasons why statements of guilt by public authorities violate the presumption of innocence. The most convincing arguments are that these statements show prejudgement on the part of the public authority. This is directly related to the first aspect of the presumption of innocence but extends beyond the fact-finder. Public statements of guilt may also taint the fact-finder's opinion, cause the public to see the accused as guilty, or actually treat the accused as guilty. In addition to prejudging the facts, statements of guilt by public authorities can undermine the rule of law and the public trust in the criminal process.

C. The Media must avoid 'undermining the presumption of innocence'

While a single statement of guilt can violate the presumption of innocence, excessive media coverage of a particular case can also be a cause for alarm. According to the United Nations Human Rights Committee, '[t]he media should avoid news coverage undermining the presumption of innocence.'[115] Excessive negative media coverage may violate the presumption of innocence because it may affect the fact-finder's opinion of the case. The media has an important function in informing the public about crimes, investigations and trials, and yet the need to disseminate news cannot overshadow an individual's presumption of innocence.

When discussing whether the media has violated or interfered with the presumption of innocence it is important to consider whether the news organisation in question has free editorial control over its content or whether the news it publishes is dictated by the relevant government. If the government controls the content of the media then the news coverage would be more akin to a statement made by a public authority and should be analysed as such when determining whether the presumption of innocence has been violated. However, when the media largely determines its own content it enjoys the right to freedom of expression and requires a different analysis of the impact its statements can have on the presumption of innocence.

[115] General Comment 32 (n 24); See William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 298; Klamberg (n 1) 119.

The media has a complex role with regard to preserving the presumption of innocence for accused people and informing the public about crime and criminal law issues. The media has a responsibility to impart information and the public has a right to receive such information.[116] It is in the public's interest for the media to cover criminal law issues so that the public can monitor the government's investigations, media coverage of investigations can provide transparency which could help prevent corruption in criminal investigations and trials, and the public can be informed about crime for public safety reasons. Further, the media's role in reporting on criminal activity or criminal procedure can take several forms. Alternatively, the coverage might quote or paraphrase statements about the accused made by others, in which case it is not necessarily the media's fault if the person making the statement infringes upon the accused's right to the presumption of innocence. The coverage could include commentary or editorials by the media itself that have a much more direct connection to the media's responsibility to uphold the presumption of innocence. While the media has a responsibility to keep the public informed and a right to freedom of expression, this must be weighed against an accused person's right to a fair trial.[117]

It is possible that the extent of media coverage about a particular incident could interfere with an accused person's presumption of innocence, even in instances where any one particular statement would not interfere with the presumption of innocence. Extensive media coverage may be 'likely to prejudice, whether intentional or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts and in the administration of criminal justice.'[118] One way media coverage might deprive the accused of a fair trial is if that coverage taints the fact-finder's opinion of the case. Much like with public authorities' statements of guilt, this is a greater concern if the fact-finder is a jury rather than a judge.[119] Media coverage could undermine public confidence in the courts and criminal justice by portraying bad investigation techniques, allowing people to

[116] *Pullicino* (n 81).
[117] Treaty Body Monitor, 'Human Rights Committee, 90th Session 'Revised General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights'' (9 August 2007), as reported in Treaty Body Monitor, Human Rights Monitor Series <olddoc.ishr.ch/hrm/tmb/treaty/hrc/reports/hrc_90/hrc_90_gc_32.pdf> accessed 16 April 2018, 6; *Włoch v Poland* App No 27785/95 (ECtHR, 30 March 2000); *Priebke v Italy* App No 48799/99 (ECtHR 5 April 2001); *Pullicino* (n 81).
[118] *Pullicino* (n 81).
[119] *Mustafa (Abu Hamza)* (n 81); *Włoch* (n 117); *Pullicino* (n 81).

speculate about what the various parties to the matter might do, or portraying one side as particularly sympathetic over another. For example, if the victim is portrayed as being very vulnerable or sympathetic, the public might call for greater action to be taken with regard to the accused, possibly resulting in an outcry for stiffer penalties or a faster trial. Additionally, if the outcome of trial is the opposite of what everyone believes should happen based on the media's portrayal of the case, then the public could believe that the criminal justice system is flawed or corrupt. This is a particular risk in cases of terrorism or other sensational crimes.[120]

In order to determine how much media coverage is required to interfere with an accused's presumption of innocence the European Court of Human Rights has suggested that an interference or violation of the presumption of innocence may result from a 'virulent press campaign'.[121] A press campaign is virulent when it is so influential that the individual's fears of the fact-finder being biased against him or her are 'objectively justified or legitimate doubts as to the impartiality of the court' as a result of the publicity.[122] This test is objective, meaning that it requires more than the accused's fear of bias, but that those fears are likely justified. It should be noted however, that cases that are in the public's interest are likely to receive significant media coverage and negative publicity should be expected.[123] While negative publicity should be anticipated in some cases, the European Court has cautioned that it can pose a threat to the presumption of innocence because of the possible negative influence it might have on the minds of the fact-finders. This is particularly true when the fact-finder is a jury. The Court has stressed that negative publicity about a trial is especially dangerous in jury trials because it can influence public opinion, and thus the minds of potential jurors, against the accused.[124] Judges however, are not immune to the affects of negative publicity regarding a case. The Court has also expressed concern that negative press could affect the presumption of innocence in trials where a judge is acting as the fact-finder, but sees this as being of more limited concern

[120] *Mustafa (Abu Hamza)* (n 81).
[121] Harris, O'Boyle, Bates, Buckley (n 31) 466-7.
[122] *Noye* (n 81); *Włoch* (n 117); *Daktaras* (n 25); *Priebke* (n 117); *Mustafa (Abu Hamza)* (n 81); *Law Office of Ghazi Suleiman* (n 92).
[123] *Mustafa (Abu Hamza)* (n 81); E.g. *Papon v France* (No 2) App No 54210/00 hudoc (ECtHR, 25 July 2002). See also *Sunday Times v United Kingdom* (No 1) (1979) Series A no 30; *Viorel Burzo* (n 4) para 160; *Akay v Turkey* App No 58539/00 (ECtHR, 24 October 2006).
[124] *Priebke* (n 117); *Kuzmin* (n 26) para 62.; *Viorel Burzo* (n 4) para 166; B *Baragiola v Switzerland* (1993) 75 DR 76, 76, 96; *Berns and Ewert v Luxembourg* (1991) 68 DR 137, 137, 147-148.

since judges should receive training to help them disregard external influences when reaching their decisions.[125]

In cases with a large amount of publicity, a burden appears to be on the government to ensure that the press does not infringe on the accused's fair trial rights, including the right to the presumption of innocence.[126] Where there have been violations of the presumption of innocence because of negative press campaigns, the government of the State in question, rather than the media, is held responsible. This is, at least in part, a result of the fact that the European Convention on Human Rights only has authority over member states and cannot make findings against private individuals or groups.[127] Although the government bears some responsibility for curtailing excessive media coverage, at the national level, there may be room for members of the media to also be held responsible for press campaigns which affect the presumption of innocence.

The International Criminal Court has also recognized the risk of prejudice against individuals who fall victim to too much pre-trial publicity. In the *Kenya Situation*, Pre-Trial Chamber II acknowledged that releasing the accused's name to the public before the issuance of a formal indictment may unduly expose the accused to negative publicity.[128] While the decision to release a suspect's name is left to the discretion of the Prosecutor's Office, the Court held that the Prosecutor should err on the side of keeping suspects' names confidential until the issuance of a formal indictment in order to avoid unnecessarily exposing suspects to the media.[129] This is most important during the situation phase at the International Criminal Court. Suspects identified during the early stages of an investigation may not ever be formally charged with crimes. To identify suspects publically before charging them might needlessly expose them to stigmatisation and prejudice.

While excessive publicity should be avoided, it may be possible to remedy the taint of an adverse press campaign against an accused individual. The impact of

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[125] *Viorel Burzo* (n 4) para 166; But see *Craxi v Italy* App No 34896/97 (ECtHR, 5 December 2002) para 104; *Mircea v Romania* App No 41250/02 (ECtHR, 29 March 2007) para 75 (judges should be specially trained to avoid being influenced by outside sources).
[126] Harris, O'Boyle, Bates, Buckley (n 31) 428-9.
[127] ECHR art 7; Trechsel (n 1) 177; *Radio France and others v France* ECHR 2004-II 119 para 24; van Dijk and Viering (n 26) 629.
[128] *Situation in Kenya* (Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)") ICC-01/09, PT Ch II (11 February 2011) para 22.
[129] McDermott (n 65) 42; *Situation in Kenya* (n 128) para 22.

negative press on jurors may be overcome either through judicial instructions or when a sufficient amount of time has passed between when the press coverage occurred and when the case is tried.[130] Jury instructions can be used to overcome prejudice generated by a media campaign that does not rise to the level of the objective test of whether there was a virulent press campaign.[131] Once sufficient time has passed, it is believed that the prejudice that the media attention may have caused will no longer be in the forefront of the public's mind. The Human Rights Committee identified an additional way to overcome media prejudice. In a case involving Trinidad and Tobago, 'widespread and continuous' pre-trial publicity that the accused was a 'notorious drug baron' was remedied by changing the rules regarding jury selection.[132] Specifically the trial court was able to avoid the taint that negative publicity would otherwise have caused by amending the Jury Act to allow for an unlimited number of potential jurors to help ensure finding people who were not negatively tainted by the publicity to be members of the jury, and by amending the Evidence Act to permit the deposition of deceased witnesses to be received as evidence at trial.[133] While this was found to remedy the situation, it is rather extreme in that it involved amendment to several legal provisions. This may not be possible in every case of excessive publicity.

The Human Rights Committee makes it clear that the media should avoid excessive press coverage of alleged crimes. Media coverage can violate or infringe on the accused's right to the presumption of innocence. Too much pre-trial publicity can lead to the fact-finder's opinion being unduly tainted against the accused. Further, media campaigns can cause members of the public to see, and then treat, suspects as if they were guilty. This however, can be avoided. The media can regulate the amount and severity of the coverage portrayed about any particular crime. The government may be able to step in to stop the media when the coverage gets close to being excessive. Further, it is possible that any taint or stigmatisation that the publicity caused could remedied by time, judicial instruction, or a widening of the jury pool.

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[130] *Noye* (n 81); Cf *Pullicino* (n 81); *Mustafa (Abu Hamza)* (n 81); *Włoch* (n 117); *GCP* (n 26); *Viorel Burzo* (n 4) para 166; *Mircea* (n 125) para 74.
[131] *Noye* (n 81).
[132] *Dole Chadee et al. v Trinidad and Tobago* Comm No 813/1998 (29 July 1998) para 3.1
[133] Ibid; see also discussion in David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001) 114; Trechsel (n 1) 177.

D. People should not be treated as guilty without a conviction

Related to the requirement that the accused should not be referred to as guilty in public is the obligation not to treat people who have not been convicted of a crime in the same manner as someone who has been found guilty. Individuals cannot be treated as if they are guilty unless they have been convicted.[134] This includes avoiding both pre-punishment and making the individual physically appear guilty through the wearing of prison issued clothing, restraints or any other alterations to their physical appearance that are reserved for those who have been convicted.[135] The purpose of this aspect of the presumption of innocence is to prevent individuals from being punished for crimes they did not commit and to prevent them from being convicted based on their appearance.

The Human Rights Committee, in General Comment 13 and General Comment 32, stated that the presumption of innocence 'implies a right to be treated in accordance with this principle [of not presuming guilt before the charge has been proven beyond reasonable doubt]'.[136] Further, the European Commission of Human Rights suggests that '[i]t is a fundamental principle embodied in [the presumption of innocence] which protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court.'[137] This demonstrates that the presumption of innocence can exist outside of the trial context as it offers a blanket prohibition on treating individuals as if they are guilty without a conviction, without a limitation as to where that treatment might occur.

It is clear that punishment without a conviction, and pre-punishment, that is, punishment in anticipation of a conviction, violates both the procedural and non-procedural aspects of the presumption of innocence. This is because punishment without a conviction circumvents the criminal justice process. If individuals could be punished without evidence, standards of proof, and little to no protections there would be no need for trials or other criminal procedure. However, because the presumption

[134] *Allen* (n 26); Schwikkard (n 1) 403; Trechsel, (n 1) 156; Kitai (n 1) 272; Klamberg (n 1) 119.
[135] *Minelli* (n 31); *Adolf* (n 44); *Allen* (n 26) para 94; *Krause* (n 3)*; Jiga v Romania* App No 14352/04 (ECtHR, 16 March 2010) paras 101 et seq; *Samoilă and Cionca v Romania* App No 33065/03 (ECtHR, 4 March 2008) paras 99 et seq. (accused appearing in public in prison clothes a violation of the presumption of innocence).
[136] General Comment 13 (n 2) para 7; General Comment 32 (n 24) para 30.
[137] *Krause* (n 3); Schabas and McDermott (n 3) 1645-1646, para 27.

of innocence is a legal presumption, then it is part of the mechanism that helps determine when people may be subjected to punishment or punishment-like treatment.[138] It follows that if the procedural aspect prevents people from being punished without a conviction, the non-procedural aspect prevents people from being punished or treated as if they are being criminally punished in all other areas of life. Otherwise, the first aspect would not be needed at trial and criminal procedure would not be necessary to punish or treat people as if they are guilty.

That the presumption of innocence is concerned with not unjustly inflicting criminal punishment on individuals, or otherwise treating individuals as if they are guilty of a crime, does not mean that the government cannot take action against individuals during criminal investigations.[139] This worry that the presumption of innocence restricts legitimate government action is a frequent criticism of the presumption of innocence as a broad human right.[140] Searching individuals or their property, restraining individuals, and other investigatory activities are generally not forms of punishment.[141] These activities can also encompass procedures that are more invasive to the person, such as breathalyser tests and blood and urine sampling.[142] The presumption of innocence is concerned with limiting those investigatory techniques that could suggest that the accused is guilty, act as a form of pre-punishment, or that are not 'strictly necessary in order to conduct the investigation and trial.'[143] Conducting physical searches, requiring the wearing of handcuffs, pre-trial incarceration and restricting contact with certain individuals under particular circumstances are all commonly accepted ways of treating an accused prior to conviction. However, these methods are not acceptable from a presumption of innocence standpoint unless particular investigatory tests have been met because these sorts of limitations have the tendency to identify the accused as different from non-accused people. While these activities may negatively affect the people being subject to these investigatory activities, such tests are furthering investigation and are

[138] The presumption of innocence as a legal presumption is the topic of the previous chapter.
[139] Stavros (n 31) 50-51; Kitai (n 1) 291; See *Lutz* (n 33); *Englert v Germany* (1987) Series A no 123; *Deweer* (n 31).
[140] See for example discussion in Kitai (n 1) 291, 291.
[141] *X v Austria* (n 54) (seizure of property and arrest as security for costs); Harris, O'Boyle, Bates, Buckley (n 31) 460-461.
[142] *Tirado Ortiz and Lozano Martin v Spain* ECHR 1999-V 553 (blood, breath urine); *X v Germany* (1962) 5 YB 192 (medical examinations); Harris, O'Boyle, Bates, Buckley (n 31) 460-461.
[143] Stavros (n 31) 50-51; Kitai (n 1) 291, 292.

generally not retributive or punishing in nature and a finding of guilt is necessarily not required to engage in these activities. Once an individual is found guilty or not guilty they will not be subject to investigative techniques, thus, these techniques cannot be considered punishment or punishment-like. Although they may feel like punishment to the individuals being investigated and they may cause some damage to the individual's reputation in the community, they are not incompatible with the non-procedural aspect of the presumption of innocence. It is important, however, that these pre-determination activities do not become punishment, for example impermissibly detaining an individual without proper justification, because that would violate the presumption of innocence.

The United Nations Human Rights Committee has stated that because of the presumption of innocence, '[d]efendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.'[144] Before conviction a suspect should not be made to appear guilty because it could cause the fact-finder and others to believe that they are guilty. Further, during trial it is important that the individual not appear to be guilty. An accused forced to wear prison clothes or remain visibly shackled and/or caged in the courtroom implies that he or she cannot be trusted and that the authorities believe them to be guilty despite not being convicted.[145] This is particularly important during jury trials as lay fact-finders may not know why the accused is being detained, or that many innocent people are in fact held in pre-determination detention.

That the presumption of innocence includes not causing the accused to appear to be guilty is controversial, but is supported in practice. Accused people and defendants at the international and internationalised criminal courts and tribunals fair better than those in national jurisdictions as they regularly appear in court without shackles, at a table in the defence section of the courtroom and in non-prison clothing. The European Court of Human Rights has held that the accused may be manacled in court so long as 'this does not create the wrong impression in the mind of the jurors or

[144] General Comment 32 (n 24) para 30.
[145] *Karimov and Nursatov v Tajikistan* Comm Nos 1108/2002 and 1121/2002 (27 March 2007); *Pinchuk v Belarus* Comm No 2165/2012 (24 October 2014); *Grishkovtsov v Belarus* Comm No 2013/2010 (1 April 2015); *Burdyko v Belarus* Comm No 2017/2010 (15 July 2015); *Selyun v Belarus* Comm No 2298/2013 (6 November 2015); *Kozulina v Belarus* Comm No 1773/2008 (21 October 2014).

hamper his defence.'[146] Further, while the practice seems to be falling out of favour, the European Court allows the use of certain docks and cages for defendants so long as they are able to participate in their trial and communicate with their lawyer.[147] Accused people cannot be presented in court in prison clothing that is specific to convicted persons, but if it is non-specific, or is specific to accused prisoners, it may be permitted.[148] The European Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings intends to strengthen these rules in favour of the accused by encouraging countries to limit the use of cages and shackles to instances when they are necessary for either security or to prevent the accused from absconding.[149] The Directive further indicates that suspects and accused individuals should not be presented in public in prison clothing 'where feasible'.[150] While on its face there are clearly many scenarios in which non-convicted people can still be presented in public in a manner that conveys guilt, the Directive confirms that this treatment is connected to the presumption of innocence and that states should make a better effort to avoid having non-convicted people physically appear to be guilty.

The Inter-American Court of Human Rights has held that physically portraying individuals as guilty before trial in public or the media violates the presumption of innocence.[151] The Inter-American Court has decided this issue in several different cases involving accusations of treason. In these cases it was stated that the accused was a perpetrator of treason and the accused was 'paraded before the media, dressed in defamatory clothing' before the commencement of trial.[152] The

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[146] Stavros (n 31) 49-50; *X v Austria* (1970) 36 CD 79; *Campbell and Fell v United Kingdom* (1984) Series A no 80.

[147] See for example Svinarenko and Slyadnev v Russia, App Nos 32541/08, 43441/08 (ECtHR, 17 July 2014); For interesting studies on how the dock is perceived by jurors see Meredith Rossner, David Tait, Blake McKimmie, Rick Sarre, 'The Dock on Trial: Courtroom Design and the Presumption of Innocence' (September 2017) 44 (3) JL & Society 317.

[148] *Samoilā and Cionca* (n 135).

[149] Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5, para 20.

[150] Ibid para 21.

[151] See e.g.: *Cantoral-Benavides v Peru* (Merits) Inter-American Court of Human Rights Series C No 69 (18 August 2000); *Lori Berenson Mejía v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 119 (2 July 2004).

[152] *Cantoral Beavides* (n 151); *Lori Berenson Mejía* (n 151), paras 158, 161 (in this decision the Inter-American Court relied on the European Court's decision in *Allenet de Ribemont* (n 4).

Court focused on the government's portrayal of the accused in the media in its entirety in holding that the public would impermissibly believe that the suspects were guilty despite the fact that no conviction had been entered against them.[153] These cases are rather extreme examples, but they stand for the idea that there is a fear that the physical appearance of the accused could affect the attitude of the fact-finder and could affect the treatment of the concerned individuals within their community.

The Inter-American Commission has also found that the presumption of innocence is violated when the media presents an individual as being guilty of the crimes alleged. The Commission indicated in a 1983 Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin that publically broadcasting the accused's confessions before a final verdict was reached led the public to prejudge the defendants' guilt.[154] Further, in its 1981 Nicaragua Report, the Commission established that publishing photographs of the accused on every page of the newspaper with accompanying statements describing them as 'henchmen', and inviting the public to do justice, violated the rights of the accused because it would cause the public to prejudge the people portrayed as guilty and may taint witnesses.[155] This goes beyond the regular, and permissible, investigatory technique of publishing photographs of suspects or accused people and asking for help, as the papers clearly intended for people to be thought of as guilty.[156]

People who have not been convicted of a crime cannot be treated as if they are guilty because this will violate the presumption of innocence. This includes refraining from punishment, pre-punishment, and physically presenting the accused in a way that communicates their guilt before a conviction. Investigatory techniques should be sufficiently different from punishment and should be used only when required standards are met. Restrictions of the accused that are necessary for security purposes, such as the use of shackles or a prison uniform in court, may be permitted but should be used only when necessary. Finally, exhibiting an accused person as guilty in the media will violate the presumption of innocence because it tends to imply a conviction and encourages the public to treat the individual as guilty.

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[153] *Cantoral Beavides* (n 151); *Lori Berenson Mejía* (n 151).
[154] Organization of American States, Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights Segment of the Nicaraguan Population of Miskito Origin' (29 November 1983) OEA/Ser.L./V.II.62, doc. 10 rev. 3 (1983); Stavros (n 31)70.
[155] Organization of American States (n 154); Stavros (n 31) 70.
[156] *YB* (n 4); Schwikkard (n 1) 405; Trechsel (n 1).

E. The presumption of innocence and post court proceedings

The preceding rules regarding the presumption of innocence dictate how a person may be treated regarding criminal charges while they are suspected. This however, raises questions of what happens regarding the non-procedural aspect of the presumption of innocence once the criminal case against an individual ends. The case's outcome determines whether the second aspect of the presumption of innocence has been overcome for the particular accusation.

Whether there is a final determination on the charges, and what that determination is, controls when this aspect of the presumption of innocence ends. Once there is a conviction, there can be public statements of guilt made against the accused with regard to those charges.[157] This is because they have been found guilty to the required standard of proof and their guilt is no longer in question. Further the presumption of innocence is inapplicable during sentencing proceedings because at that point the guilt of the accused has already been established.[158] Thus, after conviction, a person may be punished and treated in a manner consistent with his or her legal guilt. During an appeals process, public authorities can make statements of continued suspicion against the accused.[159] This is true even in circumstances when the appeal is against an acquittal.[160] This is because during the appeals process the outcome of the trial decision is not final; it may be changed or altered by a higher court.

If the accused is acquitted, public statements of guilt or even suspicion must not be made against the accused regarding the specific accusation.[161] This is due to a concern of undermining the court's authority and legitimacy. The European Commission on Human Rights has held that the judicial authority of criminal courts 'would be severely undermined if after an acquittal a suspicion could be maintained that the accused had committed the offences dealt with at the trial.'[162] An acquittal is

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[157] *Phillips v the United Kingdom* ECHR 2001-VII 29 para 35; *Garycki* (n 33) para 68.
[158] Böhmer (n 26) para 59.
[159] *Sekanina* (n 49) para 38.
[160] Ibid; X v Germany (n 142).
[161] *Sekanina* (n 49); *Del Latte v Netherlands* App No 44760/98 (ECtHR, 9 November 2004); *Geerings v the Netherlands* App No 30810/03 (ECtHR, 1 March 2007), para 49; Harris, O'Boyle, Bates, Buckley (n 31) 464-5. *Asan Rushiti v Austria* App No 28380/95 (ECtHR, 21 March 2000); *Paraponiaris v Greece* App No 42132/06 (ECtHR, 25 September 2008) para 32. See also, Trechsel (n 1) 156; Stavros (n 31) 49.
[162] *Sekanina* (n 49) para 48; *Hammern v Norway* App No 30287/96 (ECtHR, 11 February 2003) para 48; *O v Norway* ECHR 2003-II 69 para 40; *Zollman* (n 38).

a final determination of the charges which means that the accused person is, at least legally, not guilty. Thus, the person must be treated as not guilty and because of the final determination also can no longer be treated as a suspect.

In the event that a case is terminated against an accused or suspected person in any way other than conviction or acquittal, the presumption of innocence continues to provide protection from statements of guilt. If the case is discontinued before a final verdict of guilty or not guilty, the presumption of innocence remains intact and public statements that the accused person is guilty may not be made, even in other types of hearings that the accused person may have in relation to the incident that gave rise to the charges.[163] In this scenario however, it is possible to make public statements that the person is suspected of the alleged criminal activity so long as there is some continued state of suspicion.[164] If however, the accusations are terminated and the accused is no longer suspected of the crimes that were alleged against him or her, statements that imply that the formerly accused person is still under suspicion are not allowed.

Courts other than the criminal court that conducted the trial against an accused must respect the accused's presumption of innocence.[165] Courts other than criminal trial courts cannot make findings of guilt.[166] This is important in instances of simultaneous proceedings, and separate civil proceedings, which may stem from the same incident that gave rise to the criminal charges.[167] This is in part because the presumption of innocence prevents people from being treated as if they are guilty without first being convicted.[168] It is also because the criminal process is specialised and requires all of the fair trial safeguards.

