SERIOUS OFFENCES AND
THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

ZVIKOMBORERO CHADAMBUKA*

Abstract
The right to trial within a reasonable time is an important element of the human rights discourse. This article analyses the manner in which the seriousness of the criminal offence with which an accused has been charged affects jurisprudence on this right. International case law mainly from the United Nations Human Rights Committee and the European Court of Human Rights is used. Domestic case law referred to is from Canada, South Africa, the United States of America, the United Kingdom and Zimbabwe. The first question considered is whether seriousness of the charges can form a basis for arguing that there should be greater diligence in ensuring earlier trials for persons charged with serious offences. In discussing this, the paper looks at the interests served by the right to trial within a reasonable time. The other question considered is whether seriousness of the charges can justify slower trials. Here, two arguments are assessed. The first is that serious offences are inherently slower because they denote a requirement for enhanced due process. The second is that the public interest in ensuring that serious offenders are tried for their crimes requires that there be greater leeway in serious offences. It is concluded that whether the accused is incarcerated or not, seriousness of the charges should be taken as a factor requiring a higher level of diligence in the assessment as to whether the right to trial within a reasonable time has been breached.

1. Introduction
Most human rights bills at both domestic and international law include the right to trial within a reasonable time, often termed the right to be tried without undue delay or the right to a speedy trial.1 This right is an important element of a criminally accused person’s due process rights. The United States of America (US) Supreme Court’s decision in Barker v Wingo2 is considered to be the definitive case on this right in American law and is generally taken as a reference point in many other legal systems. This case established that the factors to consider in deciding whether there has been a violation of the right to trial within a reasonable time are the length of the delay, the reasons for the delay, failure to assert the right to trial within a reasonable time,3 and prejudice to the accused person.

*Zvikomborero Chadambuka is an Advocate (Barrister) practising in Zimbabwe at the Harare Bar. He holds an LLB from the University of Zimbabwe and is currently an LLM candidate now completing his dissertation at the University of South Africa (UNISA). He has completed the PGDip Economic Principles from the Centre for Finance and Management Studies (CEFIMS) under the auspices of the School of Oriental and African (SOAS), University of London and is currently a student of the Msc Finance (Economic Policy) at the same institution.

1 Protected at international law in article 14(3)(c) of the International Covenant on Civil and Political Rights, articles 20(4)(c) and 21(4)(c) of the Statutes of the International Criminal Tribunals for Rwanda and for the former Yugoslavia respectively, article 7(1)(d) of the African Charter on Human and Peoples’ Rights, article 8(1) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

2 Barker v Wingo, 407 U.S. 514 (1972)

3 Derek Obadina, ‘The Right to Speedy Trial in Namibia and South Africa’ (1997) 41 Journal of African Law, No. 2, 229-238, at 233 it is pointed out that some accused persons welcome delay and may actually contrive.

Essex Human Rights Review Vol. 9 No. 1, June 2012
Such prejudice relates chiefly to pre-trial incarceration, anxiety and concern to the accused person (often termed 'social prejudice') and prejudice to the defence (often termed 'trial prejudice').

While different jurisdictions may differ in the particulars of their approach, depending on various considerations, most prominently the specific text in the bill of rights concerned, the factors set out in Barker v Wingo or variations thereof are generally taken into account when deciding whether there has been a violation of the right to trial within a reasonable time. Another broadly agreed-upon approach is that all these factors do not need to be present in every case and are considered in a balancing process to reach a decision on a case-by-case basis. At international law, the United Nations Human Rights Committee (HRC) similarly refrains from attempting to define delay but prefers a case-by-case approach. The HRC bases its approach on a reasonableness standard chiefly taking into consideration the length of time it takes to reach a final decision, the complexity of the case, and the author's and the state party's contribution to the delay. So too in the European Court of Human Rights (ECHR) where the chief concerns are 'the complexity of the case, the applicant's conduct and the conduct of the competent authorities'.

The aim of this article is not to explore the entire discourse around the right to trial within a reasonable time. The question to be addressed is the narrower one relating to the effect of the seriousness of the criminal offence with which an accused person is charged in deciding whether there has been a violation of the right to trial within a reasonable time. The argument made here is that where there is an inordinate delay in a trial and a court engages in a balancing process of considering the factors set out above; the court should be more willing to find a violation of the right to trial within a reasonable time where an accused person is charged with a serious offence than where the charge is minor. The issue shall be addressed by considering the jurisprudence in an assortment of relatively prominent English and Roman-Dutch common law jurisdictions and at international law. Considered are decisions from the Roman-Dutch law jurisdictions of South Africa and Zimbabwe and the English law jurisdictions of Canada, England, and the US. The international jurisprudence considered is that of the HRC and the ECHR.

