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LE DROIT PENAL A L'EPREUVE DE L'INTERNATIONALISATION

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Full respect for the rights of suspect, accused and convict: from Nuremberg and Tokyo to the ICC

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I. The Promise of International Criminal Law Enforcement

Serious human rights violations are salt in the wounds caused by conflict. If left unchecked, such violations can plunge entire communities into deep hostilities and even lead to war. The connection between impunity for serious violations and the onset of lasting insecurity and armed conflict, is well demonstrated by the events preceding the Second World War and in numerous conflicts since 1945.[2] Genocide, war crimes

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[2] The following countries could be mentioned as a few examples where impunity for serious violations of human rights or humanitarian law seems to have given rise to an ongoing cycle of violence: Afghanistan; Algeria; Angola; Azerbaijan (Nagorno-Karabakh); Burma; Burundi; Chechnya; Colombia; Congo (Brazzaville); Democratic Republic of Congo; Ethiopia and Eritrea; Georgia; India over Kashmir; Indonesia over Aceh, Kalimantan, Papua, and recently over East Timor; Israel over the Palestinian question; Mexico over the Zapatistas; Nigeria; Peru; Philippines; Rwanda; Sierra Leone; Solomon Islands; Somalia; Sri Lanka; Sudan; Turkey over the Kurdish question.

and crimes against humanity traumatize individuals and families and polarize communities for decades. In some cases, the thirst for revenge seems to pass from one generation to the next, stoking the flames of continuing violence and chronic instability.

Designed to be a permanent, global institution with prospective competence, the International Criminal Court (ICC) promises to bring to trial and punish any individual responsible for crimes of genocide, war crimes or crimes against humanity, regardless of rank or official capacity – even a Head of State. The ICC is expected to form a cornerstone in the emerging system of international criminal law[3] and to be a major instrument against impunity. Where domestic authorities are either unwilling or unable to enforce criminal responsibility for serious violations, the ICC could provide a measure of justice to injured individuals and communities. Were the ICC to gain sufficient institutional legitimacy and credibility, it could deter political and military leaders from carrying out ethnic cleansing and other atrocities, providing an important element of conflict prevention. The Rome Statute[4] requires ratification from 60 States before the ICC can actually be set up.[5] As of 1 February 2002, 139 States had already signed it and 50 States had ratified it.

This paper argues that respect for the human rights of the alleged offender will be critical to the ICC's legitimacy as an exponent of international criminal justice and in turn will determine whether the ICC will be effective over the longer term. However, the ICC will have to learn from the mistakes of the ICTY and ICTR to ensure that the suspect, accused and convict enjoy at least the minimum applicable international human rights standards, and from the outset, it will have to accommodate a very strong role for the Defence.

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3 *See generally* Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation (1997).

4 The Statute of the International Criminal Court was adopted in Rome in a non-recorded vote, 120 *in favour*, 7 *against* and 21 *abstaining*, on 17 July 1998 (A/CONF. 183/9).

5 Article 126 of the Rome Statute provides that: «This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.»

II. The Nuremberg and Tokyo International Military Trials: Just and Effective or Just Effective?

To put things in historical perspective, it is worth recalling that military, political and moral considerations must have been foremost in the minds of Allied Government leaders when, even before they brought World War II to a close, they decided jointly to put on trial the top Axis commanders rather than simply to shoot them.[6] The sheer scale and systematic character of human rights violations the Axis Powers had perpetrated during World War II had to be met with direct punishment at least against top level leaders and organizers to symbolize the international community's unequivocal condemnation and resolve to deter such crimes for the future. The alternative of exacting vengeance without trial or simply resuming hostilities would have terrorized civilian populations in vanquished countries and jeopardized the Allied high moral ground. The decision to stage the spectacular international military trials of the German High Command and Japanese leadership was a wise one. It documented the culpability of Axis commanders and helped to delegitimize the extreme nationalism for which they stood – of capital importance at a time when the peace, won at such enormous human and material cost, still remained a fragile prize.