The presumption of innocence may be relevant to subsequent procedures, however they must be linked with the criminal procedure at issue. At the European Court of Human Rights '[t]he subsequent procedure must however be linked with the issue of criminal responsibility in such a manner as to bring the proceedings within

[163] These types of hearings include claiming defence costs *Lutz* (n 33); compensation for detention *Sekanina* (n 49) para 39; wrongful prosecution *Grabchuk v Ukraine* App No 8599/02 (ECtHR, 21 September 2006); *Minelli* (n 31) para 37.
[164] *Lutz* (n 33); *Nölkenbockhoff v Germany* (1987) Series A no 123; *Minelli* (n 31) para 37; *Sekanina* (n 49) para 39.
[165] *X v Austria* (n 54) 227; *Sekanina* (n 49) para 36.
[166] *Zollman* (n 38); See eg: *Sekanina* (n 49) para 22; *Ringvold v Norway* ECHR 2003-II 117.
[167] *Sekanina* (n 49) para 37.
[168] Ibid.

the scope of article 6(2).'[169] This link can be created either by the topic of the subsequent case, such as compensation for detention, or by the language or reasoning used by the court that implies that the subsequent procedure is a consequence of the criminal procedure.[170]

The non-procedural aspect of the presumption of innocence has a wider application than the procedural aspect. While the procedural aspect applies only at trial and ends with a final determination of the charges, the non-procedural aspect applies beyond the trial setting. It clearly applies before trial, once someone is accused and also can apply after trial. If someone is acquitted or the charges are discontinued, the second aspect is still applicable. Further, in subsequent or parallel proceedings, the second aspect of the presumption of innocence must be respected.

F. Conclusion

While the relevance of the presumption of innocence outside the courtroom is controversial, in practice the presumption of innocence as a human right does extend beyond the trial setting. It must reach beyond the courtroom in order to preserve the in courtroom aspect of the presumption of innocence and the other fair trial rights.[171] It is contradictory to prevent punishment without a conviction at trial while also allowing such treatment before trial. If one could be punished or otherwise treated as if guilty without a trial there would be no need for criminal procedure.

The presumption of innocence as a human right protects individuals from stigmatization, pre-punishment, and other adverse outcomes without a conviction. However, it seems that courts are reluctant to find that out-of-court statements of guilt or negative press campaigns violate the presumption of innocence. The context of the statement or campaign appears particularly important in order to determine how the statement negatively impacted the individual concerned. This reluctance is particularly noticeable when the statement in question is politically, rather than legally motivated, or where the statement did not result in a significant miscarriage of justice.[172] Because of the balance between freedom of expression, the need to inform the public of crimes, and the presumption of innocence, those who have a closer

[169] *Allen* (n 26); *Zollman* (n 38).
[170] *Zollman* (n 38); See eg: *Sekanina* (n 49) para 22; *Ringvold* (n 166).
[171] Stavros (n 31) 50.
[172] Ibid 69-70.

involvement with the actual proceedings have a stronger duty than people who are more removed from the criminal process. For statements of guilt, the courts will take into account the context in which they were made and whether a more innocuous meaning can be ascribed to the statement.

Similar to statements of guilt, excessive media campaigns can violate or interfere with the presumption of innocence. While the press should not interfere with the presumption of innocence they also have duties to keep the public informed of criminal matters. Their right to provide information and right to freedom of expression must be taken into account when determining whether a press campaign violates or interferes with an individual's presumption of innocence. Courts also seem reluctant to find that a media campaign in fact violates a particular individual's presumption of innocence as it has been held that such negative publicity might be remedied by either the passage of time, an instruction to jurors, or finding a fact-finder who has not been tainted by the media coverage.

The non-procedural aspect of the presumption of innocence also prevents people from being treated as if they are guilty without a conviction. This includes pre-punishment, punishment, and physically presenting the accused as if they are guilty. These activities violate the presumption of innocence because they cause the public to believe that the individual is guilty, which can taint the fact-finder's opinion or cause the public to take negative actions against the accused. Further, these activities can bypass the criminal justice process, allowing for punishment to occur without a conviction.

The non-procedural aspect of the presumption of innocence is different and less stringent than the legal presumption aspect. Where the first aspect applies to the fact-finder in the courtroom setting, the second aspect allows people to benefit from the protections of the presumption of innocence outside of the confines of trial. It prohibits certain treatment and behaviour toward a suspected or accused person because to not do so would obviate the need for criminal procedure. Thus, the non-procedural aspect of the presumption of innocence also helps maintain the legitimacy and respect for the courts and criminal procedure.

Chapter 5. Who has the right and when does it attach?

While the presumption of innocence generally applies within criminal law and procedure and it is agreed that the presumption is applicable during trial, the question of whether the right attaches before trial, and if so, at what point, remains open. The statutes of the international and regional human rights courts, the International Criminal Court, and the *ad hoc* and internationalised tribunals state who the presumption of innocence applies to in one of two ways, using either the word 'every', such as 'everyone' or 'every person', or the word 'accused'.[1] While these terms have two different meanings, neither limits who can enjoy the presumption of innocence. The distinction actually concerns when the right becomes operable, rather than to whom the right belongs. These classifications all mean that humans, without limitation, may enjoy the presumption. This is supported not only in the wording of the statutes but also in the classification of the presumption of innocence as a human right.

As discussed in Chapter Two, the presumption of innocence is limited to criminal proceedings. This however, is a very broad category that encompasses a wide range of behaviours and situations. Further, the presumption of innocence is a human right that is not limited to any particular type or category of person. Thus, the question arises: at what point does the right attach? That is, when do the benefits of the presumption of innocence begin? Although the presumption of innocence applies during trial, is there a point before trial where individuals may benefit from the human rights protections? The provisions contained in the human rights conventions and the statutes of the international and internationalised criminal courts fall into three

[1]UN General Assembly, Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III) (UDHR) art 11(1), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(2), European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR) art 6(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 8(2); African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217 (African Charter) art 7(1)(b), Rome Statute of the International Criminal Court (17 July 1998) (ICC Statute) art 66, UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) (ICTY Statute) art 21(3), UN Security Council, Statute of the International Criminal Tribunal for Rwanda (8 November 1994) (ICTR Statute) article 20(3), UN Security Council, Statute of the United Nations Mechanism for International Criminal Tribunals (22 December 2010) (ECCC Statute) article 35 new, UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) (STL Statute) art 16(3)(a); UN Security Council, Statute of the Special Court for Sierra Leone (16 January 2002) (SCSL Statute) art 17(3).

categories: (1) at all times; (2) when a person is accused; and (3) when a person is charged. A closer examination reveals that when the right becomes operable is more consistent than these categories imply. The general rule is that the presumption of innocence begins when a person is charged.

A. Every human has the right to the presumption of innocence

The international and regional statutes and conventions addressing the presumption of innocence indicate that there are two basic constructions used to describe who can enjoy the right. The first type implies that everyone has the right to the presumption. These use words like 'everyone,' 'every person' and 'every individual' to describe those with the right to the presumption of innocence.[2] The second construction seems far more limited in terms of who can enjoy the presumption of innocence and affords that right only to 'the accused'.[3] Whether the first or second construction is employed depends on whether the statute itself is intended to address events that have not yet occurred or whether it is created to deal with specific past events. Both are theoretically equally inclusive as they can encompass actual persons, legal persons, and groups. However, groups and legal persons are specifically excluded from some courts. The use of 'every person' or 'every individual', while seeming equally inclusive, actually limit who may enjoy the right to the presumption of innocence because these phrases can more easily exclude groups and legal persons. While groups and legal persons may be excepted, the presumption of innocence is not limited to certain or particular categories of people. Every human may enjoy the presumption of innocence.

The Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, and Rome Statute all state that the presumption of innocence applies to 'everyone'.[4] Using the word everyone is indicative of a very expansive right without limit as to who can enjoy the presumption of innocence.[5] There is evidence that this is intentional. The *travaux*

[2] ICC statute art 66(1); UDHR art 11(1); ICCPR art 14(2); ACHR art 8(2); African Charter art 7(1); ECHR art 6(2).
[3]SCSL Statute art 17(3); ICTY Statute art 21(3); ICTR Statute 20(3); ECCC Statute 35 new; STL Statute art 16(3)(a).
[4] UDHR art 11; ICCPR art 14(2); ECHR art 6(2); ICC Statute art 66(1).
[5] Young Sok Kim, *The Law of the International Criminal Court* (William S Hein & Co 2007) 215; W Schabas and Y McDermott, 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 837; Gregory S Gordon, 'Toward an International Criminal Procedure: Due

préparatoires of the Universal Declaration of Human Rights and the Statute of the International Criminal Court both indicate that earlier drafts provided the right only to the accused but were later changed so as to provide the right to everyone.[6] This change increases the number of people who may enjoy the right and implies that the presumption of innocence may extend outside the specific context of trial.

The statutes of the Extraordinary Chambers in the Courts of Cambodia, Special Court for Sierra Leone, *ad hoc* Tribunals, and Special Tribunal for Lebanon all state that the presumption of innocence applies to 'the accused'.[7] While this formulation is more limited on its face, stating that the presumption of innocence applies to 'the accused' does not limit the type of person who might enjoy the presumption of innocence. What it does is create a narrower category as to when the right may be enjoyed, that is, when the right attaches, and thus, when there can be a remedy for a violation of the right. The difference between using 'everyone' and 'the accused' focuses on when the right becomes operable, rather than who may enjoy the right. Rather than applying to all people at any time, 'the accused' implies there is a specific point in time or specific things that must happen before a person can enjoy the presumption of innocence. It implies that some criminal process has already begun, that formal charges have been brought against the individual, and cuts off the possibility of people not formally involved in the criminal justice process of being presumed innocent.

'Everyone' is such a broad term that it implies that the presumption of innocence might go beyond humans to include legal persons. Some jurisdictions such

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Process Aspirations and Limitations' (2007) 45(3) Colum J Transnat'l L 635, 666; Haji N A Noor Muhammad, 'Due Process in Law for Persons Accused of Crime' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Colum UP 1981) 150; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1994) 254, para 34; *Prosecutor v Mbarushimana* (Decisions on Defence Request for an Order to Preserve the Impartiality of the Proceedings) ICC-01/04-01/10-51, PT Ch I (31 January 2011). See also Mark Hareema, 'Uncovering the Presumption of *Factual* Innocence in Canadian Law: A Theoretical Model for the 'Pre-Charging Presumption of Innocence'' (2005) 28 Dalhousie LJ 443, 446.

[6] David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001) 20; Commission on Human Rights, Summary Record of the Fifty-Fifth Meeting (2 June 1948) UN Doc. E/CN.4/SR.55, (2 June 1948) 13; Schabas and McDermott (n 5) 1639 para 11; 1996 Preparatory Committee II, see note 14, p 194. Actually, it started with 'anyone', but this was later changed to 'everyone'.

[7] ECCC Statute art 35 new, SCSL Statute art 17(3), ICTY Statute art 21(3); ICTR Statute art 20(3); STL Statute art 16(3)(a).

as the International Criminal Court, specifically do not provide for non-human prosecutions, while others, leave this issue open.[8] Increasingly, corporations and other legal beings have been subjected to criminal prosecutions, which leads to the question of whether non-human legal entities are entitled to the presumption of innocence.[9] Whether legal persons or entities are entitled to the presumption remains unresolved. It is however, likely that such entities would be afforded the presumption if they were subjected to criminal prosecution in a jurisdiction where such prosecution is permitted.[10] Ultimately whether legal persons can enjoy the right to the presumption of innocence in a jurisdiction that allows 'everyone' the right is an issue for the specific jurisdiction.

Similar to 'everyone', although perhaps slightly more limited in scope, the American Convention on Human Rights uses the phrase 'every person'[11] while the African Charter on Human and Peoples' Rights uses the phrase 'every individual'.[12] These phrases are still quite expansive and, by the use of the word 'every,' are intended to be inclusive. For humans, this has the same affect as 'everyone.' With regard to the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, there may be a different interpretation when it comes to whether legal entities can benefit from the right to the presumption of innocence because of the use of the word 'person' and 'individual'.[13] These terms seem to be exclusive of legal persons and groups. Beyond the issue of non-human legal persons, focusing on the individual or person would mean that groups in general would not enjoy the presumption of innocence. This could potentially have a knock-on effect on

[8] For commentary surrounding this issue see: William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 566; Nadia Bernaz, 'Corporate Criminal Liability Under International Law: The *New TV S.A.L.* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon' (2015) 13(2) JICJ 313, 319-320; Kathryn Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14(1) AJHR 199, 200; Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8(3) JICJ 873, 875; Mordechai Kremnitzer, 'A Possible Case for Imposing Corporate Liability on Corporations in International Criminal Law' (2010) 8(3) JICJ 909, 916-917.

[9] For some discussion see Trechsel Stefan, 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006) 171-172; Roger A Shiner 'Corporations and the Presumption of Innocence' (2014) 8(2) Crim L & Phil 285.

[10] Shiner (n 9).

[11] ACHR art 8(2).

[12] African Charter art 7(1)(b).

[13] Ibid art 7; ACHR art 8(2).

individuals appearing within a relevant jurisdiction. If a group, made up of individuals, is seen as guilty (or at least not innocent) of some action, then proving that an individual is part of that group could lead to some portion of the group's guilt spilling over onto the individual without proof that the individual was responsible for or participated in the specifically alleged criminal act. This could be a particular issue if military, paramilitary, militias or other groups are accused of mass crimes.

Which term is used to describe who can benefit from the presumption of innocence appears to depend on the type of agreement under scrutiny. The more inclusive sounding versions, using the term 'everyone', 'every individual', and 'every person' are primarily the international and regional human rights agreements.[14] The international and regional agreements are written to be inclusive and somewhat flexible in their implementation.[15] In addition, these agreements are written this way because the future situations they will be called upon to address cannot be predicted. Thus, these conventions and statutes must be flexible enough to be relevant to future situations. The Rome Statute also uses the word 'everyone'.[16] The International Criminal Court is not a general human rights body, but rather a criminal court with specific criminal jurisdiction.[17] The Court however, still requires a great amount of flexibility within its statute. The International Criminal Court must be flexible for two reasons. First, the International Criminal Court would like to have all countries become states parties to the Rome Statute, giving the Court the ability to have jurisdiction over atrocity crimes committed anywhere in the world.[18] Therefore, the Rome Statute is written in a way so as to be inclusive of all potential parties and people who might come under its jurisdiction. Secondly, like the regional human rights courts, the International Criminal Court has jurisdiction over unknown future events. This is unlike the *ad hoc* and internationalized tribunals, which were specifically created to have jurisdiction over events that have already occurred. Like

[14] UDHR art 11, ICCPR art 14(2), ECHR art 6(2); African Charter art 7; ACHR art 8(2).
[15] Åshild Samnøy, 'The Origins of the Universal Declaration of Human Rights' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff 1999) 14-20; Sitting 5th September 1949, Report presented by Mr. P.H. Teitgen (5 September 1949), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol I (Martinus Nijhoff 1985) 192; Weissbrodt (n 6); Cecilia Medina, *The American Convention on Human Rights* (2nd edn, Intersentia 2016) 9, para 14.
[16] ICC Statute art 66.
[17] Ibid Part II Jurisdiction, Admissibility and Applicable Law.
[18] Ibid arts 10-11.

the human rights agreements, this look to the future by the International Criminal Court must necessarily be more general and inclusive so as to try to anticipate any situation that the Court may need to deal with. Thus the more inclusive terms are in the statutes that must attract member states and that must be applicable to future events.

Unlike the general agreements on human rights and the International Criminal Court's Statute, the statutes designed to specifically be used as rules or elements of criminal law, mostly use the phrase 'the accused' to describe who can enjoy the presumption of innocence. This is because these statutes create rules for courts with jurisdiction over events that have already occurred.[19] These statutes provide competence to the relevant court only for particular events that occurred during a particular timeframe. Thus, these articles providing for the presumption of innocence can be more specific in terms of who the presumption applies to, as they anticipate particular crimes being tried within the court. Further, these statutes require fewer parties to agree to them before they become operative. The *ad hoc* and internationalized tribunals only require the agreement of the United Nations and a limited number of countries to become operational. Thus, the *ad hoc* and internationalized tribunals have no reason to be more inclusive. These statutes are not meant to attract universal application, but are specifically limited to incidents that occurred within one country or region over a particular period of time.

Whether the statutes use 'everyone,' 'every person,' 'every individual' or the 'the accused' to describe who can enjoy the presumption of innocence does not limit what type of person has the right. In fact, these phrases do not necessarily limit whether individuals, groups, actual persons, or legal persons can be presumed innocent. Rather, that type of limitation is jurisdictional and housed elsewhere in the applicable statute or agreement. Unlike more general formulations using the word 'every,' the use of 'the accused' has implications for when the right becomes operable, or when a remedy may be sought for a violation of the right, which is not implied by the word 'everyone.'

Thus, the studied agreements provide the presumption of innocence to everyone without limiting what type of person has the right to the presumption of innocence. That the studied statutes and conventions provide the presumption of

[19] ICTY Statute art 1; ICTR Statute art 1; ECCC Statute art 1; STL Statute art 1; SCSL Statute art 1.

innocence to everyone is in keeping with the idea that the presumption of innocence is a human right. Human rights are meant to be available for every person to use and benefit from.[20] There may be certain times when the right is more relevant than others, but this is not a limit on what kind of person can benefit from the protections that a human right provides.

B. When the right to the presumption of innocence attaches

Although the presumption of innocence applies to every human, this does not mean that the presumption applies to every person at all times. In addition to its applicability being limited to the context of criminal law and procedure, the presumption is also limited with regard to when the presumption of innocence becomes operable of attaches as a right. Because the presumption of innocence is inextricably tied to criminal law, when the right becomes operable is linked to the role that the individual (the potential right-holder) occupies in the criminal process. Determining when the right applies helps identify how wide or narrow the right is and who can seek redress when a violation has occurred. Whether or not the right becomes operable determines how an individual may be treated by the particular duty-holder. It provides legal certainty and tells the right-holder what to expect. This is particularly interesting in the pre-trial and pre-charging contexts. If the presumption becomes operable before trial, then it could have implications for what investigative techniques are allowed, and could affect other rights, such as the right to privacy or liberty in cases of pre-determination detention. If, on the other hand, the presumption is solely limited to trial, then other rights might provide protection pre-trial, but the presumption of innocence would be irrelevant when considering investigations and pre-trial decisions.

Among theorists there is a fierce debate regarding when the presumption of innocence may be enforced as a right. All agree that if the presumption of innocence is a right, that it is applicable in the trial setting.[21] The arguments centre on whether

[20] UDHR Preamble, Art 2.

[21] See Larry Laudan, *Truth, Error, and Criminal Law* (CUP 2006) 95; Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333, 337; Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J Evid & Proof 241, 251; Magnus Ulväng, 'Presumption of Innocence Versus a Principle of Fairness' (2013) 42(3) NJLP 205, 215; Hock Lai Ho, 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights* (Hart 2012) 262-63; Antony Duff, 'Who Must Presume Whom to be Innocent of

and how far before (and after) trial the right can be enjoyed. Those that argue that the presumption of innocence can only be enjoyed at trial believe that the presumption of innocence is closely tied to the standard and burden of proof. The most extreme among them claim that the presumption is merely a restatement of these principles.[22] For those arguing that that the presumption of innocence extends to some period of time before trial, the presumption of innocence has more, and wider, purposes such as protecting citizens from overly intrusive governments, protecting the individual's reputation, and protecting individuals' legal status of innocence before conviction.[23] As a result of the differing opinions on the presumption's purpose, the arguments about when the right becomes operable range from only at trial to when someone is suspected, accused, or even extending to everyday life.[24]

There are two explanations as to why the argument is so wide-ranging as to when the presumption of innocence becomes operable. One is that each theorist approaches the presumption of innocence with his or her own legal culture in mind. Antony Duff, for example, states that his theory of the presumption of innocence was written from the perspective of common law jurisdictions.[25] Larry Laudan and Richard Lippke use the United States' legal system for their examples.[26] Lonneke Stevens sets her theory within Dutch law, and Thomas Weigend has examined the presumption from a German perspective.[27] This however, can only be part of the

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What?'(2013) 42(3) NJLP 170, 170; Lonneke Stevens, 'The Meaning of the Presumption of Innocence for Pre-Trial Detention: An Empirical Approach' (2013) 42(3) NJLP 239; Alwin A van Dijk, 'Retributivist Arguments against Presuming Innocence: Answering to Duff' (2013) 42(3) NJLP 249.

[22] Laudan, *Truth* (n 21) 95; Laudan, 'Material or Probatory?' (n 21) 337.

[23] Respectively, Weigend, 'There is Only One Presumption of Innocence' (n 21) 196; Ho (n 21) 262-63 quoting Trechsel (n 9) 164; Hareema (n 5) 445 (reducing intrusions of government on individual rights); Ashworth, 'Four Threats' (n 21) 244. All of the rationales are discussed in Chapter 2.

[24] Laudan, 'Material or Probatory?' (n 21) (trial only); Ulväng (n 21) 215 (trial only); Weigend, 'There is Only One Presumption of Innocence' (n 21) 196, 198 (suspected); Ashworth, 'Four Threats' 244 (suspected); van Dijk (n 21) 249-250 (all contexts including those outside criminal procedure); Ho (n 21) 262-263 (all contexts at least with regard to the reputational related aspect); Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268; Duff, 'Who Must Presume' (n 21) (allowing for the possibility of many presumptions of innocence based on normative roles, including one in a civil context).

[25] Duff, 'Presumptions Broad and Narrow' (n 24); Duff, 'Who Must Presume' (n 21) 170.

[26] Laudan, *Truth* (n 21); Laudan, 'Material or Probatory?' (n 21); Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016).

[27] Stevens (n 21) 239; Thomas Weigend, 'Assuming that the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8 Crim L & Philosophy 285.

explanation because these scholars hint that their theories may have some application beyond national law. The other explanation is that the theorists are largely concerned with developing a normative theory of the presumption of innocence. This means that they are concerned with what the presumption ought to be, rather than what it necessarily is in practice. There is a contradiction in stating that the presumption of innocence should apply only to the accused at trial when in practice it demonstrably applies outside of trial as well. Stating what should be, from a theoretical standpoint, is different from stating what is. Examining the presumption of innocence in international and regional practice therefore, may help determine when the presumption of innocence becomes operable in practice and reconcile some of the theories.

Among the examined charters, conventions and statutes the presumption of innocence becomes operable in one of three contexts: to 'everyone,'[28] to 'the accused,'[29] and to 'everyone charged.'[30] These terms and phrases provide guidance as to when an individual can enjoy the presumption of innocence, however, the interpretation of these terms leads to some unexpected results.

The agreements that provide that 'everyone' shall have the right to the presumption of innocence contain the most expansive formulation of the right. The use of 'everyone' should mean that the only limit to whether someone can enjoy the presumption of innocence is whether the situation is within the realm of criminal law. The articles concerning the presumption of innocence in the African Charter on Human and Peoples' Rights and the Statute of the International Criminal Court use 'everyone' as an unqualified term. Specifically, they state that '[e]very individual shall have… [t]he right…to be presumed innocent…' and '[e]veryone shall be presumed innocent…' respectively.[31] These Conventions give no further clue as to when the right might become operable. Thus they imply that the right may attach before criminal proceedings of any type have been initiated, so long as the general situation is within the realm of criminal law. Looking beyond the statutes themselves however indicates that when the right attaches for these two agreements is more specific than it initially seems.

[28] African Charter art 7; ICC Statute art 66.
[29] ECCC Statute art 35 new; SCSL Statute art 17(3); ICTY Statute art 21(3); ICTR Statute art 20(3); STL Statute art 16(3).
[30] UDHR art 11(1); ICCPR art 14(2); ECHR art 6(2).
[31] African Charter art 7; ICC Statute art 66(1).

Interpretation of the African Charter on Human and Peoples' Rights is aided by the 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', which is meant to 'further strengthen and supplement the provision relating to fair trial in the Charter and to reflect international standards.'[32] The presumption of innocence is specifically discussed in the section on 'Provisions Applicable to Proceedings Relating to Criminal Charges'.[33] This section states that the presumption of innocence applies to '[e]veryone charged with a criminal offence'.[34] Further it specifically establishes that while public officials can inform the public of criminal investigations, officials cannot express views on whether a suspect is guilty.[35] This means that the right afforded in the African Charter is actually more limited than the term 'everyone' suggests. The 'Principles and Guidelines' imply that the presumption of innocence becomes operative in two separate ways. The first is that the right attaches when an individual is 'charged with a criminal offence.'[36] Although there is no further direction, this is presumably the full right to the presumption of innocence, including both aspects. The second part implies this is the case because it requires a specific element of the presumption of innocence to apply to a wider group of people. The second part provides the presumption of innocence to suspects, a group that is more expansive than the group described as being 'charged with a criminal offence'. Suspects are merely under suspicion, they may end up being charged and prosecuted, or they may not. This is therefore a far more inclusive term than 'charged'. The section also provides that the part of the presumption of innocence that suspects are entitled to enjoy is the part preventing public officials from making statements of guilt. This is a limited part of the non-procedural aspect of the presumption of innocence as was discussed in Chapter Four. Thus, under the African Charter on Human and Peoples' Rights a wide group of people, 'suspects', can benefit from a narrower right that protects against public statements of guilt. Once a person is charged however, the whole of the presumption of innocence attaches and the individual can benefit from both aspects fully.

[32] The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003).
[33] Ibid N. Provisions Applicable to Proceedings Relating to Criminal Charges.
[34] Ibid N(6)(e), N(6)(e)(i).
[35] Ibid N(6)(e)(ii).
[36] Ibid N(6)(e).

The International Criminal Court's Statute is also more limited than the term 'everyone' denotes. Despite being included in 'The Trial' section of the Rome Statute, the presumption of innocence is clearly meant to be applicable during other phases of the adjudicative process.[37] The use of the word 'everyone' is different from the rest of the fair trial rights included in within this section. Most of the other rights apply only to 'the accused'.[38] Interestingly, the earliest drafts state that the accused is entitled to be presumed innocent, but this was changed in later drafts to the indicate that everyone shall be presumed innocent, as it appears in the Rome Statute.[39] This implies that everyone is a deliberate choice of words and has a wider application than the other trial rights. In the *Mbarushimana* case the Appeals Chamber used this line of reasoning to hold that the right attaches early in the criminal process; 'not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court.'[40] The word 'everyone' suggests an extension of the right, and signifies that the presumption of innocence exists at all points in the formal proceedings before the Court.