Before embarking on this enquiry, two preliminary points must be made. The first point is that the seriousness of a matter differs from the complexity of a matter. Seriousness relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. Complexity relates to legal or factual elements in the matter - whether they are so convoluted or technically, administratively or otherwise involved as to require intensive or otherwise time-consuming investigation.

\[\text{to bring it about in the hope of aborting the trial. The requirement that an accused assert their right to trial within a reasonable time seeks to deal with this concern, as does the approach of the Zimbabwean courts which generally decline to find a violation in cases with suspicious circumstances; thus in Chininga Mwezi v The State SC 195/94 and also Stanley Munetzi Chiweshe v The State SC 5/2001, the courts declined to find a violation where important documents keep suspiciously disappearing from the record, thereby derailing the trial. In S v Kusangaya 1998 (2) ZLR 10 (H), the court dismissed the application, noting that the indications were that the applicant was the type of person prepared to use corrupt methods to avoid being tried.}\]

\[\text{Barker v Wingo, n2 above, and the Zimbabwean case of In Re Mlambo 1991 (2) ZLR 339 (S)}\]

\[\text{Girjadat Siwapersaud v Trinidad and Tobago Communication No 938/2000 (2004)}\]

\[\text{Bezique v Central Africa Republic Communication No 428/1990 (1994) at paras. 2.1 and 5.3}\]

\[\text{Franz and Maria Deid v Austria Communication No 1060/2002/23/08/2004 at para.11.5-11.6}\]

\[\text{In Bernard Labuto v Zambia Communication No 390/1990: 17/11/95 at para.7.3 whilst acknowledging the difficult economic situation of the state party, the HRC emphasised that the rights set forth in the Covenant constitute minimum standards which all state parties have agreed to observe.}\]

\[\text{The points are as summarised in Pelissier v France 25444/94 [1999] ECHR 17 (25 March 1999) at para. 67.}\]
or prosecutorial administration. Even if the charges are serious, where the case is simple there is no basis for lengthy delay.\textsuperscript{10} The second point is that in some jurisdictions (in particular Canada, the US and Zimbabwe), if the court finds that there has been a contravention of the right to trial within a reasonable time, then the sole acceptable and minimum possible remedy would be a stay of proceedings.\textsuperscript{11} This is true whether or not trial prejudice is implicated in the matter. The idea here is that the nature of a violation of the right to trial within a reasonable time is such that any further action in the matter would only exacerbate the violation as it would amount to trial outside a reasonable time. In contrast, in other jurisdictions such as England and South Africa, the remedy of a stay of proceedings in such circumstances is only applied where either the ability to have a fair trial in the case is now compromised (such as where evidence has disappeared) or where other special circumstances in the case make a stay of proceedings appropriate. The view here is that if a fair trial is still possible – in the sense of there being no trial prejudice proven – then the court has other remedies it can use, such as ordering expedited proceedings.\textsuperscript{12} That stated we can now proceed to assess the effect of the seriousness of the offence on judgements as to whether there has been a violation of the right to trial within a reasonable time.

In seeking to assess the effect of the seriousness of the crime alleged where there is an inordinate delay in a trial, one must look at the rationale of the right to trial within a reasonable time. This right exists to avoid prejudice in respect of certain specific interests. In Barker v Wingo, Powell J identified these interests which the court considered that the speedy trial right was designed to prevent oppressive pre-trial incarceration (mainly implicating the right to liberty), to minimise 'social prejudice' i.e. anxiety and concern of the accused (mainly implicating the right to liberty and security of the person) and to limit the possibility of 'trial prejudice' i.e. that the defence will be impaired (implicating the right to a full and fair defence).\textsuperscript{13} These factors, the same ones by which prejudice to the accused person is assessed, themselves implicate a further set of fundamental human rights as set out above. It must be added that delay in a trial also results in a state of continued accusation and is thus anathema to the presumption of innocence. All accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.\textsuperscript{14} All these interests were substantially expressed in the United Kingdom House of Lords decision in Attorney General's Reference No 2\textsuperscript{15} of 2001 where Lord Bingham for the court, cited ECtHR jurisprudence, explaining the rationale of the reasonable time requirement as being so that an innocent person could clear his name

---

\textsuperscript{10} Boodlal Sooklal v Trinidad and Tobago, Communication No. 928/2000 (2 February 2000), CCPR/C/73/D/928/2000

\textsuperscript{11} R v Rabay [1987] 1 S.C.R. 588 (Canada) at para. 48-50, para. 58 and paras. 61-66; Barker v Wingo, n.2 above, at 519; and In Re Mlambo n4 above (Zimbabwe) at 354F-355E.