The Nuremberg and Tokyo Charters each contain a part entitled «Fair Trial for Defendants» guaranteeing defendants the right to be informed in detail and in reasonable time of the charges against them, duly translated into a language they understand, as well as the right to have the charges explained to them. Defendants had the right to conduct a defence on their own or with the assistance of counsel and to present evidence at trial as well as to cross-examine Prosecution witnesses. Both

[6] An important Allied step to punish World War II criminals was taken in 1942 with the Declaration of St. James, which 'resolves to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.' The intention of the Allied Powers to prosecute and punish authors of war crimes, crimes against humanity and crimes against peace, was reiterated in official statements by President Roosevelt, Prime Minister Churchill and representatives of the USSR and other Allied Governments. Punishment for War Crimes – the Inter-Allied Declaration, *signed* 13 January 1942 by representatives of the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland and Yugoslavia. *See* History of the United Nations War Crimes Commission at 89-92 (1948).

Tribunals succeeded within a remarkably short time to bring to trial and punish a number of top leaders and organizers of the Axis aggression.

However, the Nuremberg and Tokyo Trials were soon criticized for having been unfair in a number of respects. Serious substantive and procedural shortcomings in both sets of trials have led many to denounce them as examples of "victors' justice". Both Tribunals violated the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege*, ie. that there shall be neither crime nor punishment unless law so declares. It is well known that the Tribunals prosecuted individuals for the categories of "crimes against peace" and "crimes against humanity" which, prior to World War II, were not defined as crimes engaging individual responsibility.[7] This explains why the United Nations War Crimes Commission established by the Allied Powers in October 1943 had considerable difficulty deciding whether individuals should be prosecuted only for war crimes (which already comprised a well-established legal category) or also crimes against humanity (which was new but at least arguably within the spirit of the ancient customary *jus in bello*) – or whether to provide for individual responsibility also for planning, preparing, initiating or waging a war of aggression.[8]

Both the Charters of Nuremberg and Tokyo permitted trial *in absentia* which today is recognized to contradict the right of the accused to defend himself or herself.[9] Also, the International Military Tribunals could and did in fact enforce the death penalty.[10] Trial *in absentia* and enforcement of the death penalty at Nuremberg and Tokyo have to be considered all the more serious given the fact that no one convicted of a

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[7] *See further* Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations (1992), Chapter II.

[8] *See* History of the UN War Crimes Commission 1948.

[9] Article 12 of the Nuremberg Charter provided that: «The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.» *See* the London Agreement, Cmd. Paper 6903. HMSO, *signed* 8 August 1945. The Nuremberg Charter is annexed to the London Agreement.

[10] Article 27 of the Nuremberg Charter provided that: «The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.» *See* the London Agreement, Cmd. Paper 6903. HMSO, *signed* 8 August 1945. The Nuremberg Charter is annexed to the London Agreement.

crime by either International Military Tribunal had a right to appeal against his or her conviction.[11]

The Tokyo Trials suffered all sorts of additional flaws. For example, the Defence team was at first not provided with adequate office and logistical support to allow it to prepare properly. The Filipino member of the Tokyo Tribunal bench, Judge Jaranilla, who had personally been in the Bataan Death March and was interned as a POW by Japanese forces, failed to recuse himself in a case involving the Bataan Death March atrocities.[12] Much evidence was adduced in the form of *ex parte* affidavit which did not afford the Defence a right to personally cross-examine their deponent. There were many problems in the translation of documents from English to Japanese and in interpretation of live testimony from Chinese into Japanese and then into English. The rules of procedure and evidence were changed several times in the course of the trials. More serious, Tokyo Tribunal President Sir William Webb was absent from the Tokyo trials for some five weeks during which time ten accused presented their Defence arguments.[13] It appears that another Judge, Mr. Justice Pal, missed more than half of the individual Defence arguments.[14]

Because no Allied commanders or soldiers were ever prosecuted, all those brought to trial were from the defeated countries, and the judges were drawn only from the victor nations,[15] the Defence could argue convincingly that the trials were politically one-sided. Although the political climate of the time made it almost unthinkable to prosecute also Allied war criminals, the fact that not a single Allied commander or soldier had

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[11] Article 26 of the Nuremberg Charter provided that: «The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.» *See* London Agreement, Cmd. Paper 6903. HMSO, *signed* 8 August 1945. The Nuremberg Charter is annexed to the London Agreement.