Unlike the European Convention on Human Rights and the International Covenant on Civil and Political Rights which house the presumption of innocence in the same article as the rest of the rights of accused persons, in the Rome Statute, the presumption of innocence is explicitly a separate article from the rest of the rights of suspected people and the rights that are specifically granted to those standing trial.[41] This highlights the presumption of innocence's importance and that it is intended to be a right separate and distinct from the rest of the defence rights and could be extended beyond the bounds of trial. It shows that the right is meant to be more widely applicable than the rights given to defendants at trial.[42] Further, keeping in

[37] M Cherif Bassiouni (ed), *The Legislative History of the international Criminal Court: Introduction, Analysis and Integrated Text*, vol 1 (Transnational Publishers 2005) 85; Gordon (n 5) 669-670.
[38] See ICC Statute art 66 (presumption of innocence) as opposed to art 67 (rights of the accused); *Mbarushimana* (n 5) para 8.
[39] This was changed in the Preparatory Committee on the Establishment of an International Criminal Court, 'Decisions Taken by the Preparatory Committee at its Session Held 4 to 15 August 1997' (14 August 1997) Doc No A/AC.249/1997/L.8/Rev.1, 33; See also Schabas, *ICC Commentary* (n 8) 1003-1004 for discussion. ICC Statute art 66.
[40] *Mbarushimana* (n 5) para 8.
[41] ICC Statute art 66 entitled the Presumption of Innocence, art 67 entitled the Rights of the Accused. Schabas, *ICC Commentary* (n 8) 1004-1005; Schabas and McDermott (n 5) 1636 para 2.
[42] Schabas, *ICC Commentary* (n 8) 1004-1005.

alignment with the interpretation of the International Covenant on Civil and Political Rights, even the fair trial rights of Article 67(1) have been interpreted to extend beyond trial.[43] Were the presumption intended to be just another trial right, it could have been included with the rights held within Article 67. The presumption of innocence was always drafted as an article separate from the other rights and was never meant to be combined with the articles containing the other rights of the accused.

The limited case law from the International Criminal Court dealing with the issue of when the right to the presumption of innocence becomes operable supports the notion of an expansive right, however it is not as inclusive as the term 'everyone' suggests. In *Mbarushimana*, Pre-Trial Chamber I held that because Article 66(1) states that the right is guaranteed to 'everyone' means that the right must extend to more than only accused persons.[44] However, the decision goes on to list specific stages of the proceedings during which the right to be presumed innocent is guaranteed, including: 'to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court.'[45] This interpretation by Pre-Trial Chamber I limited the presumption of innocence to less than the 'everyone' promised by the Article 66. It allows for the presumption of innocence to become operative before trial, but it seems only once the individual has been formally notified of the criminal procedure against them by arrest warrant or summons. A logical conclusion to deduce from this is that the presumption of innocence is not operable during the situation phase of the International Criminal Court's proceedings. That the presumption would not provide individual protection during the situation phase is logical because at that point the entire situation is being investigated overall and no individuals have been singled out for prosecution.[46] While this interpretation is far more limited than the term 'everyone' indicates, it is in keeping with the other jurisdictional and procedural rules of the Court.

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[43] *Prosecutor v Lubanga* (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06, A Ch (14 December 2006) para 37; citing Nowak (n 5) 244.
[44] *Mbarushimana* (n 5).
[45] Ibid.
[46] ICC Statute arts 13, 14, 15, 53; International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (entered into force 23 April 2009) reg 33.

Thus, while there are two agreements that claim that 'everyone' is entitled to the presumption of innocence, a close examination of the documents surrounding the International Criminal Court and the African Charter show that the right operates in a more limited way. Both allow for the presumption of innocence to be relevant pre-trial, however at the International Criminal Court it appears that the individual must have been formally notified of the charges against them. Under the African Charter for Human and Peoples' Rights the full right to the presumption of innocence becomes operable for those who have been charged with a criminal offence while a narrower portion of the non-procedural aspect, specifically the provision concerning public statements of guilt, becomes operable once an individual is suspected.

The majority of agreements provide for the presumption of innocence to 'the accused'. The Extraordinary Chambers in the Courts of Cambodia, Special Court for Sierra Leone, *ad hoc* Tribunals, and the Special Tribunal for Lebanon all have articles establishing the presumption of innocence using the phrase '[t]he accused shall…'.[47] The American Convention on Human Rights has similar wording indicating that '[e]very person accused has the right...'.[48]

That the right is available to those who are accused seems fairly straightforward. On its face, this means that the full right to the presumption of innocence would attach once a formal accusation occurs. The *ad hoc* and internationalised tribunals all set out the definition of 'accused' as being anyone who has one or more counts of an indictment confirmed against them.[49] The American Convention on Human Rights however, does not set out a definition of 'accused'. This is presumably because the American Convention was drafted to be flexible so as to accommodate the various traditions of its member states so long as those practices fall within the general parameters of the Convention.[50] This lack of a clear definition makes it difficult to determine who qualifies as an accused under the American

[47] ECCC Statute art 35 new; SCSL Statute art 17(3); ICTY Statute art 21(3); ICTR Statute art 20(3); STL Statute art 16(3)(a).
[48] ACHR art 8(2).
[49] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (as amended 16 January 2015) (ECCC Internal Rules) glossary 'accused' p 79; Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) r 2, Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) r 2(A), Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda (as amended 13 May 2015) r 2(A), Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) r 2(A).
[50] Medina (n 15) 9, para 14.

Convention, although it is clear from the case law that once a person is arrested for a criminal charge they are 'accused'.[51]

It appears from these statutes, that once an accusation occurs, the presumption of innocence becomes operable. That accused individuals have the right to the presumption of innocence is consistent throughout the case law and other documentation pertaining to these courts. The Extraordinary Chambers in the Courts of Cambodia however, provides an exception that implies that the right may be relevant at some point before a formal accusation. At the Extraordinary Chambers, Article 35 new of the Statute provides that the presumption is applicable to those accused. However, Rule 21, within the section of procedure and general principles of the Internal Rules, provides fundamental principles that are to be used to safeguard the interests of suspects, individuals who are charged, the accused and victims, and to provide legal certainty and transparency in the proceedings.[52] Specifically, Rule 21(1)(d) states: 'Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.…'[53] The inclusion of Rule 21 within the section of procedure and general principles shows that the presumption of innocence may be wider in scope than merely applying to the trial phase. This Rule is more expansive than Article 35 new because it includes those people who are suspected. Where Article 35 new merely states that the presumption of innocence belongs to 'the accused', Rule 21 expands that right to every person 'suspected or prosecuted'. Provided that one can be suspected without being accused, the right to the presumption of innocence at the Extraordinary Chambers of the Courts of Cambodia might become operable before the point of accusation.

The third manner in which the operability of the right to the presumption of innocence is expressed within the studied jurisdictions is through the use of the phrase 'everyone charged'. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Court of Human Rights all formulate the presumption of innocence in this way.[54] One reason that they use this formulation is because the European Convention and the International Covenant are

[51] See for example *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 114 (7 September 2004).
[52] ECCC Internal Rules r 21(1).
[53] ECCC Internal Rules r 21(1)(d).
[54] UDHR art 11.

both based on the Universal Declaration.[55] Additionally, they are similar because they are all human rights documents of general application. Thus, the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights were both written in a general way in order to attract member states.[56] The European Convention on Human Rights is more limited in that only European States can become members, but it was decided early on that it would contain only 'essential rights and fundamental liberties [that] could be guaranteed which are, today, defined and accepted after long usage, by democratic regimes.'[57] This has the benefit of reconciling the various diverse legal systems amongst states parties and required a somewhat general wording in order to maintain the agreement among the drafters.

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[55] Aside from the first draft, the presumption of innocence was incorporated into the Convention in much the same formulation as the Universal Declaration on Human Rights: William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 266-269 citing Preliminary Draft Convention for the Maintenance and Further Realization of Human Rights and Fundamental Freedoms (15 February 1950), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol II (Martinus Nijhoff 1985); Amendments to Articles 1, 2, 4, 5,6,8 and 9 of the Committees Preliminary draft proposed by the expert of the United Kingdom (6 March 1950), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol II (Martinus Nijhoff 1985); Appendix to the Report of the Committee of Experts on Human Rights; Draft Convention of Protection of Human Rights and Fundamental Freedoms (16 March 1950), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol IV (Martinus Nijhoff 1977) Conference of Senior Officials (8-17 June 1950), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol IV (Martinus Nijhoff 1985); Fifth session of the Committee of Ministers, Draft Convention adopted by the Sub-Committee (7 August 1950), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol V (Martinus Nijhoff 1985); Fifth session of the Committee of Ministers, Draft Convention adopted by the Committee of Ministers, as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol V (Martinus Nijhoff 1985) Fifth session of the Committee of Ministers, Appendix A. Draft Convention of Protection of Human Rights and Fundamental Freedoms, as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol V (Martinus Nijhoff 1985) Documents prepared by the Secretariat-General, Text of the Draft Amended by the consultative Assembly including notes on the articles not yet approved by the Committee of Ministers and the Adoption of which is urged by the Consultative Assembly, as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol V (Martinus Nijhoff 1985); ICCPR preamble/chapeau; Weissbrodt (n 6); Marc J Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987).

[56] See ICCPR art 48; Samnøy (n 15) 14-20.

[57] Sitting 5th September 1949, Report presented by Mr. P.H. Teitgen (5 September 1949), as reprinted in *Council of Europe Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights,* vol I (Martinus Nijhoff 1985)

The presumption of innocence provision in the Universal Declaration of Human rights underwent some substantial changes during the drafting process, which give some clue as to when the presumption should become operative. The original version of the Universal Declaration of Human Rights described the presumption of innocence as:

> '[n]o one shall be held guilty until proved guilty and convicted. No one shall be convicted or punished for crime or any other offence except after public trial at which he has been given all guarantees necessary for his defence and which shall be pursuant to law in effect at the time of the commission of the act charged.'[58]

Eleanor Roosevelt, as the Chair of the Working Group on the Universal Declaration of Human Rights, argued that the presumption would be improved by rephrasing the statement to say, '[a]ny person is presumed innocent until proved guilty.'[59] This was adopted as the first sentence of the article's first paragraph.[60] This change simplifies the wording of the article, but also substantially changes it. The original version's use of the phrase said that 'no one shall be held guilty' implies it was concerned with either pre-trial detention or treatment of the accused, not the procedural aspect of the presumption of innocence. Thus, both aspects of the presumption of innocence were not necessarily contemplated in the original draft. Additionally, changing the phrase from 'no person' to 'anyone' makes the idea more of a positive right for the individual rather than a negative limit on government power. Both formulations imply that the presumption of innocence becomes operable at some point pre-trial, perhaps without limit.

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[58] Summary Record of the Fourth Meeting [of the Working Group on the Declaration of Human Rights] held at the Palais des nations, Geneva (8 December 1947), as reproduced in William A Schabas (ed) *The Universal Declaration of Human Rights*, vol 1 (CUP 2013); Weissbrodt (n 6) 17.

[59] Summary Record of the Fourth Meeting [of the Working Group on the Declaration of Human Rights] held at the Palais des nations, Geneva (8 December 1947), as reproduced in William A Schabas (ed) *The Universal Declaration of Human Rights*, vol 1 (CUP 2013) 1193-1194.

[60] Ibid. This was adopted four votes to nil with two abstentions. Article 10, Draft International Declaration of Human Rights (Draft United Nations Declaration of Human Rights) (Annex A) (18 June 1948), as reprinted in William A. Schabas (ed) *The Universal Declaration of Human Rights*, vol 2 (CUP 2013); Report of the Economic and Social Council on the Second Session of the Commission [on Human Rights] held at Geneva, from 2 to 17 December 1947 (17 December 1947), as reprinted in William A. Schabas (ed) *The Universal Declaration of Human Rights*, vol 2 (CUP 2013); Weissbrodt (n 6) 18.

The Declaration was again changed during the third session of the Commission to provide consistency between the French and English versions by adding the phrase 'charged with a penal offence' after 'everyone', which would account for the appearance of the word '*accusée*' in the French text.[61] This change also emphasised that the article was written to be applicable to criminal law.[62] Throughout the drafting process it became clear that Article 11 only applied to criminal cases that were adjudicated in formal hearings.[63] After making this change, the Third Committee finalized the wording of Article 11 and forwarded it to the General Assembly.[64] While this change emphasizes the criminal law requirement of the presumption of innocence, it also limits when the right becomes operable. With this change the presumption went from applying to 'anyone' to requiring that the person be charged. It also indicates that while there are limits to when the presumption of innocence applies, there is still room for the presumption of innocence during pre-trial procedures and possibly during appeal, depending on how 'charged' is interpreted.

The presumption of innocence was included in all of the drafts of the International Covenant on Civil and Political Rights.[65] Early drafts however, were found too restrictive as to whom the presumption protected. Discussions occurred during the 5th, 6th and 8th sessions of the Commission on Human Rights about broadening the scope to include: those who had been charged and were facing trial; those who had been charged and not arrested; and those who suffered from wrongfully inflicted punishment.[66] It was determined that the phrase 'Everyone charged with…' encompassed the proper scope as it allows anyone charged, regardless of whether they are arrested, to benefit from the presumption of innocence.[67] Thus, in a manner similar to that in the Universal Declaration of Human

[61] Commission on Human Rights, UN Doc. E/CN.4/SR.55 (n 6) at 13; Weissbrodt (n 6) 20; Trechsel (n 9) 154.
[62] Weissbrodt (n 6) 20. Article 10 applies to both civil and criminal law while Article 11 only applies to criminal law. Schabas, *ECHR Commentary* (n 55) 265.
[63] Weissbrodt (n 6) 23.
[64] UN doc. E/800, Annex A, article 9. See also Raimo Lahti, 'Article 11' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights* (Martinus Nijhoff 1999) 241; Weissbrodt (n 6) 23.
[65] See generally Bossuyt (n 55) 291-293.
[66] Ibid. The changes regarding the presumption of innocence are on pages 291-293 citing Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952).
[67] Ibid. See also Muhammad (n 5) 150; Nowak (n 5) 254, para 34.

Rights, the International Covenant also requires that an individual be charged before the presumption of innocence becomes operable.

Like the word 'criminal,' the European Convention on Human Rights has been interpreted to give an autonomous meaning to the word 'charged'. This development has primarily grown out of the case law pertaining to the right to trial within a reasonable time.[68] Charged means 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence' or other action that has 'the implication of such an allegation and which likewise substantially affects the situation of the suspect.'[69] This meaning is considered 'substantive' rather than 'formal' and thus the Court will 'look behind the appearances and investigate the realities of the procedure in question' to see if the suspect has been substantially affected.[70] Although arrest or formal summons for a charge are included, for the most part someone is 'charged' if they have received any official notification that an investigation has been launched against him regardless of whether an arrest occurred.[71] Article 6(2) has been specifically interpreted to reject the notion that suspects not (yet) charged have the presumption of innocence.[72] Article 6(2) therefore does not include protections for individuals who have been arrested for other reasons, such as preventative detention.[73] However, if a public statement of guilt is made about an individual who is not charged at the time of the statement, but later becomes charged with a criminal offence that the previous

[68] *Adolf v. Austria* (1982) Series A no 49 para 30; David J Harris, Michael O'Boyle, Edward P Bates, Carla M Buckley, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP 2014) 460; Pieter van Dijk and Marc Viering (revisors), 'Chapter 10 Right to a Fair and Public Hearing' in Pieter Van Dijk, Fried van Hoof, Arjen Van Rijn, Leo Zwaak (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006) 539.

[69] *Corigliano v Italy* (1982) Series A no 57, para 34; *Aleksandr Zaichenko v Russia* App No 39660/02 (ECtHR, 18 Feburary 2010) para 43, 18 Feburary 2010; Harris, O'Boyle, Bates, Buckley (n 68) 377.

[70] *Deweer v. Belgium* (1980) Series A no 35, para 42; Schabas, *ECHR Commentary* (n 55) 276-277; van Dijk and Viering (n 68) 540; Harris, O'Boyle, Bates, Buckley (n 68) 377.

[71] Deweer (n 70) para 46, *Heaney and McGuinness v Ireland* ECHR 2000-XII 419; *Ewing v United Kingdom* (1986) 45 DR 269; *X v Ireland* (1983) 32 DR 225; *Wemhoff v Germany* (1968) Series A no 7; *Pedersen and Baadsgaard v Denmark* ECHR 2004-XI 105; *Foti and Others v Italy* App Nos 7604/76, 7719/76, 7781/77 and 7913/77 (ECtHR, 10 December 1982); *Boddaert v Belgium* (1992) Series A no 235-D, para 10; *Eckle v Germany* (1982) Series A no 51 para 74; Corigliano (n 69); *Angelucci v Italy* (1991) Series A no 196-C; van Dijk and Viering (n 68); Harris, O'Boyle, Bates, Buckley (n 68) 377.

[72] *Adolf* (n 68) paras 30, 34; van Dijk and Viering (n 68) 541.

[73] *Guzzardi v Italy* (1980) Series A no 39, para 108, *Raimondo v Italy* (1994) Series A no 281-A. Schabas, *ECHR Commentary* (n 55) 281-282; Harris, O'Boyle, Bates, Buckley (n 68) 373.

statement is relevant to, the earlier prejudicial statement can be evaluated to determine whether it violates the presumption of innocence for the current charge.[74] This means that the right does not attach before the charge, but once the presumption is relevant, events that occurred before the right was operable can be remedied. However, the opposite is also true; if prejudicial statements are made about an individual who is never charged with a relevant criminal offence, the presumption of innocence is not relevant to those statements.

The wording of the statutes, conventions and covenants seem to indicate that the presumption of innocence is available to everyone, all of the time. Once the interpretation of the supporting documents and cases for these agreements is examined, however, it becomes clear that when the presumption becomes operative is fairly uniform across jurisdictions. First, the presumption of innocence applies during trial regardless of when its protection otherwise commences. No matter the system used the procedural aspect of the presumption of innocence attaches at trial. The non-procedural aspect applies during trial, but is also wider than the procedural aspect and has a starting point before trial starts. Second, no jurisdiction has a presumption of innocence that is available to 'everyone' without qualification. Even the Rome Statute and African Charter, which offer 'everyone' the right, have been interpreted in a more limited way. This helps tie the presumption of innocence to criminal law because it is only available to individuals who have some role in the criminal process. Third, the presumption of innocence applies to everyone who is charged. Across these jurisdictions it is consistent that those charged will have the right to the presumption of innocence. There may be some difference in how the jurisdiction defines when the presumption becomes operable and what constitutes the status of 'charged' but it at least includes when the person is formally notified of the charges against them.

C. Conclusion

That the presumption of innocence is a human right implies that everyone may enjoy the right to the presumption of innocence. This idea is supported by the foundational documents of the conventions, agreements, and statutes studied. None of these allow the presumption of innocence to apply to some people and not others.

[74] *Mustafa (Abu Hamza) v United Kingdom* App No 31411/07 (ECtHR, 18 January 2011); *Krause v Switzerland* (1979) 13 DR 73; Harris, O'Boyle, Bates, Buckley (n 68) 460.

Rather, it is open to all without qualification. When it comes to human beings, everyone may enjoy the presumption of innocence's protections.

While everyone can enjoy the right to the presumption of innocence, it does not apply in every context. Determining that context is essential to knowing when the presumption of innocence is relevant. As was examined in Chapter 2, the presumption of innocence is only available within the broad context of criminal law. Further, it is agreed among theorists and courts that the presumption of innocence applies at trial. While the procedural aspect of the presumption of innocence is confined to the trial setting, the non-procedural aspect is wider. It appears that the general consensus in practice is that the non-procedural aspect applies when one is 'charged' or formally accused of a criminal offence. What constitutes the status of being charged depends on the particular jurisdiction but at the very least it includes when one receives formal notice of the charges against them. While being charged appear to be the agreed upon starting point, individual jurisdictions could provide for even earlier protection to those who are suspected, as is seen in under the African Charter for Human and Peoples' Rights.

Chapter 6. Who Carries The Duty To Uphold the Presumption of Innocence?

The right to the presumption of innocence requires a corresponding duty on the part of those who must uphold the presumption.[1] The duty, expressed through the conduct of the duty holder, mainly falls to fact-finders and other public authorities, however the media and private entities and individuals may also have some duty to uphold. The duty of each of these actors differs depending on their role regarding the individual right-holder and the context in which the action or statement takes place. The way the duty is expressed, and who bears that duty, is crucial to understanding how the presumption of innocence works because it determines how duty-bearers must act in a given situation and whether a remedy may exist for inaction or a failure to uphold the presumption of innocence.

The theory regarding who has the duty is as wide-ranging as the theoretical debates about the presumption of innocence itself. That is because who has the duty to uphold the presumption of innocence is at the heart of the debate between interpreting it as a narrow or a broad presumption. Every commentator who believes that upholding the presumption of innocence requires a duty agrees that the duty lies with the fact-finder. In addition, there are also some who think that the duty extends to public officials, media, and even possibly to private individuals. Each of these categories will be discussed using the case law and rules of the international and regional courts and tribunals and this chapter will argue that the duty to uphold the presumption of innocence extends to fact-finders and public authorities.

The duty to uphold the presumption of innocence arises in both aspects of the presumption – procedural and non-procedural. What those duties entail depends on which aspect of the presumption of innocence is being applied in the particular situation. This chapter focuses on who has the duty. How the duty is carried out, that is, what each aspect requires was discussed in Chapters Three and Four.

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[1] James W Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15(1) Hum Rts Q 77; See for example Human Rights Committee, 'General Comment No. 32: Right of Equality Before Courts and Tribunals and to Fair Trial' (23 August 2007) UN Doc No CCPR/C/GC/32 (2007) para 39 (General Comment 32") (conveying duty on public officials); *Barberà, Messegué and Jabardo v Spain* (1988) Series A no 146 (conferring a duty on public officials).

A. The Presumption of Innocence Requires a Duty

The presumption of innocence is a human right and as such it requires a corresponding duty. A duty is a legal obligation to either take a particular action or refrain from acting in a particular manner.[2] Most commentators accept that the presumption of innocence carries some duty although there is disagreement as to who has that duty.[3] The narrow theorists believe the duty is limited to the fact-finders, and possibly prosecutors, at trial, while the broader theorists argue that people beyond fact-finders can also carry a duty to uphold the presumption of innocence.[4] In practice, the duty and duty-holder may be different depending on which aspect of the presumption of innocence is applicable.

The procedural aspect of the presumption of innocence makes it relatively clear that a duty exists because the statutes and case law of the criminal courts provide instructions as to how certain individuals are to uphold the procedural aspect. The Statutes of the International Criminal Court and the Special Tribunal for Lebanon, for example, state that the 'onus is on the Prosecutor to prove the guilt of the accused' and that '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'[5] This places the responsibility to uphold the presumption aspect of the presumption of innocence on the Prosecutor and the fact-finder. The duty regarding the presumption aspect is not only found in the statutes, but is also set out in the relevant case law. For example, various Trial and Appeals Chambers at the *ad hoc* Tribunals have found that the fact-finder must not convict a person unless the required standard of proof is met is the fact-finder's duty with regard to the procedural aspect.[6] These cases and statutes put a burden or duty on the

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[2] Sandara Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 66-89; Nickel (n 1).

[3] See eg: Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11(4) Legal Theory 333, 360; Antony Duff, 'Who Must Presume Whom to be Innocent of What?'(2013) 42(3) NJLP 170; Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193; Hock Lai Ho, 'The Presumption of Innocence as a Human Right' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights* (Hart 2012).

[4] Narrow Theorists: Laudan (n 1); Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016) Broader Theorists: Duff, 'Who Must Presume' (n 3).

[5] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ("ICC Statute") art 66(2) and 66(3); Statute of the Special Tribunal for Lebanon (adopted 29 March 2006) S/RES/1757 (STL Statute) art 16(b) and 16(c).

[6] *Prosecutor v Ntakirutimana et al.* (Judgement) ICTR-96-10-A and ICTR-96-17-A, A Ch (13 December 2004) para 103; *Prosecutor v Ntagerura et al.* (Judgement) ICTR-99-46-A, A

fact-finders and prosecutors because they tell them what they must do in order to uphold the procedural aspect of the presumption of innocence. Additionally, that it is a mandatory legal presumption is further evidence that a duty is required.[7] The mandatory nature of the presumption aspect necessarily requires or obligates someone to uphold this aspect and therefore confers a duty.

It is somewhat less obvious that the non-procedural aspect of the presumption of innocence carries a duty because the relevant statutes and conventions themselves do not provide explicit instructions as to who holds the duty when applying this aspect. Despite this lack of direction there is no doubt that someone bears the duty of upholding the presumption when it is expressed beyond being a legal presumption during trial. Because the presumption of innocence is being applied as a human right the implication necessarily follows that there is a corresponding duty to uphold that right.[8] Further, the use of the word 'shall' within most of the statutes and conventions studied allows for the supposition that someone or some entity must uphold the presumption of innocence.[9] While the Universal Declaration of Human Rights does not use the word 'shall' it specifically refers to the presumption of innocence as a

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Ch (7 July 2006) para 175; *Prosecutor v Martić* (Judgement) IT-95-11-A, A Ch (8 October 2008) para 55; *Prosecutor v Halilović* (Judgement) IT-01-48-A, A Ch (16 October 2007) para 109; *Prosecutor v Dragomir Milošević* (Judgement) IT-98-29/1-A, A Ch (12 November 2009) paras 20, 231; *Ndindilyimana et al. v Prosecutor* (Judgement) ICTR-00-56-A, A Ch (11 February 2014) para 400; Ho (n 3) 269.