\textsuperscript{12} Zanner v Director of Public Prosecutions [2006] 2 AllSA 588 at para. 10 (South Africa) and the British House of Lords in Attorney General’s Reference No 2 of 2001 (On Appeal from the Court of Appeal (Criminal Division) [2003] UKHL 68. The British Judicial Committee of the Privy Council (hereinafter the Privy Council) was initially of the view that a stay of proceedings was the only remedy, R v HM Advocate Privy Council DR A No. 3 of 2002, but in Spiers v Ruddy and Anor Privy Council Appeal No 64 of 2006 changed its position to mirror that of the House of Lords. The New Zealand courts consider that a stay of proceedings is the ‘normal’ (rather than ‘minimum possible’) remedy where the right to a trial within a reasonable time has been contravened; see Martin v Tauranga District Court [1995] 2 NZLR 419. A broad discussion of the reasons for these differences in approach is beyond the purview of this article.

\textsuperscript{13} Barker and Wingo, see n2 above at 532.

\textsuperscript{14} R v Askov [1990] 2 S.C.R. 1199 (Canada) at 2015

\textsuperscript{15} See n12 above.

Essex Human Rights Review Vol. 9 No. 1, June 2012
and so that a guilty one was not made to wait and suffer too long for justice, with negative effects for his health and family life.\textsuperscript{16} There is general agreement on these interests as the rationale for the right to trial within a reasonable time.

2. Is Seriousness a Basis for Faster Trials?

2.1 Pre-Trial Detention

Many bills of rights grant two distinct rights, one being a right to ‘either trial within a reasonable time or release pending such trial’ with the other being ‘the right to trial within a reasonable time’. These rights differ in their goals and objectives, a distinction best illustrated by reference to ECtHR jurisprudence on the Article 5(3) entitlement to ‘trial within a reasonable time or to release pending trial’ in contrast to the entitlement provided for in Article 6(1) to ‘...a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ The ECtHR has held that the question of a reasonable time as per Article 5(3) relates to when someone is in detention and the question involves someone’s trial or release, and Article 6(1) is when the issue only relates to the right to go to trial and receive a decision on the merits without delay, and must be considered differently.\textsuperscript{17} But the ECtHR has also held that where a person is detained pending the determination of a criminal charge against him, the fact of such detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met i.e. whether there was trial within a reasonable time as required by Article 6(1) of the ECHR.\textsuperscript{18} Thus where a person is detained, special diligence is required in ensuring that such person’s trial is held within a reasonable time. As pre-trial detention is more likely the more serious the charges, prejudice is often more substantial by reason of the detention when the charges are serious.

The area where clarity has been lacking has generally been where the accused person is not in detention. The HRC has held that long delays were unacceptable, particularly in capital cases.\textsuperscript{19} This focus on the capital nature of the charge denotes questions of seriousness. In Francis et al. v Trinidad and Tobago Communication, the HRC stated that:

\textquote[Francis et al. v Trinidad and Tobago Communication No 899/1999 (2002) at para. 5.4]{‘In cases involving serious charges such as homicide or murder, \textit{and} where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible.’ [Emphasis added]}

The phrasing here suggests that the seriousness of the charges and the denial of bail to an accused person are separate factors each of which require that an accused person be tried expeditiously. This HRC case thus suggests very strongly that the issue of seriousness is a separate concern heightening the need for a speedy dispensation of justice. The ECtHR also requires a higher level of diligence in, \textit{inter alia}, proceedings for particularly serious

\begin{itemize}
  \item \textsuperscript{16} at para 16; in \textit{In re Mlambo}, n4 above at 344C-F, the court notes that a guilty party would wish to have the charges disposed of conclusively so that he may get on with his life and that: ‘A trial at some distant date in the future, when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his prospects of rehabilitation.’
  \item \textsuperscript{17} Punzelt v the Czech Republic 31315/96 [2000] ECHR 170 (5 April 2000) and Stögmüller v Austria judgment of 10 November 1969, Series A no. 9 at 40
  \item \textsuperscript{18} Abdoiella v the Netherlands 12728/87 [1992] ECHR 70 (25 November 1992)
  \item \textsuperscript{20} Francis et al. v Trinidad and Tobago Communication No 899/1999 (2002) at para. 5.4
\end{itemize}
crimes.\textsuperscript{21} The broad idea is presented that a rational order of priority in trying criminal cases would require the trial of serious felonies before petty matters.\textsuperscript{22}