[12] *See* Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (1987) at 116.

[13] The Government of Australia called Sir William to take up his seat on the Supreme Court, which resulted in his absence from the International Military Tribunal at Tokyo from 10 November 1947 to 15 December 1947 – some 5 weeks. *See ibid*, Chapter 28 at (337-344).

[14] *Ibid* at 339, footnote 4.

[15] At the Tokyo Trials, one judge and one prosecutor were drawn from Australia, Canada, China, France, Great Britain, India, the Netherlands, and the United States. There were no judges or prosecutors drawn either from Japan or any neutral country.

to answer for the indiscriminate bombing of Dresden, Hiroshima, Nagasaki, or other civilian targets on the Axis side, reinforces the impression of "victors' justice". While this Defence argument failed to sway the Bench, post-World War II learned legal opinion could not ignore it.

International human rights standards on fair trial have become progressively developed and codified since 1945, so that as time goes on, faults in the Nuremberg and Tokyo Trials appear even more egregious than they were probably considered at the time. Since the Nuremberg and Tokyo Tribunals rendered their Judgments, human rights law at the international level has expanded and acquired greater specificity, and news and information travel quicker, so that today, the fairness of international criminal law proceedings is subjected to an even higher level of scrutiny – a point not lost on the drafters of the ICTY and ICTR Statutes.

III. The Rising Standard of the Right to Fair Trial in International Human Rights Law

Modern international human rights standards on the administration of criminal justice apply to arrest and detention, the pre-trial and trial phases, including conditions of detention from the moment of arrest to the end of a term of imprisonment. The Universal Declaration of Human Rights[16] and the International Covenant on Civil and Political Rights[17] both prohibit arbitrary arrest and detention. In case of arrest, a person has the right to be informed of the reasons for his or her arrest, which should have been carried out according to law and subjected to judicial supervision and control. An individual has a right to be presumed innocent until proven guilty as well as the right to seek legal assistance and to be brought promptly before a judge or other officer authorized by law to exercise judicial authority. Article 10 of the Universal Declaration of Human Rights, recognizes the right to fair trial as a fundamental human right.[18] The «right to be presumed innocent until proved guilty accord-

[16] *Adopted* by UN General Assembly Resolution 217A (III) of 10 December 1948.

[17] International Covenant on Civil and Political Rights, *adopted* 16 December 1966; *entered into force* 23 March 1976; UNTS No. 14668, vol. 999 (1976) at 171.

[18] Article 10 of the Universal Declaration of Human Rights reads: «Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him».

ing to law in a public trial at which he has had all the guarantees necessary for his defence» is provided for in Article 11(1) of the Declaration.

The basic elements of the right to fair trial are expressed in Article 14 of the International Covenant on Civil and Political Rights which provides for: the right to equality before the courts; to a fair and public hearing; to be presumed innocent until proved guilty according to law; to be informed of the charge promptly and in detail; to prepare adequately a defence; to be tried without undue delay; to be present at trial and to present a defence in a language of one's own choosing; to examine witnesses on an equal basis as the Prosecution; to have the benefit of an interpreter where required; to remain silent; to an appeal; to receive compensation in case of a miscarriage of justice; and the principle of *non bis in idem*, i.e. the right of the accused not to be tried or punished more than once for an offense for which he or she has been convicted or acquitted. In case the right to fair trial has been breached, the Covenant guarantees the right to an effective remedy.