[7] See discussion regarding the mandatory nature of the presumption aspect in Chapter 3. For further information on mandatory presumptions see Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP 2010) 239; James C Morton and Scott C Hutchison, *The Presumption of Innocence* (Carswell 1987) 13.

[8] Fredman (n 2) 66-89.

[9] ICC Statute art 66(1); STL Statute art 16(3)(a); Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993), as amended) UN Doc S/RES/827 (ICTY Statute) art 21(3); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (adopted 8 November 1994, as amended) UN Doc S/RES/955 (ICTR Statute) art 20(3); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004 (adopted 10 August 2001, as amended) NS/RKM/1004/006 (ECCC Statute) art 35 new; Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138 (SCSL Statute) art 17(3); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 7(1)(b); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(2).

'right'.[10] This is reinforced by the case law of the European Court of Human Rights, which has held that there is a duty to uphold the non-procedural aspect because the right is violated when individuals do not act in a particular manner and those actions affect another person's right to the presumption of innocence.[11] Stated another way, that the non-procedural aspect can be violated confers obligations on individuals to not do certain acts such as making public statements of guilt or treating people as if they are guilty. For example, as was discussed in Chapter Three, public statements of guilt made against someone who has not been convicted of a crime can violate the presumption of innocence. The duty to uphold the non-procedural aspect of the presumption of innocence may not be as robust as the duty required by the procedural aspect, because there are fewer clear instructions about what steps must be undertaken to protect the presumption as a human right, who should take those steps, and what actions will violate the presumption of innocence. Nevertheless, the non-procedural aspect of the presumption of innocence carries some obligations and duties that must be upheld.

In contrast, Magnus Ulväng argues, with regard to the non-procedural aspect, that the presumption of innocence does not create a duty or a burden because the presumption of innocence is actually not a right. He describes it instead as a guiding principle that people are not required to follow, but may choose to follow if they deem it appropriate.[12] He bases his argument on the general statutory construction of the presumption of innocence. In his view, a narrow reading of a presumption of innocence statute appears to give an instruction to the fact-finder, while a broad reading does not provide guidance on how the presumption can be extended beyond the courtroom.[13] Thus, Ulväng argues that because of this lack of instruction, the broader reading of the presumption of innocence does not convey a mandatory right but rather a principle or rule of thumb that goes to the deep structure of criminal law.[14] Because the broader presumption of innocence is general and structural in

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10 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 11(1).
11 See for example: *Ismoilov and Others v Russia* App No 2947/0649 (ECtHR, 24 April 2008) para 166; *Nešták v Slovakia* App No 65559/01 (ECtHR, 27 February 2007) para 89.
12 Magnus Ulväng, 'Presumption of Innocence Versus a Principle of Fairness' (2013) 42(3) NJLP 205, 210-211.
13 Ibid.
14 Ibid.

nature, rather than a specific right, it does not convey a specific duty on any individual.[15]

The way that the presumption of innocence is typically constructed does not support Ulväng's argument. Most of the statutes containing the right to the presumption of innocence use the word 'shall' when stating who has the right.[16] There is no indication that the word 'shall' should be respected when applying the narrower, presumption aspect but ignored when using the wider human right aspect. Ulväng is correct that the typical statutory construction of the presumption of innocence does not direct a duty-bearer in how to act with regard to the non-procedural aspect. However, the use of the word 'shall' in clauses establishing the presumption supports the notion that the presumption of innocence is both mandatory and indicative of a right. The presumption is usually worded as a positive right held by the right holder and not as a specific affirmative duty imposed on the duty-bearer. Rather than being an instruction, the articles direct that the right must exist, but do not give instructions on how the right must be upheld. Whether it is stated as a positive right or as instructions for the duty-holder should not matter because both convey that the presumption of innocence is a right and it must be followed. Thus, the required right creates an obligatory duty.

Additionally, the argument that the presumption of innocence is a rule of thumb, rather than a right, ignores the fact that the presumption of innocence is a recognized human right.[17] As a human right, there must be people who are able to enjoy the right as well as people who are able to exercise the duty. Further, there is a significant amount of case law recognizing that the presumption of innocence requires people to carry a duty.[18] As will be explained in detail below, the duty to uphold the non-procedural aspect of the presumption of innocence as a human right has been recognized in case law.

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15 Ibid.

16 ECHR art 6(2); ICC Statute art 66; ECCC Statute art 35 new; SCSL Statute art 17(3).

17 UDHR art 11(1); ICCPR art 14(3); ECHR art 6(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 8(2); African Charter on Human and People's Rights (published on 27 June 1981, entry into force 21 August 1986) 1520 UNTS 217 (African Charter) art 7(1)(b).

18 See for example *Krause v Switzerland* (1979) 13 DR 73 (duty conveyed to the Swiss Chancellor); *Prosecutor v Gaddafi* (Decision on the Request for Disqualification of the Prosecutor) ICC-01/11-01/11, A Ch (12 June 2012) (duty required of the Prosecutor).

One way to reconcile Ulväng's theory with practice is that his theory is similar to the lawmaker's duty to uphold the presumption of innocence as a human right. Lawmakers must bear the presumption of innocence in mind whilst writing laws but are not required to enforce the presumption of innocence with respect to specific individuals.[19] That is, laws must uphold or support the presumption of innocence, but in a general way, rather than with regard to the personal rights of any particular individual. Rather than conveying a specific duty, there is a general responsibility to create a law that is supported by, and not contradictory to, the presumption of innocence. The issue with this explanation of Ulväng's theory is two-fold. First, legal principles give rise to duties – in this case the requirement of respecting the presumption while writing laws. This duty is somewhat more amorphous when compared to the active duty of actually presuming a particular person innocent or not treating individuals as guilty unless they are convicted. Ulväng suggests that under these circumstances the presumption could be seen as a guiding rule rather than as requiring the fulfilment of a duty. However, there is more than one part to the presumption of innocence and even if the non-procedural aspect is more similar to a rule of thumb than the more active and concrete duties of the procedural aspect, the fact remains that the presumption of innocence is both procedural and non-procedural in nature. Both aspects require individuals to exercise a duty.

The presumption of innocence requires a duty to uphold it. The procedural aspect provides relatively clear instructions as to what the duty is and who is responsible for that duty, while the non-procedural aspect is less clear. That the presumption of innocence is a human right implies that there is a duty to uphold the right. Further, that individuals have been held responsible for violating the non-procedural aspect confers some obligation on individuals to not engage in certain behaviour. The following sections will discuss which people have the duty to uphold the presumption of innocence.

B. The Fact-Finder Must Uphold the Duty

The least controversial and most straightforward duty-bearers of the presumption of innocence are fact-finders. For the purpose of this discussion, 'fact-finder' includes both judges and juries. Whether the fact-finder is a judge or jury depends on the jurisdiction. At the regional human rights level no distinction has been

[19] The presumption of innocence as a human right is discussed in Chapter 2.

drawn between how juries and professional judges must uphold their duty to respect the presumption of innocence.[20] The fact-finder has the strongest duty to uphold the presumption of innocence because they must uphold both aspects.

The procedural aspect carries a duty that specifically falls to the fact-finder. In terms of this duty, the fact-finder must find the accused not guilty unless and until all of the elements of the alleged crime(s) are proven to the relevant standard of proof.[21] To uphold this duty a fact-finder may not even suggest that the person in question is guilty before he or she is convicted.[22] This is true regardless of whether the statement is made in the courtroom or outside of it.[23] Additionally, the fact-finder violates the presumption of innocence if counsel or witnesses make prejudicial comments and the judge does not control these comments, as it can be deemed to show prejudicial bias on the part of the fact-finder.[24] The fact-finder's duty is specifically tied to the criminal trial process and requires the fact-finder to uphold the procedural aspect of the presumption of innocence.

This duty includes approaching the case without any 'pre-conceived idea that the accused has committed the offence charged.'[25] That the fact-finder should not have preconceived notions of guilt is closely related to the right to an impartial and unbiased fact-finder. It has been argued that this is completely subsumed by the right to an impartial tribunal, however the European Court of Human Rights specifically

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[20] *Barberà* (n 1); Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993)51-52.

[21] To see how this is carried out see Chapter 3 regarding the presumption aspect of the presumption of innocence.

[22] *Minelli v Switzerland* (1983) series A no 62; *Nerattini v Greece* App No 43529/07 (ECtHR 18 December 2008) para 23; *Didu v Romania* App No 34814/02 (ECtHR, 14 April 2009) para 41. See also *Lutz v Germany* (1987) Series A no 123; *Englert v Germany* (1987) Series A no 123*; Nölkenbockhoff v Germany* (1987) Series A no 123; *Daktaras v Lithuania* ECHR 2000-X 489 . For more discussion see van Dijk, Pieter and Marc Viering (revisors), 'Chapter 10 Right to a Fair and Public Hearing' in Pieter Van Dijk, Fried van Hoof, Arjen Van Rijn, Leo Zwaak (eds), Theory and Practice of the European Convention on Human Rights (4th edn, Intersentia 2006).

[23] *Kypiranou v Cyprus* ECHR 2005-XIII 47 (statements by a judge made during a court hearing); *Lavents v Latvia* App No 58442/00 (ECtHR, 28 November 2002); *Nešták* (n 11) para 88; *Garycki v Poland* App No 14248/02 (ECtHR, 6 February 2007) para 66.

[24] *Austria v Italy* (1961) 7 CD 23; *Nielsen v Denmark* (1959) 2 YB 412; *X, Y, Z v Austria* (1980) 19 DR 213.

[25] *Barberà* (n 1) para 77; Christoph Grabenwarter, *European Convention on Human Rights* (Beck, Hart 2014) 167, para 156; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 1002; Paul Mahoney, 'Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.' (2004) 4(2) JSIJ 107, 120; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 1994) 254, para 35.

recognizes this idea as a part of the presumption of innocence.[26] Preventing the fact-finder from having preconceived notions of guilt clearly fits within both rights – the presumption of innocence and the right to an unbiased court. These rights are related however they do not completely overlap. The non-procedural aspect of the presumption of innocence includes not making statements of guilt before a conviction and not treating the accused as guilty, both of which could show bias on the part of the fact-finder against the accused. However, the presumption of innocence is more than this, it includes a specific legal presumption that the fact-finder must hold in the accused's favour. It could be possible that a fact-finder or other duty-bearer might treat an individual as guilty without actually prejudging their guilt. This would violate the presumption of innocence in terms of the non-procedural aspect but would not violate the right to an unbiased fact-finder. Further, one can think of other ways a biased tribunal may manifest itself, not only through prejudging the case, but also by giving undue weight to certain types of testimony or evidence or accepting bribes. Thus, while the right to an impartial tribunal is related to the fact-finder's duties under the presumption of innocence, neither right is completely subsumed by the other.

The procedural aspect is unique to fact-finders. They are the people who must evaluate the evidence to determine whether the relevant standard of proof has been met and whether the presumption of innocence has been overcome. The fact-finder's duty however, is not only limited to the presumption aspect. As public authorities, fact-finders are also responsible for all of the other duties imposed upon public authorities.

C. Public Authorities Have a Duty to Uphold the Presumption of Innocence

The duty to uphold the presumption of innocence is not restricted to fact-finders at trial. All public authorities have a duty to uphold the presumption of innocence.[27] Examples of this duty are that public authorities must not prejudge the outcome of a case or make public statements of guilt against the accused.[28] The

[26] *Barberà* (n 1) para 77; *Janosevic v Sweden* ECHR 2002-VII 1, para 97 (argument that it has been subsumed); David J Harris Michael O'Boyle, Edward P Bates, Carla M Buckley, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP 2014) 465-6; Grabenwarter (n 25) 167, para 156.

[27] General Comment 32 (n 1) para 39; *Gaddafi* (n 18); *Krause* (n 18).

[28] For more discussion see Chapter 4. The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In

specific duty required of a particular public official however, is determined on their role and relationship to the particular right-holder.

The main reason that public authorities have a duty with regard to the presumption of innocence is related to the presumption's role in relation to the rule of law and the power that government officials often have over private individuals. This primarily arises in the context of the presumption of innocence's non-procedural aspect. The main purpose of this aspect is to ensure that people will not be treated as if they are guilty of a crime unless they have been convicted.[29] To conform to that right, a duty is imposed public authorities. Failure to uphold this duty could expose non-convicted people to informal punishment and other sanctions against individuals who may never be prosecuted. There would also be less need for criminal procedure because without this duty, people could be treated the same regardless of whether they have been convicted of a crime through formal criminal proceedings. This would result in an increase of punishment in the absence of due process. While this might save time and money it would not uphold the rule of law.

Another main reason for extending the duty to uphold the presumption of innocence extends to all public authorities is a concern that statements or actions made by public officials might lead the public to believe that the particular individual in question is guilty before he or she has had the benefit of a trial. One reason for this concern is that statements made by public officials are thought to represent the opinions of the government or court.[30] Thus, if a public official makes a statement prejudging a person's guilt it could be thought to represent the opinion of the government itself, which includes the judges who are assigned to the particular case, and could create the appearance that the case was prejudged against the defendant. Further, the statements of public authorities may taint the opinions of members of the public against the suspected individual is because public authorities are thought to be

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Africa' DOC/OS(XXX) (2003) N(6)(e)(ii); *Allenet de Ribemont v France* (1995) Series A no 308

para 36; *Daktaras* (n 22) para 42; *Petko Petkov v Bulgaria* App No 2834/06 (ECtHR, 19 February 2013) para 91; *Borovsky v Slovakia* App No 24528/02 (ECtHR, 2 June 2009); Stavros (n 20) 51-2; Weigend (n 3) 201; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J Evid & Proof 241, 241-6; Ho (n 3) 262-63.

[29] See Chapter 2.

[30] See eg *Gaddafi* (n 18) (chamber expressed fear that the Prosecutor's statements would be attributed to the Court itself).

more believable, reliable and trustworthy than private individuals.[31] Public authorities must take care to 'avoid, so far as possible a misinterpretation by the public which could possibly lead to the suspect's innocence being called into question before trial.'[32] The public is expected to trust the government and people who work in public positions are expected to know more about the workings of government than the average citizen. This leads to the conclusion that if a public authority treats someone as guilty it may be based on information not available to the public-at-large. This can include evidence not released publicly, certain types of investigatory materials, or a greater understanding of the law and how the criminal process works. Put another way, there is some expectation that public officials have opinions of a higher quality, because they are privy to more information or expertise, and should be more trusted or respected.

D. Non-public entities have a limited duty to uphold the presumption of innocence

When considering the presumption of innocence's non-procedural aspect, public authorities are always the group with the strongest duty. One purpose of human rights is to protect the ability of the people to exist and be free from an oppressive government, including a government that would be able to punish without due process.[33] This however, does not mean that private entities do not have any responsibilities to uphold human rights between one another.[34] The duty regarding the presumption of innocence is not as clear however, for those who are not public entities, specifically the media or private individuals. These entities may have a duty but it is far more limited than that of public authorities because of the presumption of innocence's necessary connection to the realm of criminal law and because any duty to uphold the presumption of innocence must be balanced against the non-public entity's own rights.

1. Non-public entity's duty limited by realm of criminal law

As was discussed in Chapter Two the presumption of innocence is only applicable within criminal proceedings. One of the purposes of criminal law is to

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31 Grabenwarter (n 25) 168, para 158.
32 Stavros (n 20) 69; *Bricmont v Belgium* (1989) Series A no 158.
33 Weigend (n 3); UDHR preamble.
34 See Universal Declaration of Human Rights, art 29(1).

determine liability for actions the government has deemed to fall outside of norms of permissible behaviour and to impose punishment in lieu of vigilantism or informal punishment.[35] Although criminal law is largely involves the relationship between the government and the people, the media and other individuals are not precluded from bearing some responsibility for upholding the presumption of innocence.

Private entities are often not directly involved in the criminal justice process. Criminal investigations, prosecutions and trials are usually entirely conducted by public authorities. However, private individuals participate in the criminal justice process as victims, witnesses, or by disseminating news about crimes that have been committed. Additionally, private individuals often initiate the criminal process by reporting crime to the police. When private individuals are involved in the criminal process, they should uphold the non-procedural aspect of the presumption of innocence. Private individuals should not engage in punishment or otherwise treating people as if they are guilty without a conviction. When an individual or the media is directly involved in the criminal process they should have a duty to uphold the presumption of innocence. The duty must be less demanding when they are not directly involved in the criminal process because the further criminal law and procedure the situation is, the presumption of innocence becomes less relevant.

2. The media's duty regarding the presumption of innocence

In General Comment 32 the Human Rights Committee states that '[t]he media should avoid news coverage undermining the presumption of innocence.'[36] This use of 'should' contrasts with the 'duty for all public authorities to refrain from prejudging the outcome of trial' that is referred to earlier in the same paragraph. Nevertheless, it imparts some responsibility on the media. The use of 'should,' rather than 'must' or 'duty' is cautious and may reflect that the media's freedom of expression, and role in reporting information about criminal activity, must be balanced with the media's duty to uphold the presumption of innocence. This idea of balancing the media's freedom of expression against their duty under the presumption of innocence appears to be supported in the case law as well as the European

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35 Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) 14-36. This purpose of criminal law draws upon ideas from John Locke, *Second Treatise on Government* (H Davidson 1982).

36 General Comment 32 (n 1) para 39.

Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.[37]

The media has some duty to protect the presumption of innocence however; there is a question as to what constitutes 'the media'. When one thinks of the media it may be envisioned as newspapers, radio, and television outlets. The internet, greater technology and access to information have increased the amount of information disseminated from less traditional and more casual sources which leads to the question of whether these newer, and perhaps less formal, sources should be considered 'media', or something else.[38] Whether something is considered 'the media' is an open question, and one that the law concerning the presumption of innocence does not address.

Regardless, while the media has a duty to uphold the presumption of innocence, this duty must be balanced by the media's own rights to freedom of speech and expression. Therefore, what the media's specific duty is could depend on how much control the state has over the particular media outlet's content or how independent the media in question is from state control. The question of who controls the media's content is controversial and the answers are quite wide-ranging.[39] If state control over the media were portrayed as a spectrum, one could imagine that media that is completely state controlled would be on one end and media that is completely independent of state control would be on the other end. Most media however, falls in between.

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[37] See eg *Cantoral-Benavides v Peru* (Merits) Inter-American Court of Human Rights Series C No 69 (18 August 2000); *Mejía v Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 119 (25 November 2004); *Sunday Times v United Kingdom* (No 1) (1979) Series A no 30; *Viorel Burzo v Romania* App Nos 75109/01 and 12539/02 (ECtHR, 30 June 2009) para 160; *Akay v Turkey* App No 58539/00 (ECtHR, 24 October 2006); *Priebke v Italy* App No 48799/99 (ECtHR 5 April 2001); *Kuzmin v Russia* App No 58939/00 (ECtHR, 18 March 2010) para 62; Harris, O'Boyle, Bates, Buckley (n 26) 466-7 (discussing how a virulent press campaign may violate the presumption of innocence); Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/5, para 19.

[38] For some discussion on the definition of 'media' see Jan Oster, *Media Freedom as a Fundamental Right* (CUP 2015).

[39] Whether a particular media or press outlet is state run or 'free' is a complicated issue. For discussion of this issue see for example Evangelia Psychogiopoulou (ed), *Medial Policies Revisited* (Palgrave Macmillan 2014). Even allegedly free media outlets can be influenced by the government. See for example Noam Chomsky, *Media Control* (2nd edn, Seven Stories Press 2008).

The amount of state control over the media's content however, should help determine to what extent the media has a duty to uphold the presumption of innocence. Media that falls closer to being state controlled should fall within the category of 'public authority' as the content being transmitted is controlled by the state, meaning that public authorities control the narrative and, in the context of criminal law, can choose whether to portray someone as guilty. Media where the state has greater control over the content would therefore have the same duties as all other public authorities.

Media that is more independent and less controlled by the state has a greater right to freedom of expression.[40] Media that is more independent, or not state controlled, is not a 'public authority' but it does serve certain important public functions such as reporting of government actions, serious crimes and other issues in the public. Likewise, the media can also shape the public's and fact-finder's opinion about people and events, even if it is independent from state control.[41] Because public opinion can be shaped by the media, which is similar to some of the reasoning behind the public authorities' duty, the media should have some duty regarding the presumption of innocence. This duty however, needs to be balanced with the media's right to freedom of expression and responsibility to report events that are in the public's interest.

3. Individual's duty regarding the presumption of innocence

Private individuals have some duty to uphold the presumption of innocence however their duty is even less stringent than that of the media.[42] This is for two reasons. Individuals have other human rights that must be balanced against their duty to uphold the presumption of innocence and private individuals tend to have less influence than public authorities or the media over other individuals.

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[40] See Raphael Cohen-Almagor, *Speech, Media and Ethics: The limits of free expression* (Palgrave Macmillan 2005).

[41] *Mircea v Romania* App No 41250/02 (ECtHR, 29 March 2007) para 75 (judges should be specially trained to avoid being influenced by outside sources); *Dole Chadee et al. v Trinidad and Tobago* Comm No 813/1998 (29 July 1998) (case where the law was changed to find jurors who were not tainted by media coverage).

[42] Duff, 'Who Must Presume' (n 3) 179-80; Alwin A van Dijk, 'Retributivist Arguments against Presuming Innocence: Answering to Duff' (2013) 42(3) NJLP 249; PJ Schwikkard, *Presumption of Innocence* (Juta & Co 1999) 13-17.

The human rights of private individuals cannot be curtailed except when they encroach on other people's rights or the 'just requirements of morality, public order and the general welfare in a democratic society.'[43] Thus, private individuals can enjoy their rights and freedoms so long as they do not conflict with these limits. With regard to the presumption of innocence, although there is wide freedom for individuals to treat others with suspicion or distrust, there is a societal or moral harm done when a member of the public presumes someone to be guilty without justification.[44] This is because treating someone with suspicion or as though they are guilty, without cause implies that the suspected person is disregarding his or her societal obligations or disrespecting the community.[45]

Private individuals have other rights that take precedence over upholding the presumption of innocence for other private individuals. For example, private individuals are entitled to hold opinions, biases and beliefs that do not have to be based on evidence. Further, freedom of speech and freedom of expression allow individuals to express those opinions (even if reprehensible) to others within certain wide limits.[46] Additionally, while people are entitled to their biases against specific individuals (or even groups) any mistreatment resulting from that bias should not be akin to the type of treatment that can be permissibly inflicted on someone following a finding of guilt. This means that people should not be shunned, sanctioned or similarly punished by members of society without cause. When the behaviour of private citizens gets too close to the type of treatment that would normally result from a conviction, or is otherwise too far outside the acceptable level of behaviour, the non-procedural aspect of the presumption of innocence may have been interfered with and the mistreated individual could seek recourse in either civil or criminal law.

Another reason that the individual's duty to uphold the presumption of innocence is less stringent is because of the relative lack of influence that private individuals have over others. There is a concern that the government or public authorities, and to a lesser extent the media, will exert influence over the general

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[43] UDHR art 29(2); Stating that the presumption imposes a duty on individuals see Duff, 'Who Must Presume' (n 3) 179-80; van Dijk (n 42).

[44] Duff, 'Who Must Presume' (n 3); Peter DeAngelis 'Racial Profiling and the Presumption of Innocence' (2014) 43(1) NJLP 43, 47.

[45] D A Nance, 'Civility and the Burden of Proof' (1994) 17(3) Harv J L & Pub Pol'y 647, 653; DeAngelis (n 44) 47.

[46] For general discussions on the limits of freedom of speech see Eric Barendt, *Freedom of Speech* (OUP 2007); Dario Milo, *Defamation and Freedom of Speech* (OUP 2008).

public resulting in the imposition of informal sanctions against individuals that have not been convicted of anything. Private individuals however, rarely have this kind of influence over other private individuals. The opinion of one person may influence others, but in a more specific and less widespread manner than the risk posed by the government or media.

Legal theorist, Antony Duff introduces an interesting normative theory relating to the individual's duty to uphold the presumption of innocence. Duff argues that the presumption of innocence imposes a duty on individual citizens and is 'essential in a society committed to fairness and social justice.'[47] His formulation is based on the idea that the presumption of innocence 'reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.'[48] It is a notion based on the duty of mutual respect that members of a society have towards each other generally and would serve as both a duty and a right of all citizens in their daily lives.[49] Duff's approach extends the presumption of innocence beyond the realm of criminal law and procedure to the civil interactions that individuals have with each other.[50]

Duff argues that individuals have a duty as citizens to extend a 'civic trust' to all of the other citizens, meaning that members of a society (or citizens of a polity) are required to treat our fellow citizens as if they can be trusted to not commit crimes and that they are capable of both understanding reason and acting in accordance to reasoned decisions.[51] He believes there should be an expectation that people will act in accordance to social norms and obligations and refrain from crime.[52] Further, he suggests that we expect people to understand the reasons behind laws that criminalise behaviour, and we only wish to convict people who act according to their own will.[53]

To demonstrate this point Duff gives the example of how society takes precautions against crime. One way individuals prevent crime is by locking our car

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47 Duff, 'Who Must Presume' (n 3); Schwikkard (n 42) 13-17.
48 Duff, 'Who Must Presume' (n 3); Schwikkard (n 42) 13-17.
49 Duff, 'Who Must Presume' (n 3) 175-6; Schwikkard (n 42) 15; Nance (n 45) 653.
50 Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268; Duff, 'Who Must Presume' (n 3).
51 RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 196-97
52 Ibid; Schwikkard (n 42)15; Nance (n 45).
53Duff, *Answering for Crime* (n 51) 196-97.

doors, which is a legitimate act to deter crime because it is a general precaution.[54] If, however, you were to lock your car door as a response to seeing another person approaching you, that person will likely feel insulted by your action because they know you are presuming them guilty of criminal intent and showing a specific distrust of them in particular.[55] This argument is strengthened in the criminal court context because an accused person must be treated as innocent if one is to continue to treat them as a citizen. That is, you must treat an accused person as you would any citizen, because to do otherwise would be to treat them as if they are guilty.[56]

This theory is interesting when considering the presumption of innocence from a normative perspective. What Duff appears to do is apply the presumption of innocence to the normal actions of individuals in an effort to determine whether the presumption could provide an explanation for regular everyday non-criminal behaviour. When thinking about how human interaction works, it is quite common for individuals to approach strangers with a sense of neutral trust, that is, without a sense of trust or distrust towards them. One generally expects that people encountered in everyday situations will act rationally and in a law-abiding manner. Prejudices aside, it is not until that individual says or does something specific, that our attitude, or level of trust, changes. Further, if one displays an attitude of distrust towards others without reason, the person who experiences that distrust will find the behaviour outside of the norm. This is much like how the presumption of innocence works in criminal procedure. The presumption of innocence requires duty-holders to approach individuals with a belief in their innocence that can only be displaced once a certain amount of evidence has been provided to displace it.