The question then is whether the other interests protected by the right to trial within a reasonable time also warrant speedier trials in serious cases. To assess this, attention will now be turned to the interest of protecting an accused person from social prejudice.

\textbf{2.2 Social Prejudice}

Detention limits physical liberty, but there is a wider conception of ‘liberty’. In \textit{B. (R.) v Children’s Aid Society of Metropolitan Toronto}\textsuperscript{23}, Lamer CJ, who was in fact arguing for the narrowest interpretation of the right to liberty, expressly acknowledged infringement of the right to liberty and the freedom of movement by (in addition to imprisonment) any form of control or of constraint on freedom of movement such as bail conditions. The liberty interest may be impaired either by imprisonment or by being on remand.\textsuperscript{24} Liberty has also been held to be engaged where state compulsions or prohibitions affect important and fundamental life choices.\textsuperscript{25} Examples in Canadian case-law include where persons are compelled to appear at a particular time and place for fingerprinting,\textsuperscript{26} to produce documents or testify,\textsuperscript{27} or are precluded from the exercise of a choice as to where to establish their home.\textsuperscript{28} The failure to dispense speedy justice undermines these interests – interests which the right to trial within a reasonable time seeks to protect.

A central interest is the protection of the security of the person. The Canadian Supreme Court in \textit{Chaoulli v Quebec (Attorney General)}\textsuperscript{29} defines the psychological element of security of the person as encompassing ‘a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress’.\textsuperscript{30} Being charged with a crime raises a number of anxieties and concerns for an accused person. Such concerns are exacerbated by the reality that the legal presumption of innocence generally has little operation in the social field.\textsuperscript{31} Especially considering the democratic realities of an independent vibrant press, public process may well jeopardise or impair the benefits of the

\textsuperscript{21} Para. 2.4, Luca De Matteis (Judge, First Instance Court of Como – Italy), ‘Reasonable Delay in the Italian Justice System: A European Perspective’ citing cases concerning police violence and where the plaintiff is of advanced age or in ill health as other such cases.


\textsuperscript{23} \textit{B. (R.) v Children’s Aid Society of Metropolitan Toronto} [1995] 1 S.C.R. 315 (Canada) at 347

\textsuperscript{24} The Zimbabwean High Court in \textit{S v Tau 1997} (1) ZLR 93 (H) at 100E said: ‘I consider the uncertainty of the accused’s existence throughout the six years to be prejudice itself. I am not advised whether he spent time in gaol awaiting trial, but even if he did not, for over six years he was not a free man.’

\textsuperscript{25} In \textit{Blencoe v British Columbia (Human Rights Commission)} [2000] 2 S.C.R. 307 (Canada) the court stated this position as a long-held one in Canadian jurisprudence.

\textsuperscript{26} \textit{R v Bean} [1988] 2 S.C.R. 387

\textsuperscript{27} \textit{Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)} [1990] 1 S.C.R. 425

\textsuperscript{28} \textit{B. (R.) v Children’s Aid Society of Metropolitan Toronto} see n23 above at para. 51

\textsuperscript{29} \textit{Chaoulli v Quebec (Attorney General)} [2005] 1 S.C.R. 791


\textsuperscript{31} Obadina, n3 above, at 233 who makes the point that, notwithstanding the presumption of innocence, the public and public officers intuitively have little or muted sympathy for accused persons.