The right to fair trial is affirmed also in certain other multilateral human rights conventions, such as the Convention against Torture,[19] the Convention on the Rights of the Child,[20] the Convention against Racial Discrimination,[21] and the Convention on Discrimination against Women.[22]

Additionally, numerous other international human rights instruments address the administration of criminal justice directly or indirectly, such as the General Assembly's Basic Principles on the Independence of the Judiciary and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[23] among others.[24]

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[19] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by consensus* by the General Assembly 10 December 1984 , *opened for signature* 4 February 1985, *entered into force* 26 June 1987.

[20] Convention on the Rights of the Child, *adopted* by the General Assembly in resolution 44/25 of 20 November 1989, *entered into force*, 2 September 1990.

[21] The International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* by General Assembly resolution 2106 (XX) of 21 December 1965, *entered into force*, 4 January 1969.

[22] UN Convention on the Elimination of All Forms of Discrimination against Women, *adopted* by the General Assembly in resolution 34/180 of 18 December 1979, *entered into force*, 3 September 1981.

[23] On 29 November 1985, the General Assembly adopted resolution 40/32, and on 13 December 1985, resolution 40/146, both of which endorse the Basic Principles on

The European Convention on Human Rights,[25] the American Convention on Human Rights,[26] and the African Charter on Human and Peoples' Rights[27] also guarantee the right to fair trial.

International humanitarian law guarantees the right to fair trial in the context of the treatment of POWs in international armed conflict situations, and also as a minimum standard during non-international armed

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the Independence of the Judiciary, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan in August, 1985. The same day, the General Assembly also adopted resolution 40/34 entitled the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which applies to any person who has suffered harm 'through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power', which could apply to any person who has suffered abuse at the hands of domestic or international authorities in the course of international criminal proceedings, *adopted* by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August – 6 September 1985; UN Doc. A/40/53.

[24] *See* the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, *adopted* 17 December 1979, UN Doc. A/34/46; the Model Treaty on Mutual Assistance in Criminal Matters, *adopted* by the Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba; UN Doc. A/RES/45/117; the Basic Principles on the Role of Lawyers, *adopted* by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990, UN Doc. E/AC.57/DEC/11/119; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, *adopted* 9 December 1988, UN Doc. A/43/49; the Standard Minimum Rules for the Treatment of Prisoners, ECOSOC resolution 663 C (XXIV) of 31 July 1957, UN Doc. A/44/824; the Standard Minimum Rules for Non-Custodial Measures, Annex to the Tokyo Rules; UN Doc. A/5603 of 14 December 1990; the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, *adopted* on 25 May 1987 by the Committee on Crime Prevention and Control, ECOSOC resolution 1989/65; and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; *adopted* 25 May 1984 by the Commission on Crime Prevention and Control, resolution 1984/50, UN Doc. E/1984/92.

[25] European Convention on Human Rights, *adopted* 4 November 1950 in Rome, *entered into force* 3 September 1953.

[26] The American Convention on Human Rights, Art. 5(2), *signed* 22 Nov. 1969, *entered into force* 18 July 1978, OAS Treaty Series No. 36 at 1.

[27] African Charter on Human and Peoples' Rights, 1981, *Adopted* in June 1981 by the Organization of African Unity Heads of State, *entered into force* 1986 (more precise dates are not available).

conflict. Chapter III of the Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War concerns penal and disciplinary sanctions that may be imposed by the Detaining Power. After establishing that a POW shall be subject to the armed forces law of the Detaining Power, Chapter III encourages the Detaining Power to exercise the greatest leniency and adopt disciplinary rather than judicial measures.[28] It also guarantees that a POW shall be tried only by a military court rather than a civilian court, except in certain cases, and affirms the basic principle of *non bis in idem*. Article 87 prohibits collective punishment for individual acts, corporal punishment, torture and cruelty, and provides that POWS «may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts» – an important non-discrimination limitation on the range of penalties. Provisions relating to the imposition of the death penalty, conditions of detention while a prisoner awaits trial, notification of proceedings, the right to call witnesses, have access to legal counsel and to prepare a defence, the right to an appeal and notification of findings and sentence, are found in Articles 99 to 108 of the Third Geneva Convention. Fair trial guarantees and rights relating to the treatment of detainees are found also in Articles 71 to 78 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Article 75 of Protocol I[29] relating to international armed conflict supplements the provisions in the Third and Fourth Geneva Conventions. Article 3 common to the four Geneva Conventions[30] applicable in time of non-international armed conflict, prohibits «the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples». Article 6 of Additional Protocol II[31]