While the civic presumption of innocence proposed by Duff is an attractive theory, it is very different from the legally defined presumption of innocence. The latter is 'specific and retrospective,' in that it is about a specific person and specific events that are alleged to have already happened.[57] Thus, it is both temporally and individually limited.[58] The civic presumption of innocence on the other hand, is 'general and prospective' meaning that each person is presumed innocent of past crimes that he or she has not been found guilty of as well as all 'future crimes in

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54 Ibid at 197.
55 Ibid.
56 Ibid; Duff, 'Presumptions Broad and Narrow' (n 50) 273.
57 Duff, 'Who Must Presume' (n 3) 181.
58 Weigend (n 3) 201.

general'.[59] Thus, not only does the civic presumption of innocence not create an individual duty to uphold the presumption of innocence, but also when it applies, its purpose and its goals are fundamentally different. While the civic presumption of innocence is interesting because it appears to reflect how people act, and how they should act, in regular situations, it is theoretical and very different from the presumption of innocence.

E. How is the duty expressed?

One expects a duty to be carried out through actions, not thoughts. There is some confusion with the duty required by the presumption of innocence however, stemming from the fact that it is a presumption. On one hand, it seems that the duty to uphold the presumption of innocence, as with any duty, should be carried out by conduct. Conversely, legal presumptions are generally believed to be based in thought as they are inferences.[60] In practice, the duty lies in the actions taken by the duty-holder and not the thoughts or beliefs that the duty-holder may have. What that means is that it does not matter what someone thinks about an accused's guilt or innocence so long as the duty-holder's actions serve to uphold their duty associated with the presumption of innocence. This highlights the difference between thinking someone is innocent and treating them as if they are innocent.

Duties require action because the word 'duty' puts an obligation to on the duty-holder. This implies that the duty-holder must actually do something in order to fulfil his or her obligation. The duty to uphold the presumption of innocence requires action in order for the obligation to be fulfilled.[61] This conduct is represented in the words or treatment that the duty-bearer uses toward the right-holder. While it is possible for someone to have biases against the accused in their mind, if they do not act on those biases the presumption of innocence remains intact. This is seemingly obvious, but it is important to bear this in mind while discussing who has the duty and what that duty entails as the only way that one can know whether the presumption of innocence has been violated is through the words or actions of a duty-bearer.

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[59] Duff, 'Who Must Presume' (n 3) 181.
[60] John D Lawson, *The Law of Presumptive Evidence* (AL Bancroft & Co 1885) 555, rule 117; see Philippe Merle, *Les Presomptions Legales en Droit Penal*, These, 20 December 1968, Universite de Nancy, Faculte de Droit et Des Sciences Economiques, Librairie Generale de Droit et de Jurisprudence (Paris 1970); Morton and Hutchison (n 7) 11.
[61] Duff, 'Presumptions Broad and Narrow' (n 50) 272.

Presumptions generally are inferences or beliefs that individuals hold.[62] Attitudes and beliefs are thoughts that, unless expressed, stay in a person's mind. While it may be ideal for individuals to express what they think, if a person thinks something and does not express it then the thought stays with them. There is no way of knowing what private thoughts people might carry. This is particularly challenging within criminal law because if upholding a presumption is an internal process, then there is no way of knowing if the duty bearer is upholding it correctly. This is particularly true in cases that do not result in a written opinion.

There is a contradiction in the idea that someone could believe that a person is guilty, before the presumption of innocence has been overcome, and yet not violate the right to the presumption of innocence. Internal thoughts that the duty-bearer has about the right-holder's innocence however, can only be proven by the actions and speech of the duty-bearer. Further, violations of a right must have some consequence on the right-holder otherwise there would not be a violation. If a duty-bearer is able to maintain their thoughts or suspicions of guilt, while upholding both aspects of the presumption of innocence, then the right-holder has suffered no consequences and there can be no violation.

That does not mean that the duty-bearers' words must be taken without interpretation. The context of duty-bearers' statements will be considered in order to try to determine the true meaning, rather than merely focusing on the form of the statement.[63] That context will take into account both who said the statement and whether the statement can have a more innocuous interpretation.[64] Interpreting the meaning of a statement helps prevent duty-bearers from hiding their true intention of

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[62] Lawson (n 60) 555, rule 117; see Merle (n 60); Morton and Hutchison (n 7) 11 The presumption or procedural aspect of the presumption of innocence is discussed in Chapter 3.

[63] See for example *Lavents* (n 23) para 126; *Daktaras* (n 22) para 42; *A.L. v Germany* App No 72758/01 (ECtHR, 28 April 2005) para 31; *Ismoilov* (n 11) para 166; *Nešťák* (n 11) para 89; *Krause* (n 18); *Gaddafi* (n 18) para 33; *Prosecutor v Mbarushimana* (Decisions on Defence Request for an Order to Preserve the Impartiality of the Proceedings) ICC-01/04-01/10-51, PT Ch I (31 January 2011); This is discussed in more detail in Chapter 4.

[64] See for example *Gaddafi* (n 18) para 33; *Mbarushimana* (n 63); *Krause* (n 18). See also *X v Austria* (1981) 26 DR 214 for a similar situation and finding. *J v Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 275 (27 November 2013); *Fatullayev v Azerbaijan* App No 40984/07 (ECtHR, 22 April 2010) para 159; *Allenet de Ribemont* (n 28) para 38; *Garycki* (n 23) para 69; Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White and Ovey the European Convention on Human Rights* (6th edn, OUP 2014) 287; W Schabas and Y McDermott, 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 1645-6, para 27.

depriving someone of their right to the presumption of innocence and further underscores the importance of this right.

F. Conclusion

The presumption of innocence is a human right owed to the right-holder. There must, therefore, be some corresponding duty obligating others to ensure that the right-holder has access to the right. While everyone bears some duty to uphold the presumption of innocence, the practical application of the presumption indicates that while the right may belong to everyone equally, the duty is somewhat narrower and depends on the duty-holder's role. This more limited category of duty-holders results from the fact that the imposition of a duty must not unduly limit the rights and freedoms of the person upon which the duty is being imposed.

Fact-finders at trial have the broadest duty with regard to the presumption of innocence, as they must uphold the presumption in both its procedural and non-procedural aspects. By comparison, public authorities are only required to uphold the non-procedural aspect of the presumption of innocence. However, they also have a strict obligation with regard to that duty. Public authorities must not treat a non-convicted person as if he or she is legally guilty. Greater limitations on the rights and freedoms of public authorities, such as their right to freedom of expression, may be justified because of the influence public authorities may have over public opinion or because of how a public authority's actions may reflect back onto the court or criminal justice system. To allow public authorities to treat non-convicted people in the same manner as those with a conviction would obviate the need for due process and the criminal justice system generally.

Private entities have some duties to uphold the non-procedural aspect of the presumption of innocence. This duty must be balanced against the entity's other rights. Private entities must be able to enjoy their own rights and freedoms so long as they do not violate other people's rights or the society's morality or welfare. Generally speaking when someone does this it will be handled within the applicable criminal or civil law. The free media has a stronger duty than private individuals. This is because private individuals have more rights and freedoms than the media and the media has more ability to influence the general public.

A close examination of the duty to uphold the presumption of innocence highlights the existence of the two different aspects. The duty changes not just

because of the normative role individuals play in society, or their particular role within government, but because of the setting in which the duty-bearer's action occurs. This chapter shows that the duty is different depending on whether the duty-bearer is acting inside or outside the trial setting, as well as whether the duty-bearer is a public authority.

Outside of the trial context, the duty is general and everyone bears some responsibility to ensure the accused receives its protections. This duty is part of the non-procedural aspect of the presumption of innocence and has the purpose of not causing public opinion to turn against individuals. Thus, it ideally prevents extrajudicial punishment by either the government or the public. It requires the government to not treat individuals as guilty unless they have been convicted. Further, it prevents public authorities from treating individuals as under suspicion unless the relevant standard of proof has been met to warrant a different kind of treatment. Individuals cannot subject others to informal punishments that would normally be enacted by the government. The media and private individuals cannot express their suspicions as to another person's guilt to such an extent as to violate laws regarding defamation.

Within the trial setting there is another function to the duty arising from the presumption of innocence. This aspect of the duty is tied to the presumption of innocence being an actual legal presumption and is relevant to the fact-finder's responsibilities. The presumption of innocence requires the fact-finder to presume innocence until and unless there is enough proof to overcome the required standard of proof. The purpose of this duty of the presumption of innocence is to prevent convictions of innocent people.

Chapter 7. The Relationship Between the Presumption of Innocence and Pre-Determination Detention

Today there are an estimated 3.3 million people worldwide being held in detention without a conviction, despite the fact that the presumption of innocence prevents punishment or treating people as guilty without a conviction.[1] In many countries, the number of people detained prior to a final determination on their charges is growing and is a major contributor to prison overpopulation.[2] Although human rights law is based on a principle of non-incarceration, pre-determination detention has become the norm in most criminal jurisdictions.[3]

On its face, pre-determination detention appears to be directly at odds with the presumption of innocence. Pre-determination detention seems to treat individuals as if they are guilty without a conviction. Imprisoning someone pre-determination restricts their human rights and can act as pre-punishment. This is particularly true when an individual is being held in pre-determination detention in conditions that are the same or similar to those imposed on a person who has been convicted after trial. Although some scholars and courts who subscribe to a narrow reading of the presumption of innocence argue that the presumption of innocence does not apply to pre-determination detention, they base this idea on the notion that the presumption of innocence only applies at trial and that other rights control whether or not pre-determination detention is appropriate. If the presumption of innocence applies to pre-

[1] Open Society Justice Initiative, ''Presumption of Guilt: The global overuse of pretrial detention' (2014) <www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf> accessed 16 April 2018, p 7.

[2] Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making the in EU' (2017) <www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf> accessed on 16 April 2018; Lonneke Stevens, 'Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does not Limit its Increasing Use' (2009) 17 Eur J Crim Cr L Cr J 165, 167. Commission of the European Communities, 'Green Paper on Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures' (17 August 1994) Doc No COM(2004) 562 final (2004), 3.

[3] UN General Assembly, Universal Declaration of Human Rights, 10 Dec 1948, 217 A (III) (UDHR) art 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR) art 5; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 7; African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217 (African Charter) art 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 9.

determination processes, it appears that detaining someone who has not been convicted would necessarily interfere with the presumption of innocence.

The earlier chapters of this study argue that the presumption of innocence applies to pre-trial processes and decisions. In fact, the non-procedural aspect of presumption of innocence applies to all facets of the criminal process and helps regulate the relationship between individuals and the government. Specifically, the presumption of innocence requires that individuals not be punished or be treated as guilty unless they are convicted of a crime. If the presumption of innocence is to help avoid arbitrary detention, it is easy to see that pre-determination detention is in tension with the presumption of innocence and its purpose of not punishing innocent people.

Laws authorising pre-determination detention are not set out in the same articles or sections of criminal codes and statutes as the laws guaranteeing the presumption of innocence. As such, the legality of a pre-determination detention decision is often evaluated through the lens of the laws regarding pre-determination detention alone and not in conjunction with laws guaranteeing the presumption of innocence. However, an overwhelming number of cases that decide presumption of innocence issues are actually considering whether detaining someone prior to trial violates the presumption of innocence.[4] This is usually involves an inquiry about the relationship between the presumption of innocence generally and the accused's general pre-determination detention status. Very few decisions evaluate whether the reasons behind the individual's pre-determination detention violate the presumption of innocence.

Accused persons are detained before the outcome of trial for a number of reasons and for varying lengths of time. This chapter evaluates whether the reasons given for pre-determination detention can comply with the presumption of innocence. As such, it will not discuss the general philosophical issues that surround pre-trial detention. To that end, it is assumed that situations may exist under which pre-trial detention is justified under law. Further, this chapter will not argue whether the reasons for pre-trial detention are justifiable under any other legal provisions.

There are three main reasons why a person may be incarcerated before the determination of the outcome of their case. They are: 1) the type of charges the person

[4] W Schabas and Y McDermott, 'Article 66: Presumption of Innocence' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 1648, para 32.

has been accused of; 2) crime prevention; and 3) to ensure that the accused person is present for trial. In addition to these reasons justifying pre-trial detention, there are additional special considerations that exist in international criminal law that may prevent an accused from being released from custody before the outcome of their trial is determined. Each of these reasons and special considerations for pre-determination detention will be evaluated with respect to the presumption of innocence in order to establish whether any of them are compatible with the presumption. The chapter concludes that it is not consistent with the presumption of innocence to hold someone in pre-determination detention based on the type of charges they have been accused of or to prevent the accused from committing future crimes. The presumption of innocence is only compatible with holding an accused before trial to ensure that he or she will appear for trial. This reason however, can only be valid if the decision to detain the accused before the trial's outcome is considered outside of criminal procedure. Finally, the special circumstances discussed within international criminal law cannot be used as reasons or excuses to hold someone in detention before a conviction as they are clearly at odds with the presumption of innocence.

A. What is Pre-Determination Detention?

Pre-determination detention exists when an individual is held in custody during all or any part of the time between when he or she is arrested and the final outcome of the case.[5] While commonly called pre-trial detention it is more aptly described as pre-determination detention, as it can occur both before and during trial. The period during which each accused is detained prior to a determination of the charges differs on a case-by-case basis, although many accused people are detained for some period of time prior to the entry of a verdict.

Pre-determination detention can be linked with arbitrary detention. Arbitrary detention is detention that occurs without legitimate justification.[6] It is either not connected to criminal charges brought against the accused or the detention occurs in the absence of the required level of proof to support an arrest or continued detention.[7]

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[5] Jeff Thaler, 'Punishing the Innocent: the need for due process and the presumption of innocence prior to trial' [1978](2) Wisc L Rev 441, 450; Laurence H Tribe, 'An Ounce of Detention: Preventative Justice in the World of John Mitchell' (1970) 56(3) Va L Rev 371, 384; Stevens, 'Pre-Trial Detention' (n 2).

[6] UDHR art 9; ECHR art 5; ACHR art 7; African Charter art 6; ICCPR art 9.

[7] See Organization of American States, Inter-American Commission on Human Rights, 'Report on the Use of Pretrial Detention in the Americas' (30 December 2013)

While this kind of detention occurs, and is widespread, it is specifically guarded against in the international and regional human rights instruments.[8] Detention without justification violates a number of human rights including the right to liberty, the right to autonomy, the right to work, the right to family life, and the right to due process. Pre-determination detention differs from arbitrary detention because it has some justification under the law. However, pre-determination detention is related to arbitrary detention because pre-determination detention is often used as a justification for incarcerating someone for no legitimate reason. Sometimes this occurs when individuals are held in pre-determination detention but are not charged for an excessive amount of time, which national and regional courts have found can violate the presumption of innocence. The Inter-American Court of Human Rights held that being detained for six years without justification violates the presumption of innocence.[9] Likewise, individuals in Malawi are sometimes kept in detention without charges for months or even years, despite a Constitutional requirement to uphold the presumption of innocence in a pre-trial setting.[10]

Of the international and internationalised criminal courts and tribunals, only the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court have released accused individuals from pre-determination detention before the accused was acquitted or served their full sentence.[11] There was no provision for pre-determination release in the Charters of either the Nuremberg or Tokyo Tribunals.[12] That trend continued in international criminal law until 1999 when the International Criminal Tribunal for the former Yugoslavia amended Rule 65 of its Rules of Procedure and Evidence and began to release more accused individuals prior

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OAE/SER.LL/V/II. Doc 46/13 (2013)for an in depth discussion regarding arbitrary detention and the ways it may be disguised as pre-determination detention.

[8] UDHR art 9; ICCPR art 9(1); ECHR art 5; African Charter art 7(3).

[9] López Álvarez v Honduras (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 141 (1 February 2006) para 144.

[10] Shima Baradaran, 'The Presumption of Innocence and Pretrial Detention in Malawi' (2010) 4 MLJ 124, 124-125.

[11] Yvonne McDermott, *Fairness in International Criminal Trials* (OUP 2016) 42-44; Caroline L Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) 60(1) Am U L Rev 1, 7.

[12] Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003) 84; Anne-Marie La Rosa 'A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial' (1997) 37 Int'l Rev Red Cross 635.

to trial.[13] Before the amendment, requests to be released under Rule 65 could only be granted in 'exceptional circumstances'.[14] The amendment eliminated the 'exceptional circumstances' requirement and set out several new criteria to be satisfied before release would be granted.[15] Despite this change, detention remained the norm.[16] Although some accused were released before trial commenced all defendants were imprisoned once trial began.[17] With the exception of some long breaks in trial at the former Yugoslavia Tribunal, defendants before the *ad hoc* Tribunals remained in pre-determination detention from the beginning of trial until the final decision was made.

The International Criminal Court and the Special Tribunal for Lebanon seem to have shifted away from the trend of extended pre-determination incarceration and pre-determination release is more likely at both. The International Criminal Court and the Special Tribunal for Lebanon require the Pre-Trial Chamber to release the accused unless pre-determination detention is necessary to guarantee the accused's presence at trial, prevent the accused from obstructing justice, or to prevent the continuing commission of the crime for which the person is charged.[18] This represents a significant change from the jurisprudence of the Nuremberg and Tokyo Tribunals and the *ad hoc* Tribunals. This change prioritised release unless certain conditions are present, whereas at the *ad hoc* Tribunals preferred to continue to detain the accused unless very specific conditions were met. Although pre-determination detention is still

[13] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 8 July 2015) (ICTY RPE) r 65.
[14] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 14 March 1994)r 65 Although the exceptional circumstances requirement is included in all versions of the Rules of Procedure and Evidence until 1999.
[15] ICTY RPE r 65.
[16] Examples of decisions where provisional release was granted after the rule change: *Prosecutor v Halilović* (Decision on Request for Pre-Trial Provisional Release) IT-01-48-PT, T Ch (13 December 2001). Examples where release was considered an 'exception' *Prosecutor v Krajišnik et al.* (Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release) IT-00-39 & 40PT, T Ch (8 October 2001) para 12; *Prosecutor v Jokić* (Order on Miodrag Jokić's Motion for Provisional Release) IT-01-42-PT, T Ch (20 February 2002), para 18. Zappalà (n 12) 96-97.
[17] Davidson (n 11) 42.
[18] McDermott (n 11) 42-44; Rome Statute of the International Criminal Court (17 July 1998) (ICC Statute) art 60(2); Rules of Procedure and Evidence, Special Tribunal for Lebanon (29 November 2010) (STL RPE) r 102; *Prosecutor v Bemba* (Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa) ICC-01/05-01/08, PT Ch II (14 August 2009), para 77 (stating that the decision on release is 'not of a discretionary nature' when all the conditions are met).

widely used at the International Criminal Court, this shift in attitude should allow for more pre-determination release and better justified pre-determination detention in the future. The Special Tribunal for Lebanon should follow a similar practice however, their suspects remain at large.

If the accused is not released while trial is pending, it is possible for an accused individual to spend many years in pre-determination detention, depending on the circumstances of their case.[19] During this time, the individual accused suffers the loss or constriction of many rights including: the right to liberty, freedom of movement, the right to privacy, the right to work, the right to enjoy family life, and due process rights.[20] Individuals held in pre-determination detention may also experience economic, social and psychological consequences during their time in detention.[21] They often lose their jobs, are restricted in their ability to spend time with family and friends, lose control over their schedule, lose the freedom to act as they choose, have restricted visits with their legal counsel, have a limited ability to help with their defence, and may suffer other consequences and deprivations depending on the circumstances.[22] In some domestic settings there is some suggestion that an individual held in pre-determination detention is more likely to be convicted after trial, or more likely to receive a custodial sentence upon conviction.[23] Thus, a non-convicted person held in pre-determination detention suffers many of the same social losses as a convicted person. In an effort to minimise these negative consequences, individuals being detained prior to a determination of the crimes against them are meant to be housed in areas of the jail or prison that are separate from convicted individuals to counter any suspicion that pre-determination detention is analogous to punishment.[24] The conditions of their confinement are meant to be less restrictive, and if possible, more comfortable than what is experienced by individuals who have been convicted. Unfortunately, regardless of how nice the conditions may be the non-

[19] Davidson (n 11) 4. See also the Open Society (n 1) and Fair Trials (n 2) reports for more current and national statistics.
[20] Richard L Lippke, *Taming the Presumption of Innocence* (OUP 2016) 159; Davidson (n 11) 13.
[21] Thaler (n 5) 451; Rinat Kitai, 'Presuming Innocence' (2002) 55(2) Okla L R 257, 286-287.
[22] Kitai (n 21) 285-286.
[23] Ibid 286.
[24] *Munyagishari v the Prosecutor* (Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals Against the Decision on Referral under Rule 11bis) ICTR-05-89-AR11bis, A Ch (3 May 2013); McDermott (n 11) 42-44.

convicted accused being held in pre-determination detention will still suffer most of the same deprivations and restrictions of their other rights, as those people in detention for punishment, and may suffer other stigmas once they return to their communities.

B. Does the presumption of innocence apply to pre-determination detention?

The presumption of innocence and pre-determination detention are contradictory concepts that exist in most, if not every, legal system. Pre-determination detention is in tension with the presumption of innocence because it involves incarcerating an individual, an act typically regarded as a form of punishment, prior to any decision of conviction that would determine that the accused must be subject to punishment. Where the presumption of innocence prevents individuals from being treated as if they are guilty without a conviction, pre-determination detention appears to place non-convicted people in the same or similar conditions as a person who has been convicted. There is quite a lot of controversy when determining whether the presumption of innocence is at all relevant to the issue of pre-determination detention, in part because there is no general consensus about the scope of the presumption of innocence.[25] The fact that individuals are treated as guilty by being deprived of so many rights and freedoms, that are equivalent to the deprivations they would experience if convicted, should be a clear indication that the presumption of innocence is relevant to pre-determination detention. The similarity of between pre-determination detention and punishment, in terms of the restriction of rights, shows that the presumption of innocence's role of preventing people from being treating as guilty unless there is they have been convicted, is implicated as well.

Imprisonment is the most severe sentence a convicted person can receive in most jurisdictions. Placing someone in pre-determination detention creates the appearance that he or she has been subjected to the worst possible punishment before they are even convicted.[26] Human rights law strongly favours liberty over detention, and protects against arbitrary detention not just through the presumption of innocence

[25] See discussion in Una Ni Raifeartaigh 'Reconciling Bail Law with the Presumption of Innocence' (1997) 17(1) OJLS 1, 4.
[26] *Barreto Leiva v Venezuela* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 206 (17 November 2009) para 121; Lippke (n 20) 157.

but also through the application of other specific rules.[27] The International Covenant on Civil and Political Rights states 'it shall not be the general rule that persons awaiting trial shall be detained in custody.'[28] Further, the presumption of innocence dictates that people should not be treated as if they are guilty without first being convicted.[29]

The debate over whether the presumption of innocence applies to pre-determination detention is hindered by disagreements about the proper application of the presumption of innocence. There is a lack of standard as to what weight the presumption of innocence should be given with regard to determining whether pre-determination detention is permissible.[30] Lonneke Stevens argues that when it comes to pre-determination detention the presumption of innocence is 'an important but abstract principle operating in the background.'[31] This means that the presumption of innocence is relevant to pre-determination detention but does not clarify the ways in which it is relevant, what its weight should be when making the decision to hold someone in pre-determination detention, and whether the presumption of innocence can be used to help or criticise pre-determination detention practices.

One could argue that the various intrusions and deprivations that are imposed on the accused during investigation, such as search and seizure, questioning and various types of monitoring, are not different from pre-determination detention. However, this does not seem justified because the deprivations and restrictions placed on the individual in detention are greater than the other types of restrictions placed on the accused. In addition, the purposes of pre-determination detention are different from the goals of different investigatory techniques. In particular, people are not placed in pre-determination detention for investigatory purposes, that is to gather

[27] ACHR art 7(5); ECHR art 5(3); African Charter arts 6, 7(1)(d), ICCPR art 9(3); UDHR art 9. William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 285-286; Commission of European Communities (n 2) 3; Kate Doran ''Provisional Release in International Human Rights Law and International Criminal Law' (2011) 11(4) Int'l C L R 707, 724; Stefan Trechsel, 'Rights in Criminal Proceedings Under the ECHR and ICTY Statute – a precarious comparison' in Bert Swart, Alexander Zahar and Göran Sluiter (eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 149, 165-6; La Rosa (n 12) 642-643.