Essex Human Rights Review Vol. 9 No. 1, June 2012
presumption of innocence; doubt will have been sown as to the accused person’s integrity and conduct in the eyes of family, friends and colleagues.32 There are thus real issues of loss of privacy, stigmatisation and the disruption of family life, social life and work;33 and even hostility.34 Added to these sources of stress and anxiety is the uncertainty as to the outcome of the case and the possible sanctions and mounting legal costs; all this in a process that is adversarial as criminal justice processes are wont to be. These are significant sources of prejudice; and they do get worse with the passage of time while one awaits trial.35 The seriousness of the offence with which an accused is charged relates very closely with most of these concerns, as the stress, anxiety and uncertainty is greater where the charges are more serious; for example, the worry as to the possible verdict and sanctions is much more acute on a serious charge.36 Similarly, the burden of stigma and its underlying and consequent complications as expressed above is greater with more serious charges. Hostility is also a much more powerful concern in such circumstances. Serious charges thus result in equally serious prejudice. Even in the absence of detention, serious charges should therefore be such as to require a high level of diligence on the part of the state.

2.3 Trial Prejudice
The US Supreme Court in *Doggett v United States*37 notes that ‘impairment of one’s defence is the most difficult form of speedy trial prejudice to prove, because time’s erosion of exculpatory evidence and testimony can rarely be shown’.38 Memory lapses are the quintessential expression of this problem for it has been noted that what is forgotten can rarely be proven.39 There is a presumption of prejudice grounded in logic once there has been a substantial delay in finalising a case. In circumstances where the presumption arises and prejudice has been thus inferred, an accused person does not have to show that the delay caused particular prejudice. Although the burden of proving that proceedings were not conducted within a reasonable time is generally on the accused, the presumption operates to cast the duty on the state to rebut the inferred prejudice.40 The presumption of prejudice gets stronger the lengthier the delay.41 Extremely lengthy delays result in an irrebuttable presumption of prejudice.42 Although the presumption applies in respect of both the ‘social’ and the ‘trial’ prejudice,43 in light of the issues of proof with trial prejudice, the presumption of prejudice is a much more significant matter when consideration is given to questions of trial prejudice.

3. Can Seriousness Justify Slower Trials?
3.1 The Enhanced Due Process Argument
It has been suggested that with a serious case, even if it is a simple one, there can be delays as a result of due process concerns, as these concerns arise to a greater and more

32 R v Mills [1986] 1 S.C.R. 863 (Canada) at paras. 146-7
33 R v Mills, n32 above at paras. 146-7 and R v Rahey, n11 above (Canada) at paras. 22-3 (also note para. 71)
34 Barker v Wingo, see n2 above.
35 Uviller, n22 above at 1394.
36 In *S v Morrisby* 1995 (2) ZLR 270 (S) at 273B, the Zimbabwe Supreme Court considered that where the charge is one for which there is the possibility of a prison terms, the applicant’s anxiety is duly increased.
37 *Doggett v United States* 505 U.S. 647
38 At 655
39 Barker v Wingo , see n2 above at 530-2; *In Re Mlambo*, n4 above (Zimbabwe) at 351A
40 *In Re Mlambo*, n4 above at 352E-G
41 *In Re Mlambo*, n4 above at 354E-F; *Doggett v United States*, see n37 at 651; and in *Zanner v Director of Public Prosecutions*, n12 above, the presumption of prejudice is little acknowledged as the court requires that there be specific evidence of how exactly the defence evidence is prejudiced.
42 R v Askov, n14 above.
43 *United States v Marion* 404 U.S. 307 (1971) (US)
Serious Offences

The HRC in Francis et al. v Trinidad and Tobago held that where the fair trial rights of an accused have not been scrupulously respected, the death penalty is unacceptable. The ECtHR in Alobella v The Netherlands at para 21-2 stated as follows:

‘The Court observes that the case, although not particularly complex, was a serious one, the applicant having been accused of the crime of incitement to murder. Nevertheless the courts dealt with it within the above-mentioned period of four years and four months. In view of the fact that five court examinations were involved, this period as such is not unreasonable.’

But the ECtHR, in the same case, highlighted the limited reach of the idea that enhanced due process requirements can justify longer delays in serious cases. It did this by pointing out that the right to trial within a reasonable time itself imposed on the contracting states the duty to organise their legal systems in such a way to ensure that their courts could meet each of its requirements. The ECtHR has also rejected a state’s attempts to justify delays by invoking its international responsibility to look carefully into all matters involving serious cases of drug trafficking. Thus this due process point must evidently never be overstressed, as the proper position is that due process must be scrupulously observed in all cases, whether serious or not.