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28 Article 83 of the Third Geneva Convention, 1949.

29 Protocol I additional to the four Geneva Conventions of 12 August 1949, *adopted* 8 June 1977, *entered into force* 7 December 1978. By 1 February 2002, there were 159 States Parties to Additional Protocol I.

30 Geneva Conventions, *adopted* 12 August 1949, *entered into force* 21 October 1950. By 1 February 2002, there were 189 States Parties to the Geneva Conventions.

31 Protocol II additional to the four Geneva Conventions of 12 August 1949, *adopted* 8 June 1977, *entered into force* 7 December 1978. By 1 February 2002, there were 151 States Parties to Additional Protocol II.

which applies to «the prosecution and punishment of criminal offenses related to the armed conflict» supplements common Article 3 in connection with non-international armed conflict.

IV. The Right to Fair Trial in the ICTY and ICTR

In contrast to the Nuremberg and Tokyo Tribunals, the ICTY and ICTR were established not through the joint exercise of municipal military jurisdiction, but by the United Nations Security Council on the basis of Chapter VII of the Charter of the United Nations. ICTY and ICTR Judges are drawn not from victor countries to judge the vanquished, but from a range of countries to judge perpetrators from all sides of the conflict over which each exercises competence. However, the ICTY and ICTR can be criticized for being politically selective, since the Security Council did not set up Tribunals to address similar violations in other countries.

Unlike the Nuremberg and Tokyo Charters, the ICTY and ICTR Statutes provide for individual criminal responsibility only for acts that have become well established as constituting crimes under international law and have been defined as such with some precision.[32] Neither Statute

[32] In this regard, the Secretary General's Report to which the ICTY Statute is annexed, underlined that the Statute provides for a framework for the enforcement only of established international humanitarian legal norms, and not norms *de lege ferenda. See* Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), including the Statute of the Tribunal, UN. Doc. S/25704 of 3 May 1993 & Add.1 of 17 May 1993. The point was reiterated by Mrs. Madeleine Albright, then Permanent Representative of the United States to the United Nations, in an interpretive statement, endorsed also by the Governments of France and the United Kingdom, which expressed her Government's view that Article 3 of the ICTY Statute covered all the obligations under international humanitarian law agreements in force in the territory of the former Yugoslavia, including Article 3 common to the four Geneva Conventions, 1949, and the provisions of Additional Protocol II, 1977. Significantly, the Security Council did not include in either the ICTY or ICTR Statutes the crime against peace i.e. crime of aggression – a wise decision since aggression remains to be defined for the purposes of international criminal law enforcement. While the categories of crimes outlined in the ICTY and ICTR stick closely to the established law, and in fact are narrower, it should be kept in mind that the principles of *nulla poena sine lege* and *nullum crimen sine lege* apply also to the interpretation of criminal law, and the Tribunals' fidelity to the spirit of the law must be evaluated on a case-by-case basis.

allows for trial *in absentia.* In line with the abolitionist trend in modern international human rights law, neither Statute provides for imposition of the death penalty.