[28] ICCPR art 9(3).

[29] RA Duff, 'Pre-Trial Detention and the Presumption of Innocence' in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013); Shima Baradaran, 'Restoring the Presumption of Innocence' (2011) 72 Ohio St LJ 723, 723; Raifeartaigh (n 25); Tribe (n 5); Kitai (n 21) 287.

[30] Stevens, 'Pre-Trial Detention' (n 2) 170-171.

[31] Ibid.

evidence. Rather pre-determination detention is imposed because of the seriousness of the particular charges brought against the accused, to prevent the accused from committing additional crimes, or to ensure that the accused appears for trial.

Despite its resemblance to punishment without a conviction, some scholars, of the narrow, trial based, view of the presumption of innocence argue that the presumption of innocence is not implicated during the judicial decision to hold the accused in detention prior to a determination of the charges. For these commentators, pre-determination detention is fundamentally different from punishment because it lacks the necessary component of social disapproval or sanction.[32] The idea is that there is no intent to punish the accused, but to merely restrain them while the investigation and trial processes are allowed to continue.[33] This view is seen as being compatible with 'actual investigation and trial' because the accused is regarded as a 'suspect' or 'defendant' rather than as 'guilty' or 'innocent'.[34] Thus, because no judgment has been passed regarding the accused's guilt, then the presumption of innocence is not implicated.[35] This position fails to account for the fact that the deprivations caused by pre-determination detention may be indistinguishable from punishment. Further, the accused who must endure time in prison without having been convicted, and the public, may not be able to discern the difference between pre-determination detention and punishment.[36]

Another argument suggests that it is unnecessary or irrelevant to conduct a presumption of innocence analysis when considering pre-determination detention. Under this line of thinking, other rights supply the protection that the presumption of innocence is meant to provide to the accused. This argument claims that presumption of innocence is unnecessary in this context because it is infringing on the domain of other rights, including the rights to liberty and personal autonomy, which provide the accused with adequate protection without resorting to the presumption of innocence.[37]

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[32] See the discussion of this topic in Lippke (n 20) 158-159; See also Thaler (n 5) 450-451; Kitai (n 21) 287. For a general definition of punishment see HLA Hart, *Punishment and Responsibility* (OUP 1968) 4-5.
[33] Thaler (n 5) 451.
[34] Kitai (n 21) 277-278.
[35] Carlo Umberto Del Pozzo, *La Liberta' Personale Nel Processo Penale Italiano* (UTET 1962) cited in Kitai (n 21) 277-278.
[36] Lippke (n 20) 156; Thaler (n 5) 451; Stefan Trechsel, 'The Right to be Presumed Innocent' in Stefan Trechsel and Sarah Summers (eds) *Human Rights in Criminal Proceedings* (OUP 2006) 180.
[37] Lippke (n 20) 157, 166-167.

However, while these other rights may protect the accused from unjustified restraint or imprisonment these rights do not specifically protect him or her from being punished prior to a conviction. Since pre-determination detention can be similar to punishment, the presumption of innocence is relevant.

Stevens argues that while the presumption of innocence may be relevant to pre-trial detention in theory, this connection does not exist in practice. She suggests that because the European Court of Human Rights in part justifies pre-determination detention on crime prevention grounds it falls outside the scope of the presumption of innocence.[38] Further because the presumption of innocence lacks specific rules or scope it can be manipulated to be more or less relevant to the question of whether pre-determination detention is relevant.[39] Thus, while the presumption of innocence is relevant to pre-determination detention on an abstract level it provides no practical guidance as to how pre-determination detention is to be applied and additionally cannot be a limiting factor on whether or when pre-determination detention is applicable.[40] Rather, the presumption of innocence reminds the fact-finder that pre-determination detention must have a specific justification.[41] This argument limits the presumption of innocence's role in determining whether pre-determination detention is applicable, however, it still argues that the presumption is relevant, albeit in a general and abstract manner.

That the presumption of innocence and pre-determination detention exist within the same legal systems could be evidence that the presumption of innocence is not relevant to pre-determination detention if the co-existence of these two rules cannot be reconciled.[42] Proponents use this argument to support their position that the presumption of innocence that is only pertinent during trial with little or no applicability in the pre-trial process. However, the presumption of innocence does apply outside of the trial context, and before trial has begun, thus the presumption of innocence could apply to pre-determination detention. This however, does require some reconciliation of the two legal concepts.

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[38] Lonneke Stevens, 'The Meaning of the Presumption of Innocence for Pre-Trial Detention: An Empirical Approach' (2013) 42(3) NJLP 239, 246-247.
[39] Stevens, 'Pre-Trial Detention' (n 2); Stevens, 'The Meaning of the Presumption of Innocence' (n 38).
[40] Stevens, 'Pre-Trial Detention'; Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 246-247.
[41] Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 248.
[42] Del Pozzo (n 35) cited in Kitai (n 21) 277-278.

The debate about the applicability of the presumption of innocence to pre-determination detention is also seen in the decisions of many international and regional courts, tribunals and other human rights bodies. The European Court of Human Rights and the European Commission both acknowledge that the presumption of innocence is relevant to whether someone can be held in pre-determination detention.[43] However, both institutions have found that there is no human right to bail and that a denial of bail does not violate the presumption of innocence.[44] At the International Criminal Tribunal for the former Yugoslavia, President Cassese stated that the interests of security and order had to be balanced by the presumption of innocence when making decisions regarding detention.[45] Further, Judge Robinson's dissent for the provisional release decision in *Prosecutor v Krajisnik et al.* specifically links the notion of provisional release with the presumption of innocence.[46] The International Criminal Court also acknowledges that the presumption of innocence is relevant to the decision of issuing an arrest warrant and detaining an accused person prior to a conviction.[47] In contrast, the Appeals Chamber of the Special Court for

[43] See for example, Commission of European Communities (n 2); See also Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 240-241.

[44] ICCPR art 14; *Prosecutor v Norman et al.* (Fofana - Appeal Against Decision Refusing Bail) SCSL-04-14-AR65, A Ch (11 March 2005) para 32; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 1002.

[45] *Prosecutor v Blaškić* (Decision on Motion of Defence Seeking Modification of Detention of General Blaškić) IT-95-14-T, Pres (9 January 1997); Schabas and McDermott (n 4) 1648, para 32.

[46] *Prosecutor v Krajišnik et al.* (Dissenting Opinion of Judge Robinson to the Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release) IT-00-39 & 40PT, T Ch (8 October 2001); for a decision with a similar argument see *Prosecutor v Jokić* (Order on Miodrag Jokić's Motion for Provisional Release) IT-01-42-PT, T Ch (20 February 2002) (the public interest must be balanced with the presumption of innocence in making decisions regarding provisional release).

[47] *Prosecutor v Bemba* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence") ICC-01/05-01/08, A Ch (19 November 2010) para 49; *Prosecutor v Bemba* (Public redacted version Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'") ICC-01/05-01/08, A Ch (5 March 2012) para 40; *Prosecutor v Gbagbo et al.* (Decision on the "Requête de la Défense demandant la mise en liberté proviso ire du president Gbagbo") ICC-02/11-01/11 PT Ch I (13 July 2012)para 42; *Prosecutor v Ntaganda* (Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 19 November 2013 entitled "Decision on the Defence's Application for Interim Release") ICC-01/04-02/06, A Ch (5 March 2014), *Prosecutor v Ntaganda* (Dissenting Opinion of Judge Anita Ušacka to the Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber

Sierra Leone explicitly decided that the presumption of innocence is not relevant to pre-determination detention.[48] This is based on the perspective of some domestic courts that the presumption of innocence is only relevant as a counterpoint to the standard and burden of proof at trial and therefore has no place in the pre-determination detention decision.[49]

The tension between the presumption of innocence and pre-determination detention is real – pre-determination detention involves assigning non-convicted individuals the strictest punishment allowed in most criminal justice systems. Even if pre-determination detention does not fulfil the requirements of punishment, the deprivations and restrictions that the detained individuals experience are tangible and may be indistinguishable from those restrictions resulting from punishment.[50] Ultimately, the disagreement between whether the presumption of innocence applies to pre-determination detention is an extension of the arguments of how broad or narrow the presumption of innocence is or should be.[51] Those who believe in a broader interpretation of the presumption of innocence believe that it is relevant to the decision to detain someone before they are convicted. Those who argue a narrower approach think that the presumption of innocence has no place in the pre-determination detention decision. To what extent pre-determination detention comes into conflict with the presumption of innocence depends on the reason stated for the pre-determination detention.

C. Presumption of innocence and length of pre-determination detention

When discussing pre-determination detention there are two considerations to which the presumption of innocence may be relevant: the decision to detain and the length of detention. The decision to detain someone is justified on numerous grounds,

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II of 19 November 2013 entitled "Decision on the Defence's Application for Interim Release") ICC-01/04-02/06, A Ch (5 March 2014) para 4. See also Schabas, *ICC Commentary* 1006; International Bar Association 'Fairness at the International Criminal Court' (August 2011) <www.ibanet.org/Document/Default.aspx?DocumentUid=7D9DA777-9A32-4E09-A24C-1835F1832FCC> accessed 16 April 2018, 36.

[48] *Prosecutor v Norman et al.* (Fofana - Appeal Against Decision Refusing Bail) SCSL-04-14-AR65, A Ch (11 March 2005), para 37; Schabas and McDermott (n 4) 1648-1649, para 32; William A Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 517

[49] For example, *Bell v Wolfish*, 441 US 520 (1979); This is also the Canadian perspective *R v Pearson* (1993) 17 CR (4th) 1, 77 CCC (3rd) 124.

[50] Lippke (n 20) 166.

[51] Pamela R Ferguson, 'The Presumption of Innocence and Its Role in the Criminal Process' (2016) 21(2) Crim L F 131, 153.

which are discussed at length in the following sections. The length of detention however, is a different issue and raises the question of whether amount of time spent in detention could violate the presumption of innocence. This is a particularly important question in international criminal law where pre-trial and trial processes regularly occur over the course of a number of years. One of the most obvious examples can be found in Thomas Lubanga's prosecution by the International Criminal Court. Lubanga was incarcerated for six years, including during two extended stays in proceedings, before a verdict was entered against him.[52] The fact that he was ultimately convicted does not negate or lessen the infringements upon several of his rights and liberties that he suffered pre-conviction.

Some courts try to minimize the impact of lengthy periods of pre-determination detention by crediting the time served prior the verdict towards the sentence the accused receives following a conviction. While this may address the overall amount of time someone must be incarcerated it also gives the appearance that the period of time spent in pre-determination detention was part of the accused's punishment.[53] As a result, even if the stated reasons supporting the detention of the accused prior to trial are not meant as punishment the individual being held in pre-determination detention may perceive them as such. This serves to blur the distinction between pre-determination detention and punishment and raises presumption of innocence concerns.

The argument that the length of detention can violate the presumption of innocence is based on the supposition that the longer the period of detention the more it appears to be pre-punishment. This is supported by the Inter-American Court of Human Rights, which has held that an excessive length of pre-determination detention can violate the presumption of innocence, as it is 'tantamount to anticipating a sentence'.[54] It is true from the perspective of the accused that the longer he or she is detained, the more it appears that the accused person is being punished. Although the length of detention can create a greater appearance of punishment it does not cause

[52] *Prosecutor v Lubanga* (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/06, T Ch I (10 July 2012) (stating Mr Lubanga was arrested on 16 March 2006 and that the Trial Chamber's decision convicting him was on 14 March 2012).
[53] Lippke (n 20) 158-159.
[54] Chaparro Álvarez and Lapo Íñiguez v Ecuador (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 170 (26 November 2008), para 146; Cecilia Medina, *The American Convention on Human Rights* (2nd edn, Intersentia 2016) 305, para 65.

the detention to be punishment itself. Thus, while the length of pre-determination detention may implicate fairness issues and other rights, the length of time that a person is in prison without a conviction is not a presumption of innocence issue on its own. The presumption of innocence only becomes relevant when determining whether someone is being treated as if they are guilty without a conviction.

It has been suggested that the length of time someone is in pre-determination detention should be linked with, or proportionate to, the length of sentence they would receive if convicted of the alleged charges.[55] This argument strengthens the link between pre-determination detention and pre-punishment, which furthers the belief than an improperly supported decision to detain someone prior to determining his or her guilt or innocence is violative of the presumption of innocence, whereas the length of detention by itself is not. The Human Rights Committee has commented that connecting whether someone should be held in detention, or the length of time someone is held in detention, to the sentence that the accused might receive, could violate the presumption of innocence.[56] Further, the amount of time allowed in pre-determination detention should not be linked to the offence charged, or the potential sentence upon conviction, but rather a legitimate interest, such as ensuring the accused's presence at trial.[57] The argument supporting the separation of the length of pre-determination detention from the charges or potential sentence further distances pre-determination detention from pre-punishment. This acts as evidence that the length of detention alone does not violate the presumption of innocence. Rather, it is the justification of the decision to hold an accused in pre-determination detention that could violate the presumption of innocence.

What can violate the presumption of innocence is the reason supporting the decision to hold someone in pre-determination detention. If there is no longer adequate suspicion that the individual committed the alleged crime, but is still being detained, the presumption of innocence is violated. Likewise, if the original reason for

[55] Stevens, 'The Meaning of the Presumption of Innocence' (n 38).
[56] Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Italy' (18 August 1998) UN Doc No CCPR/C/79/Add.94 (1998); Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Ecuador' (18 August 1998) UN Doc No CCPR/C/79/Add.92 (1998); Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Argentina' (3 October 1995) UN Doc No A/50/40 (1995); discussed in David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001) 115.
[57] Ibid.

detaining the suspect was not properly justified, or it no longer exists, the presumption of innocence is violated due to a failure to properly respect the presumption as it works with the standard of proof. These issues are related to the length of detention because each day that someone is in pre-determination detention is an opportunity to review the reasons why they are being detained and whether those reasons are still warranted or justified. To not have periodic reviews of an individual's detention could allow a situation where a once properly justified pre-determination detention has become arbitrary, thus violating the presumption of innocence.

It is tempting to state that the length of pre-determination detention alone implicates the presumption of innocence, after all if treating someone as guilty implicates the presumption, the amount of time spent treating someone as guilty must also implicate the presumption of innocence. This however, is not the case. If the presumption of innocence is relevant to pre-determination detention, it is implicated in the decision-making process to detain or release someone rather than the amount of time an individual actually spends in pre-determination detention. While the length of pre-determination detention can be long, and the length can make it seem more like pre-punishment, the actual length of pre-determination detention is covered by other human rights principles such as fairness, proportionality, and due process.

D. The justifications or reasons for pre-determination detention

The conventions and statutes considered in this study are surprisingly quiet regarding the issue of why pre-determination detention is allowed. Upon examination of these statutes and conventions it can be determined that there are three main reasons for pre-determination detention: the type or seriousness of the alleged crime, prevention of future crimes, and ensuring that the accused is present for trial. The European Convention on Human Rights allows for 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'.[58] This provision implies that a person can be held in pre-determination detention on the basis of a reasonable suspicion that they committed an offence, without requiring any other justification. It also allows for pre-determination detention in order to prevent future crimes or prevent the accused person from

[58] ECHR art 5(c).

absconding. The African Charter on Human and Peoples' Rights and the American Convention on Human Rights state that the reasons for detention must be 'previously laid down by law.'[59] The African Charter further indicates that '[u]nless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.'[60]

The Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia do not provide reasons for detention. Instead they state that '[u]pon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country….'[61] Further, Rule 65 provides that '[o]nce detained, an accused may not be released except upon an order of a Chamber.'[62] An accused person may be released 'only if [the Chamber] is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.'[63] Rule 65(c) stipulates that conditions may be imposed on an accused who is released from pre-determination detention including requiring a bail bond and 'such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.'[64]

The Rome Statute and the International Criminal Court's Rules of Procedure and Evidence also fail to identify the basis for holding an accused in pre-determination detention. The reasons for arrest, however, are provided for in Article 58 of the Statute. A person may be arrested if '[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) arrest is necessary: (i) To ensure the person's appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the

[59] African Charter art 6; ACHR art 7(2).
[60] The African Commission on Human and People's Rights, 'Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa' DOC/OS(XXX) (2003), M.1.(e) Provisions Applicable to Arrest and Detention.
[61] ICTY RPE r 64.
[62] Ibid r 65(a).
[63] Ibid r 65(b).
[64] Ibid r 65(c).

Court and which arises out of the same circumstances.'[65] If none of these conditions exist the Prosecutor may issue as summons for the suspect to appear 'with or without conditions restricting liberty (other than detention)'.[66] Because of the non-custodial alternative of a summons to appear, it seems that the reasons for arrest would also be the reasons for continued pre-determination detention for part or all of the pre-trial and trial periods. This is supported by the Rules of Procedure and Evidence, which do not provide reasons for arrest or detention but do allow for periodic review of the accused's pre-determination detention in order to determine whether release is appropriate.[67] The Rules of Procedure and Evidence do not identify the circumstances that must exist for pre-determination detention to be terminated, but rather state that review of the decision to hold a person in pre-determination detention must occur at certain intervals.[68] In fact, this is supported by the decisions of the Court, which allow for pre-determination detention for the reasons of ensuring the accused's appearance, preventing obstruction of the court's proceedings, or preventing the commission of crimes.[69] The lack of specific provisions regarding the reasons for pre-determination detention in the Rome Statute or Rules of Procedure and Evidence imply an assumption that if a person is arrested before the International Criminal Court that they will remain in detention subject to the periodic reviews provided for in Rule 118.

The Rules of Procedure and Evidence for the Special Tribunal for Lebanon are very clear on what will allow for the release of an accused person held in pre-determination detention. At this Tribunal, the accused individuals must be released unless detention is necessary to ensure appearance at trial, prevent obstruction or endangering the court's activities, or 'prevent criminal conduct of the kind which he is suspected.'[70] This Rule seems to express a preference for release, as it imposes a requirement on the Tribunal to release individuals with pending cases unless one of those requirements are met. Unfortunately, because none of the suspects have been

[65] ICC Statute art 58.
[66] ICC Statute art 58(7); for possible restrictions see Rules of Procedure and Evidence, International Criminal Court (as amended 2013) (ICC RPE) r 119.
[67] ICC RPE r 118.
[68] Ibid.
[69] See for example *Prosecutor v Gbagbo et al.* (Public redacted version Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'") ICC-02/11-01/11, A Ch (26 October 2012).
[70] STL RPE r 102(A).

arrested or appeared before the Tribunal, this rule has not been interpreted by the case law.

There is agreement amongst international and regional statutes and conventions that pre-determination detention is justified depending on the type of crime alleged, whether detention will prevent future crimes and when it is used to ensure that the accused will appear for trial. What is at issue is whether detaining an accused for any of these reasons complies with the presumption of innocence. This chapter concludes that incarcerating an accused person before a verdict is reached to prevent the commission of future crimes or because of the seriousness of the crimes alleged is not in compliance with the presumption of innocence.

1. Type of Crime

One reason used to justify pre-determination detention is the type of the crime of which the individual has been accused.[71] There is a common belief that when a person is accused of a particularly serious or complex crime it suggests that he or she is unusually dangerous and that it is necessary to keep the accused imprisoned to protect the community at large.[72] However, this reasoning violates the presumption of innocence because it is prejudging the case, pre-punishing the accused, and can lead to arbitrary detention.

When evaluating whether the presumption of innocence is violated by a particular justification for pre-determination detention it is essential to first evaluate whether the decision to keep the accused in pre-determination detention is criminal in nature. This establishes whether the presumption of innocence is relevant to the decision to hold someone in pre-determination custody. The decision to detain people based on the type of crime they are accused of plays a role in the decision to bring charges against the accused because the type and severity of the crime is the reason for the detention. The two decisions go hand-in-hand; because someone is charged with X crime they will, or are more likely to, be detained pre-determination. Since the decision to detain someone pre-determination because of the type of crime that they

[71] See eg ICTY RPE r 65; ICC Statute art 60(2), STL RPE r 102. For some discussion of how this is permitted in Mexico see Ana Aguilar-García, 'Presumption of Innocence and Public Safety: A Possible Dialogue' (2014) 3(1) Stability: Int'l J of Sec & Dev 1, 3.
[72] See discussion in Stevens, 'Pre-Trial Detention' (n 2) 178-179; Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 242.

are accused of is a decision within the realm of criminal law, the presumption of innocence applies and must be taken into consideration.

It could be argued that the type of crime alleged should mandate or even create a presumption in favour of detaining the accused prior to the entry of a verdict. For example, people accused of genocide, crimes against humanity and war crimes could be automatically held in pre-determination detention because to do otherwise would communicate that these crimes are no more serious than other crimes and allowing their alleged perpetrators to remain free would trivialize the harms and human rights violations suffered by the victims.[73] This argument involves some prejudgment of the guilt of the accused before their conviction.[74] The danger of requiring pre-determination detention to allay fears that the crimes charged, and harms suffered, are not trivial necessarily implies that the accused committed those crimes. Taken to its extreme, basing pre-determination detention on the severity or type of crime means that no one accused of these crimes could be acquitted because a presumption of guilt has been created through their detention. There are other ways of demonstrating that grave crimes are being taken seriously without violating the presumption of innocence. [75] One concrete suggestion is that more severe sentencing upon conviction would communicate that convictions for these charges are being taken seriously.[76]

Further, detaining people merely because the type of crime of which they are accused is grave or serious means that individuals charged for international crimes would never be released pre-determination. This is because one of the purposes of international criminal trials is to end impunity for atrocity crimes.[77] If someone is charged with a crime at the international level, particularly at the International Criminal Court, then the crime itself is already very grave.[78] The decision to exert jurisdiction over the crime would mean that everyone accused would need to be held in pre-determination detention.

Choosing to detain people accused of certain crimes during the pre-determination period because of the type of crime they are alleged to have committed

[73] Davidson (n 11) 13.
[74] Trechsel 'Rights in Criminal Proceedings' (n 27) 165-6.
[75] Davidson (n 11) 13.
[76] Ibid.
[77] See ICC Statute Preamble.
[78] See ICC Statute art 17(d) requiring a gravity threshold for cases to be admissible before the court

is clearly not in keeping with the purpose of the presumption of innocence because seeks to punish the accused without a conviction.[79] This is particularly true if the likely sentence to be given after conviction is part of the reason that the type of crime is considered in the pre-determination detention decision. The European Court of Human Rights and the Inter-American Court of Human Rights have held that pre-determination detention cannot be used to 'anticipate the sentence'.[80]

Despite the clear prohibition on pre-punishment it has been found that some judges do use pre-determination detention as a form of punishment. Lonneke Stevens found, in an interesting empirical study of courts in the Netherlands, that some judges pre-punish the accused by detaining the accused prior to a determination based on what the final sentencing decision might be.[81] Put a different way, the judges were more likely to impose pre-determination detention in order to get the punishment started when they anticipated that a prison sentence would be imposed following a conviction.[82] However, at the time a pre-determination detention decision is made the individual is merely accused of the crimes alleged and can still be either convicted or acquitted. It is possible that at some point during the trial process it will become clear that the individual should not have been a suspect in the first place. With regard to the presumption of innocence, at the time of accusation, no one has fully assessed the proofs against the accused, and so the accused must still be treated as innocent. Yet an accused held in pre-determination detention for the reason that they were accused of a particular crime must suffer all the deprivations that come with pre-determination detention merely on the basis of an accusation rather than conviction. This amounts to pre-punishment.

Pre-determination detention justified on the basis of the severity of the charges has also been examined at the European Court of Human Rights and the *ad hoc* Tribunals. These courts allow for the severity of the charges to have some bearing on the decision to hold an accused person in pre-determination detention.[83] Although this

[79] Trechsel 'Rights in Criminal Proceedings' (n 27) 165-6.
[80] *Smirnova v Russia* 2003-IX 241; *Tomasi v France* (1992) Series A no 241-A; *Letellier v France* (1991) Series A no 207, 21, para 51 (1991). See also Davidson (n 11) 15-16.
[81] Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 243.
[82] Ibid.
[83] *Tomasi v France* (1992) Series A no 241-A, para 89; *Ilijkov v Bulgaria* App. No 33977/96 (ECtHR, 28 July 2001), para 82; *Prosecutor v Perišić* (Decision on Mr Perišić's Motion for Provisional Release during the Court's Winter Recess Case) IT-04-81-T, T Ch I (17 December 2008), para 10; *Prosecutor v Stanišić et al.* (Decision on Provisional Release, IT-

consideration has more weight at the *ad hoc* Tribunals than the European Court, neither allows for the severity of the charges to be the sole reason for pre-determination detention.[84] The European Court of Human Rights has specifically held that the type of crimes charged against the accused cannot result in automatic detention.[85]

Pre-determination detention has also been based on the perceived complexity of the case at issue. The European Court of Human Rights has found that case complexity is a valid reason for holding an accused prior to a final determination on the charges, particularly in terrorism cases. It was held in *Sagat et al. v Turkey*, that because terrorism cases are very complex and serious, the suspects could be held in detention for a year and a half.[86] This is an interesting pretext for justifying pre-determination detention because in that particular case the suspects were accused of arson for throwing a Molotov cocktail at three cars.[87] The European Court appears to be considering complexity as a justification for pre-determination detention because of the type of crime as a category, rather than the factual complexity of the particular case before the court.