A further point mitigates against the idea that delay in serious offences is justified by the need to be especially particular where the offence is serious. This point arises from the fact that the corollary to the argument is that greater stress should be laid on the interest of an accused in having a full and fair defence in serious cases. Ergo, if due process in serious offences must be scrupulous, then the accused person’s ability to adduce their defence fully and fairly must also be scrupulously ensured. It would, for example, follow that the presumption of prejudice noted above should be stronger with serious offences. On this basis, lower-level prejudice to the accused person’s interest in a full and fair defence would be required for a court to hold that there had been a contravention of the right to trial within a reasonable time when the charge was for a serious offence. This factor, at the very least, very significantly blunts the force of any due process argument that seeks to justify lengthier delays when the offence with which an accused person is charged is serious. Also of note is that serious, complex charges are commonly developed in the relative leisure before accusation and thus such charges should often be tried even more quickly than simple matters.

3.2 The Public Interest Argument

44 We are not dealing here with circumstances relating to the established right of an accused person to have sufficient time to prepare his/her defence; the right to trial within a reasonable time certainly is no medium to hurry an accused such as to preclude them from properly conducting their defence.
45 See n20 above
46 Errol Johnson v Jamaica, n19 above at para. 8.9; Earl Pratt and Ivan Morgan v Jamaica, n19 above at para. 15
47 See n18
48 At para 24; the HRC also considers that the duty is on a state party to organise its system so as to avoid administrative delays, see Bernard Lubuto v Zambia, n8 above at para. 7.3, where it was held that ‘the difficult economic situation’ of a State party is no excuse for not complying with the Covenant, and ‘the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe’. Note though that the Namibian courts in S v Heidenreich 1996 (2) BCLR 197 at 204-205 held that the applicant’s right to speedy trial must be balanced against ‘the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in Namibia’, and that the weight to be given to the factors considered in determining whether there was a violation must vary according to prevalent economic and social conditions; see Obadina, n3 above at 234.
49 Mansur v Turkey, judgment of 8 June 1995, Series A, No. 319-B at para. 68
50 Uviller, n22 above at p.1384,
There are two chief notions of the public interest when considering the right to trial within a reasonable time. First is the public interest in having trials within a reasonable time. In *Barker v Wingo*, the court recognised the public interest in speedy trials, noting that lengthy delays meant that society lost wages which an incarcerated accused may have earned; allowed manipulation of the system; allowed dangerous accused persons to be released from incarceration and possibly commit more crimes; resulted in temptations to jump bail and resulted in remanded persons being kept in custody for excessive periods, resulting in increased prison populations and aggravating the evils associated with overcrowded jails as well as prejudicing rehabilitation efforts. The deterrent goals of the criminal law are inadequately served when the defendant is deprived of the right to trial within a reasonable time. Other concerns are that unnecessary delay is likely to be prejudicial to the prosecution case and can have a devastating effect upon both victims and key witnesses. Also, as there is a financial cost to keeping an accused person on remand, delay increases costs and places additional pressure upon scarce resources. It also breeds cynicism, and tends to bring the administration of justice into disrepute. But note the sentiments of the Court in *In Re Mlambo*, wherein it was stressed that the right to trial within a reasonable time was targeted towards the protection of the individual interest in fundamental justice and that although the societal interest was of great importance, it was a consequence of, and not the object of, the right. Indeed, in Canadian jurisprudence, there is a debate as to whether any notion of societal or public interest in the right to trial within a reasonable time is even relevant.

The other public interest issue is the need to ensure that people accused of crime be prosecuted. This interest was noted in *In Re Mlambo*, where the court stated that ‘the charges against the appellant were far from trivial and that there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes’. The court in that matter nevertheless held that there had been a violation of the individual’s right to trial within a reasonable time and therefore the trial could not take place. A submission was made before the Privy Council that the guilt of the appellant was obvious and it would therefore be wrong to allow him to escape a conviction by quashing it on the grounds of delay; but the Privy Council rejected this submission, merely stating that such an argument overlooked the importance of the constitutional guarantee. Obadina argues that the speedy trial provisions are directed exclusively towards the protection of accused persons and that they are not subject to any internal limitation. Thus that the public interest in securing the conviction of the guilty should not, *per se*, operate to abridge the right to speedy trial; except only to the extent allowed by any applicable common limitation provision. He stresses that any such limitation, where it exists, has a subordinate status in the balancing process - particularly where (as is often the case) the provisions embodying the right to speedy trial do not expressly authorise such a restriction. One here then notes South

---

51 At 519
53 In Re Mlambo, n4 above at 345 citing *R v Askov*, n14 above.
54 At 344F-G
56 Uviller, n22 above at 1378, considers the notion of there being a societal interest in the right to trial within a reasonable time which may exist in opposition to the interests of the accused to be dubious.
57 At 354G-355E
58 *Darmalingum v the State Privy Council Appeal No. 42 of 1999* at 10.
59 Derek Ohadina. See n3 above, at 234
African case law, which tends to stress the public interest in the prosecution of offenders. In *Zanner v Director of Public Prosecutions*, the South African Supreme Court stated that:

‘The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime.’