In contrast to the Nuremberg and Tokyo Charters, the ICTY and ICTR provide for a full right of appeal against convictions on an error of law invalidating the decision, or on an error of fact which has occasioned a miscarriage of justice. The Appeals Chamber has the authority to affirm, reverse or revise the decisions taken by the Trial Chambers. Moreover, the Rules of Procedure and Evidence provide the accused with the right of appeal on an interlocutory basis from a denial of provisional release or from being found in contempt of court. However, as Scharf has argued, the rotation of Tribunal judges between the appellate and trial levels results in the lack of an effective appeal for the accused in the sense of Article 14(5) of the International Covenant on Civil and Political Rights which guarantees that: «Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law».[33]

Certain other rights not found in the Nuremberg and Tokyo Charters, such as the right to have access to exculpatory evidence in the possession of the Prosecutor, and the right against self-incrimination, are provided for in the ICTY and ICTR Statutes.

The issue as to whether an order to conduct *in camera* proceedings to protect the identity of victims – a protective measure contemplated in both Statutes – violates the right of the accused to a public hearing, arose in the *Tadic Case* where Trial Chamber II held that the protection of victims and witnesses is a valid reason to limit the right of the accused to a public trial.[34] It was held in *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* that the identity of certain Prosecution witnesses could be withheld indefinitely from the Defence – a decision that greatly hinders the right of the accused to conduct cross-examination.[35]

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[33] Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal,* 13 Nouvelles Etudes Penales (1997) 259-266 at 262-263.

[34] *See Prosecutor v. Dusko Tadic a/k/a «Dule», Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses,* 10 August 1995; IT Doc. IT-94-I-T.

[35] *Ibid.* In this Decision, in which Judges McDonald and Vohrah constituted the Majority, Judge Stephen filed a Separate Opinion stating that the protection of victims and witnesses justified limiting the public nature of a hearing, but not its fairness.

The right not to be subjected to double jeopardy also figures in the ICTY and ICTR Statutes[36] which prohibit a person from being tried by a national court in respect of acts for which the person has been tried already by the International Criminal Tribunal – a guarantee absent in the Nuremberg and Tokyo Charters.

International human rights standards on fair trial are well reflected in the ICTY and ICTR Statutes and Rules. Articles 20 and 19 of the ICTY and ICTR Statutes, respectively, provide that the Trial Chambers shall ensure that the trial is: «fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.» Articles 21 and 20 of the ICTY and ICTR Statutes, respectively, incorporate almost verbatim the provisions on the rights of the accused to a fair trial from Article 14 of the International Covenant on Civil and Political Rights.[37]

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[36] Article 10(1) of the ICTY Statute and Article 9(1) of the ICTR Statute.

[37] Article 21 of the ICTY Statute provides that:

«1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.»

As for the right of the accused «to have adequate time and facilities for the preparation of his defence», Trial Chamber II held, in denying a Defence motion for adjournment of the trial date in the *Celebici Case*, that:

> «Article 21(4)(b) of the Statute is designed to ensure a fair trial for the accused. The provision is not intended as a vehicle to delay trial but to guard against hasty trials where the Defence is unprepared. The operative phrase in the Article, «adequate time», is flexible and begs of a fixed definition outside the particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors, including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons.»[38]

Some differences in judicial opinion have emerged over the interpretation of the principle of equality of arms between Prosecution and accused in Article 21(4)(e) of the ICTY Statute corresponding to Article 14(3)(e) of the International Covenant on Civil and Political Rights. In his Separate Opinion on the *Prosecution Motion for Production of Defence Witness Statements*,[39] Judge Vohrah held that the principle of equality of arms is meant to favour the accused in order to diminish the inequality he or she suffers against the Prosecution «which has all the advantages of the State on its side». He continued that: «the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused». However, Judge Vohrah's view that equality of arms must produce approximate equality in fact between Prosecution and accused was countered by Judge McDonald in a separate dissenting opinion. Judge McDonald held that the ICTY did not in fact enjoy many of the advantages that Governments did in domestic prosecutions because the ICTY Prosecutor had to rely on the cooperation of States which at times could be problematic, and that consequently, it was not necessary

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[38] The Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as «Pavo», Hazim Delic, Esad Landzo, also known as «Zenga» (Celebici Case), *Decision on the Applications for Adjournment of the Trial Date* of 3 February 1997.