Another method of considering the severity of the charges against an accused individual is to examine the amount or type of evidence against the accused in order to determine whether pre-determination detention is justified. Focusing on the evidence rather than the specific charge allows for pre-determination detention based on severity for almost any crime. In a jurisdiction where a charge of murder may be severe enough on its face to allow for pre-determination detention, a crime of theft, which normally would not be severe enough, but which is accompanied by seemingly particularly strong evidence against the accused, could also justify pre-determination detention. Considering the amount or type of evidence against the accused also involves prejudgment of the case's outcome. Here, the connection between the justification and the outcome is perhaps even more clear, as a decision to hold

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03-69-PT, T Ch III (26 May 2008), para 46; *Prosecutor v Haradinaj et al.* (Decision on Ramush Haradinaj's Motion for Provisional Release) IT-04-84-PT, T Ch II, (6 June 2005), para 24; *Prosecutor v Stanišić et al.* (Decision on Prosecution's Appeal Against Decision on Provisional Release) IT-03-69-AR65.2, A Ch (3 December 2004), para 15; Discussed in Doran (n 27) 716-717.

[84] Doran (n 27) 717.

[85] *Caballero v United Kingdom* ECHR 2000-II 45.

[86] *Sagat et al v Turkey* App No 8036/02 (ECtHR, 6 March 2007).

[87] Ibid; see also *Sahin v Turkey* App No 29874/96 (ECtHR, 17 October 2000), and discussion in Stevens, 'Pre-Trial Detention' (n 2) 179.

someone in pre-determination detention made on the amount or type of evidence against them necessarily requires some assessment of the evidence and a decision of whether that evidence indicates some guilt on the part of the accused. This decision then mandates that the accused be held in a jail under conditions very much like punishment, despite the fact that not all the evidence has been assessed.

Courts are divided on the issue of whether the strength of the evidence can justify pre-determination detention. The American and Canadian perspective takes into account the weight of the evidence or the strength of the prosecutor's case when determining whether pre-determination detention is appropriate.[88] At the European Court of Human Rights on the other hand, the strength of the case against the accused is not relevant to a decision regarding pre-determination detention.[89] This is supported by the accused's argument in the *Pavković* case at the International Criminal Tribunal for the former Yugoslavia that the weakening of the prosecutor's case should warrant his release from detention.[90] In this case, the Tribunal held that it was not appropriate to consider the weight of the evidence against the accused until trial.[91]

Some scholars argue that the weight or amount of evidence against the accused should be considered when deciding to detain an accused person before a final determination is reached, but that when doing so it must be demonstrated to a higher standard of proof than that required for arrest.[92] This would limit the number of individuals detained pre-determination and help ensure that those individuals that are detained before a verdict is reached are more likely to be found guilty. Requiring more proofs against the accused however, is merely showing that there are more pieces of proof, it does not demonstrate the reliability of the evidence. If the reliability of the evidence is questioned or tested during a hearing on the decision for pre-determination detention, it is likely that this would turn into a mini-trial encouraging even more prejudgment on the part of the fact-finder.

This reason for pre-determination detention can lead to arbitrary detention, which by its very nature violates the presumption of innocence. Prosecutors often have some discretion as to what crimes they can charge in each particular case.

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[88] United States Federal Rules of Criminal Procedure 18 USC 3142(g)(2); *R v Hall* [2002] 3 SCR 309, 2002 SCC 64.
[89] Davidson (n 11) 17-18.
[90] *Prosecutor v Šainović et al.* (Decision on Pavković Motion for Temporary Provisional Release Case) IT-05-87-T, T Ch (7 December 2007), para 2.
[91] Ibid.
[92] Lippke (n 20) 163.

Suppose a particular type of crime requires pre-determination detention but a lesser-included offence does not. A prosecutor may be able to use discretion to charge only the lesser offence in some instances to purposely keep particular accused individuals out of pre-determination detention. More frighteningly, a prosecutor could choose to charge the highest possible crime, even if conviction is relatively unlikely, in order to detain an accused person without a conviction.

Deciding to hold someone in pre-determination detention because of the type of charge should violate the presumption of innocence because it involves pre-punishment, pre-judgment, and arbitrary detention. Pre-determination detention under these circumstances treats the accused as guilty although he or she has not been convicted. Using the severity of the charges brought against the accused as a reason for pre-determination detention violates the presumption of innocence in other ways as well. It assumes that there is some truth to the charge before a full evaluation of the evidence and conviction. It may cause instances of arbitrary detention, where similar behaviour could be charged differently in order to make the difference between detention and release pending trial. As such, it is incompatible the presumption of innocence.

2. Crime prevention

A second justification for pre-determination detention is crime prevention. This justification exists when a person accused of a crime is detained before the outcome of their case because the fact-finder thinks they may commit other crimes if they are released.[93] Judges engage in this kind of pre-determination detention when they consider whether the accused is a recidivist, or is likely to: commit further crimes; be a danger to the community; tamper with witnesses of the alleged crime; or obstruct justice.[94] This type of pre-determination detention is the same as preventative detention.[95] It weighs the interests of the community in being protected from future crimes against the interest of the accused in maintaining their liberty.[96] It is not

[93] See eg ICC Statute art 60(2); STL RPE r 102; ICTY RPE r 65; Raifeartaigh (n 25) 17.
[94] Duff, 'Pre-Trial Detention' (n 29) 117-118; *Prosecutor v Gbagbo et al.* (Decision on the "Requête de la Défense demandant la mise en liberté proviso ire du president Gbagbo") ICC-02/11-01/11 PT Ch I (13 July 2012); Stevens, 'The Meaning of the Presumption of Innocence' (n 38) 243.
[95] Duff, 'Pre-Trial Detention' (n 29) 118.
[96] Stevens, 'The Meaning of the Presumption of Innocence' (n 38); Thomas Weigend, 'There is Only One Presumption of Innocence' (2013) 42(3) NJLP 193, 203; Aguilar-Garcia (n 71)

consistent with the presumption of innocence as it prevents crimes that may not ever occur and therefore also assumes the accused's guilt for crimes that have not occurred.

This is different from detention for 'mere dangerousness', which is considered purely preventative, and is rarely, if ever, justified.[97] Most commentators agree that something more than 'dangerousness' is required to keep someone in pre-determination detention.[98] If someone is detained just because they are believed to be dangerous, this would allow detention for people who have been acquitted of crimes, completed the sentence for a previous crime, or were never even accused of crimes.[99] It would permit a whole host of people to be detained with little proof that they are dangerous. This clearly violates the presumption of innocence as it treats people as guilty of crimes of which they have not yet been, and may never be, accused. It assumes guilt in both the crimes for which they stand accused and crimes they may commit in the future.

In general, preventative detention without a charge is not permissible given an individual's right to liberty.[100] The European Court of Human Rights has held that it can only be permissible during an international armed conflict 'where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law.'[101] Otherwise, derogation from Article 5 of the European Convention on Human Rights would be required.[102] With respect to those already accused of a crime however, pre-determination detention justified by an argument that the accused is likely to commit crimes if released, is permissible under the statutes and conventions studied here.

At the International Criminal Court, the risk of committing future crimes could be considered as a ground for pre-determination detention under Article 58(1)

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[97] Lippke (n 20) 156.

[98] Ibid; Thaler (n 5) 471-472; Tribe (n 5) 378.

[99] Lippke (n 20) 156; Tribe (n 5) 405.

[100] *A and Others v. the United Kingdom* [GC] ECHR 2009-II 137; *Ireland v the United Kingdom* (1978) Series A no 25; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 235.

[101] *Hassan v the United Kingdom* ECHR 2014-VI 1; Schabas, *ECHR Commentary* (n 100) 235.

[102] *Lawless v Ireland* (no 3) (1961) Series A no 3, s 13-14; *Ireland v the United Kingdom* (1978) Series A no 25, s 196; *Guzzardi v Italy* (1980) Series A no 39, s 102; *Jėčius v Lithuania* ECHR 2000-IX 235, s 47-52; Schabas, *ECHR Commentary* (n 100) 235.

of the Statute. In *Prosecutor v Gbagbo*, the Appeals Chamber held that when considering the issue of future crimes being committed by an accused person, the type of future crimes that might be committed did not need to be stated, it is the mere risk that future crimes might be committed that is enough to secure an accused person in pre-determination detention.[103] To decide this, the Appeals Chamber assumed that the risk was that Gbagbo might commit crimes in the future that are similar to those crimes of which Gbagbo stood accused.[104] The Appeals Chamber also asserted that the presumption of innocence has not been violated because Gbagbo still 'enjoys the presumption of innocence in the determination of the charges against him' and the Pre-Trial Chamber was permitted to take into account any risk that the accused would commit future crimes if released.[105] While the Appeals Chamber is correct that the accused has the right to the procedural aspect of the presumption of innocence regardless of whether the accused is held in pre-determination detention, the Appeals Chamber ignores the non-procedural aspect of the presumption of innocence requiring that an accused not be treated as guilty prior to a conviction. Further, this decision highlights the lack of standards regarding the level and type of proof required for the pre-determination detention decision. The Statute of the International Criminal Court does provide for pre-determination detention on the basis of the risk that future crimes might be committed by the accused, however, this decision underlines that there is apparently no particular standard of proof required to show that the accused is a risk. Rather, the Appeals Chamber found that 'in the specific circumstances and in light of the information before the Chamber, there is a risk that he may commit further crimes if released'.[106] This is a relatively vague statement, especially when considered in light of the Appeals Chamber's previous holdings that 'the question revolves around the possibility, not the inevitability of a future occurrence' and the notion that the Pre-Trial Chamber did not have to specify what types of crimes they thought might be committed by Gbagbo if he were released from detention. [107]

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[103] *Prosecutor v Gbagbo et al.* (Public redacted version Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'") ICC-02/11-01/11, A Ch (26 October 2012), para 70.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] *Prosecutor v Bemba* (Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release")

The presumption of innocence is relevant to the determination of whether someone will commit future crimes while awaiting trial because the underlying determination is necessarily criminal in nature. The narrow view of the presumption of innocence argues that requiring pre-determination detention on the basis of prevention of future crimes does not violate, or even implicate, the presumption of innocence so long as the detention decision is not based on a pre-judgment of the underlying charges.[108] However, even at this early juncture it can be seen that holding individuals in pre-determination detention because of a risk of future crimes being committed is inconsistent with the presumption of innocence. One should not be held in detention without the burden of proof for arrest being met. In this case, there has been no burden of proof met for the not-yet-committed criminal acts. In fact, the individual is being held in prison for crimes they may never commit.

The fear that pre-determination release would lead an accused person to either engage in future crimes or to exert pressure on witnesses assumes that they are guilty of the accusations against them.[109] This is an obvious form of impermissible pre-judging that violates the presumption of innocence. It also acts upon the inference that the accused is likely to commit crimes of a similar nature if given the opportunity. However, at the level of international crime, it has been shown that once the conflict in which the alleged crimes were committed has ended, the risk of reoffending or continued participation in atrocity crimes is extremely low.[110] Further, incarcerating people for crimes that have not yet been committed means they are being detained without first meeting the evidentiary standard for arrest for those crimes. This is not particularly different from requiring people too be detained for merely being 'dangerous.'[111] This brings the detention into the range of preventative detention. Richard Lippke counters this argument by stating that if pre-determination

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ICC-01/05-01/08, A Ch (16 December 2008), para 55; *Prosecutor v Gbagbo et al.* (Decision on the "Requête de la Défense demandant la mise en liberté proviso ire du president Gbagbo") ICC-02/11-01/11 PT Ch I (13 July 2012).

[108] See Weigend (n 96) 203; Antony Duff, 'Presumptions Broad and Narrow' (2013) 42(3) NJLP 268, 273; Lippke (n 20) 169.

[109] *Prosecutor v Lubanga* (Decision on the Application for Interim Release of Thomas Lubanga Dyilo) ICC-01/04-01/06, PT Ch I (18 October 2006) p 6; Schabas, *An Introduction* (n 27) 285-286; Duff, 'Pre-Trial Detention' (n 29) 117-118.

[110] Christoph JM Safferling, *Towards an International Criminal Procedure* (OUP 2001) 144-145; Davidson (n 11) 33.

[111] Duff, 'Pre-Trial Detention' (n 29) 118; Tribe (n 5) 415; see discussion in Lippke (n 20) 172-173.

detention is used in a selective way in cases where there is strong evidence to show that the accused committed the alleged crime and 'substantial evidence that they pose a threat to others' then detention on the basis of preventing future crimes could be justified so long as there are no other reasonable means to prevent those future crimes.[112] While this brings the public safety argument to the fore, it fails to properly respect the accused's right to liberty, particularly when there is no reliable evidence to believe that the accused will commit crimes in the future.

Pre-determination detention justified on crime prevention grounds necessarily does not consider the accused legally innocent of future crimes. Even if the accused is almost certainly going to be convicted of the currently alleged crimes, this does not mean that they are necessarily dangerous or will commit crimes while awaiting trial.[113] It is extremely difficult to predict future criminal behaviour and whether an individual is likely to engage in it.[114] In this situation the government is judging whether the individual will do something they have not yet done and may never do. Predictions about whether an individual will commit future crimes are not particularly reliable.

Some argue that evidence showing that an individual committed a serious violent crime demonstrates a predisposition on his or her part to commit other similar crimes in the future.[115] This argument is especially strong when it is made about accused individuals with a history of recidivism.[116] Justifying detention on this basis requires more proof than a mere suspicion that an individual is likely to commit further crimes.[117] It necessitates evidence that the accused committed the initial crime and considers whether the individual's 'dangerous dispositions or impulses' have been activated, meaning whether they are likely to commit more offences.[118] Despite requiring some proof, this argument fails on multiple grounds. First, it pre-judges the allegations against the accused by implying that the accusation against them demonstrates a predisposition to commit crimes in the future.[119] Second, it serves to

[112] Lippke (n 20) 173.
[113] Weigend (n 96) 203; Tribe (n 5) 382.
[114] Tribe (n 5) 382; See discussion in Lippke (n 20) 174.
[115] Lippke (n 20) 164; Thaler (n 5) 447.
[116] Lippke (n 20) 164.
[117] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) Int'l J Evid & Proof 241, 276-7.
[118] Lippke (n 20) 164; Thaler (n 5) 447.
[119] Duff, 'Pre-Trial Detention' (n 29) 117-118.

punish the accused twice for crimes already committed: once following the conviction for the first crime, and again through pre-determination detention for the second crime. Further, considering previous convictions under these circumstances can lead those who are formerly convicted to be treated as scapegoats and targets of false accusations in the future.

As an example, suppose that it is illegal to possess a certain drug and that an individual is charged with possession of said drug. Now suppose that individual is actually addicted to the drug and has a number of prior convictions for possession of that same drug. Because of their addiction, it is extremely likely, perhaps almost certain, that this person will use (and therefore possess) this drug again while awaiting trial for their current charges. This might seem like a good case for pre-determination detention to prevent future crime; the likelihood of recidivism before the current trial takes place is extremely high and would almost certainly be prevented during the pre-trial period by keeping the accused in jail. However, it is possible for people who are addicted to drugs to stop using them, and therefore it is possible that this person will not possess drugs while waiting for trial. If they are not going to possess the drug, then holding them in jail to prevent future crimes is just as arbitrary as holding someone in jail who has never been accused of committing a crime. The problem is that it is impossible to predict with accuracy. The presumption of innocence requires that people are not treated in the same manner as legally guilty people they have not been convicted of a crime, and in this particular situation detaining the individual in question would be to detain them for something that has not even happened.

The European Court of Human Rights does not support this position. Upholding decisions by the European Commission on Human Rights and national courts, the European Court of Human Rights found that in a case involving fraud, several previous convictions for fraud could cause the national courts to fear that the accused will reoffend while awaiting trial.[120] When reaching its decision, the European Court failed to consider that detention under these circumstances runs counter to the presumption of innocence. Presupposing that the accused will commit more crimes while charges are pending not only assumes they are guilty of the current charges, but that they will also be guilty of crimes that have not been committed.

[120] *Toth v Austria* (1991) Series A no 224, paras 70-73.

It is difficult to see how pre-determination detention solely for the prevention of future crimes is different from pre-punishment.[121] Ordering individuals into pre-determination detention for crimes they may never commit is the equivalent of arbitrary detention, which in turn, is inconsistent with the presumption of innocence. The accused is only susceptible to pre-determination detention as a result of the outstanding, unproven allegations against them. Holding individuals in prison for potential, future crimes pre-judges both the case before the court and assumes that the accused will commit crimes on remand. Finally, it pre-punishes the accused for both the crime they are alleged to have committed and crimes they may never commit. These sorts of prejudgment must be avoided if the presumption of innocence is to have any meaning at all.

3. Prevent Absconding/ Ensuring Presence at Trial

The third type of pre-determination detention is designed to ensure that the accused will be present at trial. Whether this kind of detention is necessary depends on the perceived likelihood that the accused will abscond before trial. Unlike the other reasons for pre-determination detention, this justification can comport with the presumption of innocence because the decision to hold someone in detention for this reason is outside of the criminal process and therefore the presumption of innocence does not apply.

Detaining someone prior to a final determination of the case in order to ensure that the accused is present for trial is an attempt to prevent the accused from thwarting the criminal process. The accused's presence is important for trial, and at most international and internationalised courts and tribunals the accused's presence is required for trial to commence.[122] If the accused is not present at the outset of trial in courts that do not allow for trial *in absentia*, then the trial process cannot begin until the accused is located and brought before the court. Ensuring that the accused is present for trial is necessary to allow the trial process to continue and for justice to be

[121] See discussion in Lippke (n 20) 169 citing Marc Miller and Martin Guggenheim 'Pretrial Detention and Punishment' (1990) 75(2) Minn L Rev 335, 359-64.
[122] ICC Statute art 63; UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia (25 May 1993) art 65(c); Rules of Procedure and Evidence, Special Court for Sierra Leone (as amended 7 March 2003) (SCSL RPE) r 60; but see UN Security Council, Statute of the Special Tribunal for Lebanon (30 May 2007) art 22.

done.[123] This is a different kind justification for pre-determination detention because it is motivated by the need to ensure that trial takes place in the interests of justice. Requiring pre-determination detention to ensure presence at trial is therefore less like punishment or pre-punishment and more akin to an administrative decision to prevent the accused from interruption the criminal process. [124] Ensuring that trial takes place, in recognition of the needs of the victims and society as a whole, is a legitimate purpose that might justify detaining the accused pre-trial because all parties have an interest in ensuring trials are fair and just, including the state, court, prosecutor, defendant and victims.[125]

Using pre-determination detention to ensure that an accused person is present for trial requires the judge to predict the accused's future behaviour. Richard Lippke does not separate ensuring the presence of the accused at trial from crime prevention as a reason for pre-determination detention.[126] He feels that both are based on predicting the behaviour of the accused leading to decisions derived from similar logic.[127] However, these are recognised as separate reasons for pre-determination within criminal law systems. Here it is argued that, although both justifications require the fact-finder to predict behaviour, they are separate because the purposes are somewhat different and because unlike a justification of crime prevention, fear of absconding as a justification for pre-determination detention can be a decision that is not criminal in nature, and thus, does not necessarily invoke the presumption of innocence.

Failure to appear for court is not necessarily a crime. Some jurisdictions have criminalized failures to appear and if it is being considered as a crime, then the evaluation of whether pre-determination detention is allowable under the presumption of innocence would be considered under either the type of crime or crime prevention justifications. However, in jurisdictions where failure to appear is not criminalized, the decision to detain someone prior to the entry of a verdict in order to ensure that they appear for trial is not within the criminal process. Detention to ensure the appearance of the accused is warranted by the public's interest in justice being done

[123] Doran (n 27) 729-730.
[124] Raifeartaigh (n 25) 6.
[125] Lippke (n 20) 168-69; Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45(3) Colum J Transnat'l L 635, 690-691.
[126] Lippke (n 20) 157.
[127] Ibid.

when a person is accused of a crime.[128] The accused also has an interest in going through the trial process and receiving a decision about the charges against them. These issues remove the decision to detain someone to ensure their presence at trial from the sphere of criminal law and places them amongst other public and personal interests. Therefore, because the consideration is not criminal, the presumption of innocence is not relevant to this type of pre-determination detention.

Additionally, individuals may fail to appear for trial for many reasons. Anyone can abscond regardless of whether they are guilty. It is commonly believed that individuals facing more serious charges and/or a higher potential sentence upon conviction are more likely to abscond from trial, particularly if the likelihood of conviction seems high.[129] To determine whether the likelihood of conviction is high the fact-finder necessarily must review some of the evidence including the number of witnesses and documents against the accused.[130] In fact, if pre-determination detention is requested after some or all of the prosecution's evidence has been presented at trial, the court may have a tendency to find that the accused is even more of a flight risk as the accused now knows what evidence the prosecution has against them.[131] This should be avoided, as it implicates the presumption of innocence and criminal procedure, and there are other non-criminal indicators to help determine whether someone is a flight-risk. For example, the court could look to the strength of the ties that the accused has to the community, whether the individual has reliably come to court dates before, and whether they voluntarily surrendered to the court's

[128] Safferling (n 110) 242; Artur Malaj, 'Reflection of the Due Process Standards in Judgments in Absentia', (2015) 4(1) Acad J Interdisc Stud135, 135.

[129] *Prosecutor v Bemba* (Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011") ICC-01/05-01/08, T Ch III (16 August 2011) paras 55-56, 59; *Prosecutor v Lubanga* (Decision on the Application for Interim Release of Thomas Lubanga Dyilo) ICC-01/04-01/06, PT Ch I (18 October 2006), p 5 citing *Tomasi v France* (1992) Series A no 241-A, para 89; *Mansur v Turkey* (1995) Series A no 319-B; See also: *Prosecutor v Brđanin et al*. (Decision on Motion by Radoslav Brdanin for Provisional Release) IT-99-36-T, T Ch II (25 July 2000); Ferguson (n 51) 54-55; Thaler (n 5) 443, 447.

[130] Trechsel 'Rights in Criminal Proceedings' (n 27) 165; Davidson (n 11) 44.

[131] *Prosecutor v Šainović et al.* (Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess) IT-05-87-AR65.2, A Ch (14 December 2006), para 14-15 This can also happen after a non-acquittal after the prosecutor has presented their case see eg *Prosecutor v Prlić et al*. (Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Petković and Ćorić) IT-04-74-AR65.5, A Ch (11 March 2008); *Prosecutor v Prlić et al*. (Partly Dissenting Opinion of Judge Güney to Decision on Praljak's Appeal of the Trial Chambers2 December 2008 Decision on Provisional Release) IT-04-74-AR65.11, A Ch (4 February 2009); Davidson (n 11) 43.

jurisdiction or evaded arrest.[132] A person who does business, lives, and has family in the area of the court is more likely to come to court than someone who is not tied to the community. If factors not related to the evidence are considered, then the decision to hold someone in pre-determination detention in order to prevent him or her from absconding could be deemed a decision outside of the criminal process. If that is the case, then the presumption of innocence does not apply to this decision.

There should be specific, articulable proofs demonstrating the tendency or likelihood that the accused could abscond when justifying pre-determination detention on this basis.[133] It is not enough to find that someone is likely to abscond because they are facing serious or grave charges. That mischaracterises this reason for pre-determination detention as it is actually concerned with the type of crime charged rather than appearance at trial. Further, those charged with very serious crimes would never be able to be released. If on the domestic level, it were determined that someone should be held in detention because they are likely to abscond if they have a murder charge, then no one would be able to be released if they were facing crimes against humanity or war crimes.

The International Criminal Tribunal for the former Yugoslavia created an interesting hybrid of this type of pre-determination detention. Before 1999 all accused individuals were held in detention until their cases were determined unless they had 'exceptional circumstances' that required their release.[134] After 1999 exceptional circumstances were no longer required and it became easier for individuals to be released pre-determination.[135] However, the accused still needed to prove that they were not a flight risk.[136] Interestingly, however, the accused was always detained during the actual trial, even if they had been released during the pre-determination process. This ensured that the trial could continue and that the accused would be present for trial.[137] A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia announced that 'generally it would be inappropriate to grant provisional release during trial because, *inter alia*, release could disrupt the remaining

[132] Davidson (n 11) 34.
[133] Lippke (n 20) 168-69.
[134] Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia (as amended 14 March 1994) (or any time before 1999).
[135] ICTY RPE r 65.
[136] Davidson (n 11) 36-37; *Prosecutor v Haradinaj et al.* (Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release) IT-04-84-T, T Ch I, (20 July 2007), para 8.
[137] Doran (n 27) 729-730.

course of the trial.'[138] This approach demonstrates that there may be a substantive difference between basing pre-determination detention decisions on whether the accused will appear and all other justifications for holding an accused before a verdict is reached.

Even when determining whether someone will abscond, pre-determination detention may not always be appropriate with respect to the presumption of innocence and other human rights implicated by detention. First, it should be used in a limited way and only against those who are legitimately likely to abscond. Second, an evidentiary standard must be set demonstrating that the absconding accused are likely to not return for trial or subsequent court hearings. Finally, it should be questioned whether pre-determination detention is ever appropriate if there is little or no possibility of a custodial sentence for the alleged crimes.[139] It is inexcusable to hold individuals in pre-determination detention if ultimately there is no custodial sentence at stake. However, it may still be appropriate to hold those individuals thought likely to abscond in recognition of those factors that are separate from the rest of the criminal process. While this type of pre-determination detention still resembles punishment, and may be related to the criminal charges, the fact that it is justified on non-criminal law grounds means it does not violate or indeed, involve, the presumption of innocence. That is not to say that this type of pre-determination decision is always justified or permissible, but merely that it does not involve the presumption of innocence.

4. Special considerations for international courts and tribunals/ convenience

There are some pre-determination detention issues that are unique to international and internationalised criminal courts and tribunals. These include: a lack of agreement about where the accused will be able to live while awaiting trial; a lack of agreement about who pays for housing and transportation needs; and a lack of security within the accused's home state.[140] In practical terms, any of these considerations can cause a person to be held in pre-determination detention even if the

[138] *Prosecutor v Krajišnik et al.* (Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release) IT-00-39 & 40PT, T Ch (8 October 2001), paras 10, 14; Doran (n 27) 729-730.
[139] Lippke (n 20) 162-163.
[140] Davidson (n 11) 3.

judges would like to release the accused. However, continuing to hold an individual when pre-determination detention is not justified violates the presumption of innocence.