The use of the language of human rights, by referencing the right to life when dealing with what is in fact a limitation in the public interest, should not be such as to bring limitations to the same level as the rights in issue. It is submitted that such an approach is not a prudent one as it falls into an error of principle. Central to any human rights scheme, particularly constitutional rights, is the principle that rights are the norm and limitations are the exception. As has been said; ‘the primary purpose of constitutionalising rights of minority groups, such as accused persons, is precisely to protect them from the majority or sceptical governments who might otherwise be disposed to override them.’ It should be acknowledged that virtually every criminal offence invades another person’s rights in some way and an approach that considers such invasion as a matter of human rights in itself can only detract from the true right to trial within a reasonable time issues which should be under adjudication.

4. In the Final Analysis

Where does this leave us? The interests which the right to trial within a reasonable time seek to serve are generally more deeply undermined when the allegations against the accused person are serious. Thus where the charges are serious, courts should be less tolerant to delays in trial. Pre-trial detention is more likely in serious matters, but even without such detention, the limitations on liberty and movement incumbent upon serious offences tend to be more pressing. The stress and anxiety of accusation is more serious with serious offences; one is oft faced with a prison sentence that looms and recedes on every court attendance. Matters are worsened due to the limited operation of the presumption of innocence in the social realm as one’s integrity and conduct remains the subject of uncertainty and negative speculation during the pendency of the charges. Prejudice to the defence leading to failures of a fair trial – which can rarely be practically shown – will have more devastating effects when the charges are serious. Thus in the primary, faster trials are demanded *because* of the seriousness of the offence concerned.

The two bases on which the contrary can be argued are firstly that due process requirements are more pressing the more serious the charge and these may cause delay. But states have a duty to ensure scrupulous due process in *all* cases, thus ensuring due process can be used to justify delays in more serious matters only to a very limited extent. Furthermore, if due process is to be considered as more important in serious cases, then courts must also be less tolerant of delays in serious cases as they result in the possibility of trial prejudice – a patent failure of due process – which is all the more devastating where the charges faced are serious. The due process factor therefore does not detract

---

60 At para. 21. See too Obadina, n3 above at 231, where in discussing the Namibian case of *S v Heidenreich*, n40 above, the author points out that the court in that matter considered the seriousness of the offence such as to allow for a longer delay in coming to trial (note though that the 8-month delay in that case did not seem unreasonable by any and all standards).

61 A point made in the HRC’s *General Comment No. 27: Freedom of Movement (Art.12)* at para. 13.

62 Obadina, n3 above, at 234.

63 The language used by the Zimbabwean Supreme Court in *S v Morrisby*, n36 above at 273B.

Essex Human Rights Review Vol. 9 No. 1, June 2012
from the force of the principle that the interests sought to be protected by the right to trial within a reasonable time are more significantly undermined when the charges are serious. The other basis to argue the contrary from this is the public interest need to ensure that people accused of crime are prosecuted. This is true but other factors must be taken into consideration. Of note is that there is similarly a public interest in ensuring faster trials. Also, in acknowledging the public interest in ensuring that persons be prosecuted, there must be an understanding that at issue is a guarantee of the individual’s rights; thus courts should not be blinded by the said public interest and should retain an awareness of the fact that rights are primary and limitations are secondary. Thus in spite of the due process concern and the public interest in the prosecution of offenders, faster trials must be demanded for more serious offences. Consequently, courts should be more likely to find that there has been a violation of the accused person’s right to trial within a reasonable time where there is inordinate delay in matters where the charges are serious.

In the final analysis, more serious offences require faster justice if the principles behind the right to trial within a reasonable time are to be protected. Where one is charged with a serious offence, the dictates of the right to trial within a reasonable time – and those of the right to a fair trial – require that the obligation of exceptional diligence be placed on the criminal justice system. This is a logical result of the realities that shape the nature and scope of the right to trial within a reasonable time.