[39] *Tadic Case* Decision on Prosecution Motion for Production of Defence Witness Statements of 27 November 1996.

to level the playing field between Prosecution and Defence. In its *Decision on the Prosecutor's Motion for an Order requiring Advance Disclosure of Witnesses by the Defence* in the *Celebici Case*, Trial Chamber II expressed its clear disagreement with Judge Vohrah's view, holding that:

> «an inclination in favour of the Defence is tantamount to a procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms. This will be inconsistent with the minimum guarantee provided for in Article 21 paragraph 4(e) of the Statute. In the circumstances of the International Tribunal, the Prosecutor and the Defence rely on State co-operation for their investigation, so *prima facie*, the basis for the inequality argument does not arise.»[40]

Similarly, in the Kayishema / Ruzindana case, the ICTR Trial Chamber reiterated:

> «its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the status quo that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.»[41]

Undue delay in trial proceedings has caused particular controversy. In the *Bagosora Case*, Judge Ostrovsky filed a Separate Opinion on the *Prosecution Motion for Adjournment* holding that the Bagosora trial could not be further postponed because he had already been in custody for two years without trial.[42]

An even more serious sequence of events violating the rights of the accused seems to have taken place in the *Barayagwiza Case*. Mr. Barayagwiza, suspected of having perpetrated acts of genocide in Rwanda, was arrested in Cameroon on 16 April 1996. A few days later, the Prosecutor took notice of the arrest and requested Cameroon to take

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[40] *See* the *Celebici Case* Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence of 4 February 1999.

[41] *See* Judgement in the *Kayishema / Ruzindana Case* of 21 May 1997; Case No. ICTR-95-1-T at para. 60.

[42] *Separate Opinion of Judge Ostrovsky on the Prosecution Motion for Adjournment*, ICTR Decision of 17 March 1998.

measures to prevent the escape of the suspect. On 6 May 1996, the Prosecutor requested an extension of provisional measures. Ten days later, the Prosecution stated it had no intention to prosecute the suspect. Meanwhile, Mr. Barayagwiza remained in prison without having been charged. On 21 February 1997, the Cameroon Court of Appeal rejected a request of Rwanda for the extradition of the suspect to Rwanda and it ordered the suspect to be released. However, the same day, the ICTR Prosecutor again requested provisional detention of the suspect. Then, on 24 February 1997, the ICTR Prosecutor requested the issuance of an Order for the suspect's arrest and transfer to the ICTR. On 3 March, an ICTR Judge signed an Order for Mr. Barayagwiza's transfer to the ICTR. On 29 September 1997, the prisoner filed a writ of *habeas corpus*. On 21 October, a decree of the President of Cameroon authorized the man's transfer to the ICTY. The next day, the Prosecutor submitted an indictment for confirmation and the indictment was confirmed on 23 October and an arrest warrant and order for surrender issued. Finally, on 19 November 1997, Mr. Barayagwiza was transferred to the ICTY detention unit. But he was not brought before the Trial Chamber until 23 February 1998. The next day, he filed a motion to have his arrest and detention nullified on the grounds that his right to a fair trial were violated.

The story did not stop there. On 17 November 1998, the Trial Chamber dismissed the Mr. Barayagwiza's motion to nullify his arrest and detention, and on 4 December, he filed a notice of appeal against that Decision. This appeal was not heard until 2 November 1999 after he had spent more than three years in provisional detention during which time his writ of *habeas corpus* was never considered.[43]

The Appeals Chamber ruled that Mr. Barayagwiza suffered a delay of 260 days between the ICTR's request for transfer and his actual transfer to the ICTR (4 March 1997 and 19 November 1997), a delay of 96 days between his transfer to the ICTR and his initial appearance (between 19 November 1997 and 23 February 1998), and a delay of 79 days between his initial appearance and a hearing held on an urgent motion (between 23 February 1998 and 11 September 1998).