Often an individual who is accused of international crimes, particularly at the International Criminal Court, cannot return to their home country. Their home country may be unstable, at war, or otherwise insecure.[141] At times, the accused's political rivals are in charge of the country, and would be hostile to the accused if they returned.[142] Further, requiring a released individual to go back to their home country could look like impunity to both the victims of the alleged crimes and the public as a whole.[143] The pre-trial process at the International Criminal Court and the *ad hoc* tribunals can last for years and it may appear that the accused is not actually being tried at all. Anger and resentment in the community and a public perception of the accused's guilt could result in street justice or reprisals taking place against the accused.

Suspects before the International Criminal Court who are not welcome in their home nation often find it difficult to relocate to other countries. In order to live in another country they must either already be a citizen of that state, have some other legal right to live there, or gain admittance pursuant to an agreement between the International Criminal Court and the new country.[144] This can be challenging because countries do not want to be seen as sympathetic to people who have committed grave

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[141] See e.g,: *Prosecutor v Bemba* (Decision on Application for Interim Release) ICC-01/05-01/08, PT Ch II (14 April 2009).

[142] See for example: *Prosecutor v Bemba* (Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa) ICC-01/05-01/08, PT Ch II (14 August 2009).

[143] *Prosecutor v Lubanga* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Mr Thomas Lubanga Dyilo") ICC-01/04-01/06, A Ch (21 October 2008), para 28; *Prosecutor v Lubanga* (Dissenting Opinion of Judge Georghios M Pikis to the Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Mr Thomas Lubanga Dyilo") ICC-01/04-01/06, A Ch (21 October 2008) para 9; *Prosecutor v Prlić et al*. (Dissenting Opinion of Judge Schomburg to the Reasons for Decision on Prosecution's Urgent Appeal Against "Decision Relative a la Demande de Mise en Liberté Provisoire de L'Accusé Pušić" Issued on 14 April 2008) IT-04-74-AR65.6, A Ch (23 April 2008) para 10, 17 (comparing interests of victims with those of the accused); Davidson (n 11) 52.

[144] *Prosecutor v Bemba* (Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa) ICC-01/05-01/08, PT Ch II (14 August 2009); International Bar Association (n 47) 36-37.

international crimes. Refusing to admit suspects because of the sort of crimes he or she is alleged to have committed is a form of pre-judgment that implicates the presumption of innocence. Further, it often forces suspects to remain in pre-determination detention even after a judge has found such measures to be unnecessary because there is nowhere for the suspect to go.

The International Criminal Court's failure to conclude agreements with states parties about relocating those accused that have been released from custody is a gap in the law regarding state party cooperation. The Rome Statute requires states parties to cooperate with investigations and prosecutions of the Court, however this does not extend to cooperating with the defendant.[145] This lack of a cooperation requirement is emphasized in Article 57(3)(b), which limits the Court to requesting cooperation on the defence's behalf only to the extent 'necessary to assist the person in the preparation of his or her defence.'[146] States parties have interpreted the act of facilitating an accused's release as a voluntary, rather than a necessary, measure, and therefore not one that falls under Article 57(3)(b).[147] This has made it difficult for the Court to grant pre-determination release because no country will accept the accused person.

This is not a problem unique to the International Criminal Court. Before granting the pre-determination release of an accused the rules of the International Criminal Tribunal for the former Yugoslavia require that 'the host country and the State to which the accused seeks to be released' has 'the opportunity to be heard' when a decision is to be made regarding pre-determination release.[148] This was a major stumbling block for individuals seeking release in the early years of the Tribunal because judges did not give much credence to the guarantees of the country that would receive the accused individual.[149] This was the result of a lack of cooperation between the countries that made up the former Yugoslavia and the Tribunal, as well as the Tribunal's own inability to ensure the accused appearance at trial. However, as time went on, and the region became more stable and cooperative,

[145] ICC statute art 86.
[146] International Bar Association (n 47) 37, ICC Statute art 57(3)(b).
[147] International Bar Association (n 47) 37; Goran Sluiter, 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law', (2010) 8(3) NW J Int'l Hum Rts 248, 265.
[148] ICTY RPE r 65(B).
[149] *Prosecutor v Krajišnik et al.* (Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release) IT-00-39 & 40PT, T Ch (8 October 2001) para 18.

the court began to accept the guarantees. The International Criminal Tribunal for Rwanda also had this rule requiring guarantees by the country that would host the accused.[150] This rule prevented pre-determination release at the Rwandan Tribunal because no country, including Rwanda, would guarantee the appearance of the accused.[151]

The Special Court for Sierra Leone also required guarantees prior to release.[152] It was held that these guarantees and conditions for release must be 'meaningful' because of the Court's lack of police force and enforcement powers, which meant there was a danger of not being able to re-arrest the accused if an accused individual were to abscond.[153] Despite the Agreement between Sierra Leone and the United Nations, which requires the government to 'comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers', it was found that the domestic police did not have the capacity to sufficiently monitor accused individuals who had been released.[154] The lack of an adequate police force became the primary justification in favour of continuing to imprison the accused before the entry of a verdict at the Special Court.[155]

As the home of several international and internationalised courts and tribunals, the issue of releasing an accused into a country other than their home nation is of particular relevance in the Netherlands. The agreement allowing the trials and pre-determination detention to take place in the Netherlands states that the accused is in the custody of the court rather than within the jurisdiction of the Netherlands.[156] This is to prevent accused people from claiming asylum or residency rights within the Netherlands. Originally, the Netherlands took the position that an accused could be released into the country but would need a residence permit.[157] However, that position has now changed and an accused person released on remand is required to

[150] ICTR RPE r 56(B).
[151] Davidson (n 11) 37.
[152] SCSL RPE r 65(B).
[153] *Prosecutor v Sesay et al.* (Decision on Application of Issa Sesay for Provisional Release) SCSL-04-15-PT, T Ch (31 March 2004); *Prosecutor v Sesay et al.* (Sesay – Decision on Appeal Against Refusal of Bail) SCSL-2004-15-AR65, A Ch (14 December 2004).
[154] Schabas, *UN International Criminal Tribunals* (n 48) 395.
[155] *Sesay* (Decision on Application) (n 153); Schabas, *UN International Criminal Tribunals* (n 48) 395; Doran (n 27) 725.
[156] *Djokaba Lambi Longa v Netherlands* ECHR 2012-IV 449, para 44.
[157] Trechsel 'Rights in Criminal Proceedings' (n 27) 164.

leave the Netherlands.[158] This forces the courts and tribunals to arbitrarily detain those suspects who could be granted release but for a lack of a place to live.

It could be argued that these considerations are not particularly important because the conditions of the detention centre in The Hague are much nicer than the conditions the accused would face in another type of prison.[159] The United Nations Detention Unit in The Hague is notorious for its comfortable accommodations, having at times been referred to as the 'Hague Hilton'.[160] However, no matter how nice the conditions, it does not negate the fact that individuals housed there are still suffering deprivations and restricted human rights that would not be permitted were the individual not imprisoned. Further, some of these deprivations are exacerbated by the detention centre's distance from the accused's home and family and the typical length of the trials at the International Criminal Court.[161]

The willingness of a state to accept the accused is not the only consideration in deciding whether the accused can be released while awaiting trial. There are a number of logistical issues about how the individual will get to and from the court, whether they will work or otherwise be supported, and who will pay for their housing and living expenses.[162] In addition, the court may require some assurances that the country will be responsible for helping get the accused to court, making sure they do not abscond, or providing a police force and resources in the event that they do abscond. These situations do not necessarily implicate criminal law, making it unclear whether the presumption of innocence applies. On one hand, these are circumstances that have nothing to do with the accused individual. On the other hand, a refusal to enter into agreements about which nation will house the accused while trial is pending, and who will pay for housing and transportation for the individual, can be convenient excuses for countries who do not want to be responsible for housing people accused of genocide, war crimes and crimes against humanity. These excuses are contrary to the presumption of innocence as they involve a prejudgment that the accused is guilty.

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[158] See *Prosecutor v Mucić et al.* (Decision on Motion for Provisional Release Filed by the Accused Hazim Delic) IT-96-21-T, T Ch (24 October 1996). But see *Prosecutor v Brđanin et al*. (Decision on the Motion for Provisional Release of the Accused Momir Talic) IT-99-36-T, T Ch II (20 September 2002).

[159] Davidson (n 11) 5-6. In the domestic setting, Richard Lippke argues that pretrial detention should have much better accommodations than post-conviction detention. See Lippke (n 20) 158-161.

[160] Davidson (n 11) 5-6.

[161] Ibid 5-6.

[162] Ibid 64-65.

Governments should generally adhere to the presumption of innocence when passing laws and entering into agreements which have to do with criminal law. Thus, these types of agreements should be decided upon when international and internationalised courts and tribunals are established so as to have a minimal impact on the presumption of innocence.

A final consideration unique to international and internationalised courts and tribunals is that these courts do not have a dedicated police force or other enforcement mechanism to investigate the accused's whereabouts or effectuate a re-arrest were the person to abscond.[163] The courts and tribunals rely on national police forces and the cooperation of states parties and international organizations to arrest suspects.[164] It can be a lengthy and expensive process and one no court or tribunal would wish to go through more than once should an accused abscond. Further, there is no guarantee that countries will cooperate with a renewed arrest procedure or that the individual will be found. If they cannot find the absconded individual and cannot continue the trial *in absentia*, it will give the appearance that impunity has prevailed. This is impractical and will have negative implications for the court. In addition, the lack of enforcement provisions would lead to an inability to monitor released individuals.

To allow an individual, who has been deemed worthy of remand while awaiting the outcome of their case, to be unnecessarily held in prison violates the non-procedural presumption of innocence because it treats individuals as if they are guilty without first securing a conviction. Even those accused of war crimes and heinous human rights violations have the same human rights as everyone else accused of a crime.[165] International and internationalised courts and tribunals, as well as national governments, must not be allowed to deprive the accused of these rights simply in the name of convenience or because of lack of agreement between states.

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[163] Schabas, *UN International Criminal Tribunals* (n 48) 395.

[164] See eg *Prosecutor v Brđanin et al*. (Decision on Motion by Radoslav Brdanin for Provisional Release) (n 29); *Prosecutor v Brđanin et al*. (Decision on Motion by Momir Talic for Provisional Release) IT-99-36-PT, T Ch II (28 March 2001), para 18; *Prosecutor v Krajišnik et al.* (Dissenting Opinion of Judge Robinson) (n 46) para 10; Matthew M DeFrank, 'ICTY Provisional Release: Current Practice, a Dissenting Voice, and a Case for a Rule Change' (2002) 80(6) Texas L Rev 1429, 1434-1435.

[165] *Jentzsch v Germany* (1970) 25 CD 15; see also Doran (n 27) 726.

E. Conclusion

The presumption of innocence and pre-determination detention exist and conflict in every criminal law system. That both are permitted is incongruous, as pre-determination detention appears to violate the presumption of innocence by treating individuals as guilty without the accused having been convicted of a crime. In practice, particularly because incarceration is the most severe form of punishment available in most jurisdictions, pre-determination detention can be indistinguishable from punishment and results in the restriction of human rights of those individuals accused of crimes. Further, even if the accused are not ultimately convicted of a crime, pre-determination detention can have long-lasting consequences for the accused.

There are three overarching reasons used to justify pre-determination detention: 1) the type of crime of which the person is accused; 2) preventing the accused from committing additional crimes; and 3) ensuring the accused's appearance at trial. Only the third justification can be compatible with the presumption of innocence. The first two justifications both involve making decisions within the area of criminal law, meaning the presumption of innocence must be involved in the decision making process. Both fail to comply with the presumption of innocence because they act as pre-punishment, an assumption that the accused is guilty, and constitute impermissible preventative detention.

Pre-determination detention for the purpose of ensuring that the individual will be present for trial is the only justification that can be compatible with the presumption of innocence. It is an administrative decision rather than one informed by criminal law, and therefore the presumption of innocence does not apply. That said in order to avoid the overuse of pre-determination detention there should be a strict set of rules and standards to prove that the accused person has some propensity to abscond. The seriousness of the charges is not in and of itself an adequate justification. Instead, the fact-finder should look to extrinsic proof such as ties to the community, and whether the accused has absconded previously, when making his or her decision about whether to detain the accused at any time prior to reaching a verdict.

While some of these justifications for pre-determination detention may violate the presumption of innocence, the length of the detention is not one of them. Although the length of detention may make it seem more like punishment, pre-

determination detention resembles punishment regardless of the length of detention. The length may exacerbate the issue, but if pre-determination detention can be justified on some grounds, and is not just imposed to pre-punish the suspect, then the length of the detention does not change the determination of whether the detention violates the presumption of innocence.

In addition to the justifications for the pre-determination detention, the international criminal law system has specific challenges that may affect whether the accused can be released from detention before a verdict is reached. These include: the lack of police force that could monitor the accused or re-apprehend them if they abscond; the fact that not every accused can return to their home-state due to instability or retribution; and that third states are unlikely to accept individuals accused of such serious international crimes. These issues must be resolved. Not releasing an individual from detention, even though he or she has the right to be free, violates the presumption of innocence because it serves to punish an individual prior to conviction.

Because of the inherent contradiction between pre-determination detention and the presumption of innocence greater safeguards should be in place to help ensure that the two ideas can co-exist. There should be clear standards of proof required to show that a person is likely to commit future crimes or abscond from the court. The justifications about the type of crime or the special considerations that occur in the international sphere can never be reconciled with the presumption of innocence.

Chapter 8. Conclusion

The presumption of innocence is a modern right that is rooted in ancient history. The first recorded use of the presumption of innocence is thought to be in Hammurabi's Code. Over time, the presumption of innocence was included in most national jurisdictions, international and regional human rights agreements, and is a fundamental right applied at the international and internationalised criminal courts and tribunals. Despite this long history and development, there is no consensus as to what the presumption of innocence is, when it applies, or what protection it provides.

Everyone may enjoy the presumption of innocence. There is no human who cannot benefit from this right. There is, however, a limiting condition on when a person may enjoy the protections of the presumption and that is that the right to the presumption of innocence only applies within criminal proceedings. The presumption of innocence is relevant within the context of criminal proceedings because criminal proceedings are where an individual's 'guilt' and 'innocence' are at issue. The presumption of innocence is concerned with the legal definitions of guilt and innocence. In essence guilt means that all of the elements of a criminal offence are proven against a person to the required standard of proof. Innocence, in the legal sense, means that the requirements for guilt are unfulfilled. Legal innocence then, is the same as 'not guilty' and results in a person not being convicted. When discussing the purpose of the presumption of innocence, to prevent people from being treated as if they are guilty without a conviction, what is meant is not that individuals must be treated as if they are innocent in the sense of being completely irrelevant or unrelated to a particular crime that has occurred. That definition of innocence would mean that no one could be the subject of investigation, and that individuals could not be held responsible for their criminal activities. Instead the presumption of innocence requires that people who have not been convicted be treated as not guilty. They can be subject to investigation and criminal procedure so long as it is warranted and not the same as the treatment that an individual who has been found guilty would receive.

Factual innocence exists when the person accused actually committed the crime, regardless of what may be proven against them, and is relevant to the presumption of innocence because it is related to our sense of justice. Ideally, only those who are both legally and factually guilty would be convicted and those who are factually innocent would never be found legally guilty of crime. An injustice occurs when a factually innocent person is found legally guilty. The presumption of

innocence is meant limit the number of factually innocent people who are convicted of crimes by forcing a burden and standard of proof on the prosecutor rather than requiring the accused person to prove his or her own innocence. Further, the presumption of innocence helps prevent injustices by instructing the fact-finder as to the conditions under which a conviction can be found. Finally the presumption of innocence prevents shortcuts from being taken within criminal justice by requiring both proof of guilt and for that proof to reach a particular standard before a conviction can be entered against the accused. It is only after there is sufficient proof of guilt against the accused, that the accused person may be convicted of a crime. Conviction, or a legal finding of guilt, is required before anyone may be punished or otherwise be treated as if they are guilty. In this sense, the idea of factual innocence and factual guilt can provide assurances about whether the criminal justice system is working properly.

When the right becomes applicable depends on which aspect of the right is at issue. There are two aspects to the presumption of innocence. The procedural aspect is a mandatory rebuttable presumption of law that provides instructions to the fact-finder during trial. It is an instruction to the fact-finder as to under what conditions the accused may be found guilty of the charges against him or her and what to do if those conditions are not met. Thus, the presumption of innocence has a relationship with the standard of proof required for conviction. While generally, this standard is quite high, the presumption of innocence merely requires enough proof to be provided to reach whatever standard the particular jurisdiction or criminal code requires. Providing enough evidence of guilt to meet the standard of proof rebuts or overcomes the presumption of innocence. Only then may the fact-finder find the accused guilty. The procedural aspect of the presumption of innocence also necessarily directs the burden or onus of proof away from the accused. This is because if the fact-finder is observing the presumption of innocence, the accused will be found innocent unless someone else provides sufficient proof of guilt. Thus, the accused has nothing to prove because the default outcome is that the accused has, from the outset, won the case. It is only after proof of guilt is provided, to the required standard, that the accused will be convicted. It is not in the accused's interest to provide that proof, and thus, the responsibility falls to another party, usually the prosecutor.

The procedural aspect of the presumption of innocence may be waived by the accused. Waiver of the presumption of innocence only occurs when the accused

enters a guilty plea to the charges of which they have been accused. This is different from a confession because a confession is a piece of proof that still needs to be tested for veracity, reliability, and relevance. The process of entering a guilty plea asks the fact-finder to enter a finding of guilt against the accused while the accused concedes that the standard of proof could be met at the end of a full trial. This waives the procedural aspect of the presumption of innocence by the accused agreeing that the presumption would be overcome at trial and asking the fact-finder to enter a guilty verdict.

The second aspect of the presumption of innocence is non-procedural and applies in a wider context. This aspect extends beyond trial to the point when someone is 'charged' with a criminal offence. The non-procedural aspect is primarily concerned with ensuring that people are not treated as if they are guilty without a conviction first being found against them. The secondary concern is to prevent things that occur outside of the trial from affecting the fairness of the trial proceedings. The main activities that it prohibits are public authorities making statements affirming the guilt of individuals who have not been convicted of a crime, the media excessively portraying a non-convicted person as guilty of a crime, and activities that generally make a person appear guilty unless they have been convicted. Not treating people as if they are guilty prohibits punishment and punishment-like activities including but not limited to imprisonment, making accused people appear in shackles unnecessarily, and making people who are accused of crimes appear in public in clothing that implies they have been convicted. While these are the types of treatment most dealt with by courts, it seems that this list cannot be exhaustive, and signals an area in which the law could further develop if other types of activity were to be questioned as a violation of the presumption of innocence. This aspect of the presumption of innocence helps uphold the rule of law and justice by forcing criminal procedure before a person may be treated the same as a person who has been found legally guilty. To do otherwise, could render criminal justice obsolete.

While anyone may enjoy the presumption of innocence, the practical application implies that the duty to uphold the presumption of innocence is narrower. The case law suggests that the closer the actor is to the case against the accused, the stronger the duty is. Thus, fact-finders have the strongest duty. They must take an active role in upholding both the procedural and non-procedural aspects of the presumption of innocence, and may also need to take steps to ensure that others are

upholding the presumption. Prosecutors and police working on the particular case in question have a somewhat less strong duty. They must uphold the non-procedural aspect of the presumption of innocence, but there are instances where they may refer to the accused as guilty, such as when a prosecutor is making an argument in court. The duty to uphold the non-procedural aspect exists for all other public authorities. Whether a public authority's actions against the accused will be interpreted as a violation of the accused person's presumption of innocence will depend on the overall context as evaluated by the relevant court. Private entities may also have a duty to uphold the presumption of innocence but this is a considerably weaker duty than that held by public authorities. For private entities any duty to uphold the presumption of innocence must be balanced against their own rights and freedoms.

Thus, it the presumption of innocence not a blanket right that has constant applicability and does not control our everyday lives, it only applies within the general context of criminal law and procedure. When during the criminal process the right to the presumption of innocence becomes operative is open to debate but there is a general consensus that, at the very latest, it attaches once an individual is 'charged'. Particular jurisdictions may provide for an earlier activation of the right, but that is not part of the general rule. Courts and jurisdictions may choose to provide the presumption of innocence in any other areas of law. Indeed, businesses and individuals may extend a presumption of innocence to individuals in a private setting. However, providing the presumption of innocence outside of criminal law might not make sense, because legal guilt and legal innocence are not at issue in other types of legal proceedings. Further, because these other settings are outside of criminal law, the outcome of the determination cannot be criminal guilt. Criminal guilt is a determination that can only be made within the confines of the criminal process, and thus, perhaps the presumption of innocence should remain with that determination. While institutions, jurisdictions and individuals could choose to apply the presumption of innocence outside of criminal law, it is not a requirement. The only time the presumption of innocence is required is during criminal law processes.

What happens after criminal proceedings depends on the outcome of those proceedings and the aspect of the presumption of innocence that is implicated. The only time the first aspect is overcome is when there is a finding of guilt after trial or waiver via guilty plea. However, because this aspect is a legal presumption it is not applicable outside of the trial setting. What happens to the second aspect after a

criminal process depends on the outcome of the case. If the charges are discontinued or there is an acquittal, then the second aspect of the presumption of innocence remains in tact. If the outcome is a conviction, then the second aspect of the presumption of innocence is overcome and the convicted individual may be punished and may incur whatever sanctions or treatment are appropriate for a conviction within the particular jurisdiction. Thus, while the second aspect is relevant to events that occur beyond trial, it too is overcome by a conviction.

The presumption of innocence's role in preventing non-convicted people from being treated as if they are guilty comes into conflict with laws allowing for pre-determination detention. It is paradoxical that both the presumption of innocence and pre-determination detention are permitted within most criminal justice systems. These two ideas may be reconciled if the decision to hold a person in pre-determination detention can be taken outside of the context of criminal law and procedure as that would make the presumption of innocence not relevant to the decision. When examining the main statutory reasons allowing for pre-determination detention – type of crime accused, crime prevention, and ensuring the accused will be present for trial – it can be seen that only one of these justifications may be reconciled with the presumption of innocence.

The only justification for pre-determination detention that can be reconciled with the presumption of innocence is detention to ensure that the accused is present for trial. This is the only reason that can be removed from criminal law because it does not have to do with either the underlying crime or future crimes. Rather, ensuring that an accused person appears for trial helps ensure that justice can be done for all parties because it allows the criminal process to continue and come to a resolution. Although using pre-determination detention to ensure the accused's presence at trial may be reconciled with the presumption of innocence, it does not mean that all accused people should be detained for this purpose. Rather, there should be clear rules and factors to consider when determining whether this type of pre-determination detention is appropriate.

By requiring a conviction before a punishment or sanction can be enacted, the presumption of innocence helps promote the rule of law and supports justice. Allowing people who have not been convicted to be treated the same as people who have been convicted would circumvent the criminal justice process and would potentially lead to many more injustices. It is much easier, efficient and less

expensive to punish people without going through criminal procedure and requiring proof of guilt to a particular standard. If the non-convicted could be treated the same as those with a conviction, then there would be no need for rigorous investigation or criminal procedure. Doing so however, would allow more factually innocent people to be punished.

Throughout this study there has been an on-going discussion about how broad or narrow the presumption of innocence should be. This discussion has largely been driven by the various normative theories. While these theories describe what the presumption of innocence should, ideally be, the presumption is in practice may be quite different. In practice, the presumption of innocence is both broad and narrow. It is broad in that it is found in a wide range of jurisdictions, national, regional, and international, but it is narrow because it only applies within criminal law and procedure. Everyone is entitled to the presumption of innocence, but an individual can only benefit from its protections once they are 'charged' with a criminal offence. Everyone could have some duty to uphold the presumption but the highest duties are limited to public officials and fact-finders. It prevents public authorities from making public statements of guilt about an accused person, but it is not a general protection from defamatory comments implying a person's guilt. The presumption of innocence is relevant to pre-determination detention, but cannot be reconciled with most of the common reasons for that detention. It finds relevance beyond the bounds of trial, but remedy for incidents that occur outside of the court setting are only found if criminal proceedings are ever launched against the affected individual.

Thus, in practice, the presumption of innocence is somewhere between the broad and narrow normative theories. It is broader than Laudan and Lippke argue because it has application beyond trial. The presumption of innocence is also narrower than Ho posits because it is not an overarching right, while the presumption is related to a large number of due process rights its use is limited to a specific purpose. Duff's theoretical civic presumption of innocence is not supported by the practical application, but his idea that there could be more than one presumption of innocence finds some support in the application of the presumption's two different aspects. As Weigend argues, the presumption of innocence does have a purpose related to controlling the relationship between individuals and government power, but the power concerned is limited to the power to punish or sanction or otherwise treat non-convicted people as if they are legally guilty of a crime. While the normative

theories do not provide a solution to defining what the presumption of innocence is, they provide what they think the presumption of innocence should be. Discussing what the presumption of innocence should be is important as the theory can help guide practice or can provide frameworks and lenses to help determine if the way that the presumption of innocence is developing in practice can, or should, be altered.

The presumption of innocence is a human right that applies within criminal proceedings. Its two aspects work together and independently to ensure that innocent people are not treated in the same manner as people who have been convicted of a crime. To do otherwise would obviate the need for criminal law and procedure and fundamentally change the rule of law.

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