The Appeals Chamber found that Mr. Barayagwiza had been detained illegally first, for nine days over the 20-day limit specified in the ICTR's Rule 40 governing the request for provisional detention, a second time for 233 days between 4 March 1997 once the Cameroon courts had

[43] *Jean-Bosco Barayagwiza* v. *the Prosecutor*, ICTR Appeals Chamber Decision of 3 November 1999.

dismissed Rwanda's request for extradition and Barayagwiza was transferred to the ICTR on 19 November 1997, and yet a third time involving his transfer to the ICTR following which he remained in custody for 96 days until he was brought before Trial Chamber II on 23 February 1998 in the face of fair trial guarantees in the ICTR's Statute, Rules and in general international human rights law.[44] The Appeals Chamber dismissed the indictment «with prejudice» to the Prosecutor, holding that she had «failed with respect to her obligation to prosecute the case with due diligence» thereby precluding further ICTR prosecution of Mr. Barayagwiza and ordered his release and transfer back to Cameroon. By the time his appeal on the legality of his arrest and detention was heard on 2 November 1999, he had already spent more than three years in jail!

The Government of Rwanda expressed outrage at the Tribunal's order to release Mr. Barayagwiza – a man alleged to have played a key role in planning the execution of the genocide perpetrated in 1994 and, through Radio Milles Collines radio station, of inciting Hutus to kill Tutsis, and withdrew any cooperation with the ICTR – a move that threatened to derail the work of the ICTR entirely. The Prosecutor then appealed the ruling as to the order of release and the accused as to his transfer back to Cameroon. In a Judgement of 31 March 2000, the Appeals Chamber then revised its judgment. The Appeals Chamber recognized that Mr. Barayagwiza's rights had been violated, but dismissed his motion to be released on the grounds that the introduction of newly discovered facts into evidence showed that his release would be a disproportionate remedy for the harm he suffered, in particular, that Mr. Barayagwiza had been aware of the charges against him. The Chamber further ruled that, in the event he should eventually be found not guilty, he should receive

[44] Article 19(1) of the ICTR Statute guarantees that: «The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.» Article 19(2) provides that: «A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.» Article 20(4) provides: «In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay»

financial compensation, and if found guilty, his sentence should be reduced to take into account the infringements of his rights.[45]

In January 2001, counsel for Mr. Barayagwiza obtained a declaration from the Court in Yaounde that the document filed by the Prosecutor to the ICTR was false and did not tally with the original in material respects, and therefore the grounds for the Appeal Chambers decision was based on false information.

Both Mr. Barayagwiza and Mr. Semanza – a defendant in another ICTR case also involving Cameroonian cooperation with the ICTR – have sent communications to the United Nations Human Rights Committee complaining that the ICTR violated their right not to be subject to arbitrary arrest or detention among others.

The *Barayagwiza Case* exemplifies that serious violation of the right of a suspect or accused committed in the course of State cooperation can compromise the integrity of international criminal justice. It also highlights that the ICC will have to pay special attention to the right to fair trial, and the observance of international human rights standards generally, not only in its own procedures, but as regards cooperating States.

V. The Right to Fair Trial in the ICC

The ICC will have to live up to a higher set of international standards on fair trial than existed at the time of the Nuremberg and Tokyo trials. Moreover, the ICC will have to depend much more on State cooperation than did the Nuremberg and Tokyo Tribunals – which functioned in territories totally occupied by the Allied Powers – in order to undertake investigations, carry out arrests, place persons in provisional detention, get the suspect transferred to ICC custody, gather witness testimony and

[45] As noted by the Appeals Chamber in its Decision of 3 November 1999 in *Prosecution v. Barayagwiza*, in para. 40: The relevant parts of the applicable Articles of the Statute, Rules of the Tribunal and international human rights treaties are set forth below for ease of reference. The Report of the UN Secretary-General establishes the sources of law for the Tribunal. The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal_s applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.»

evidence and to do many other things essential to Prosecution and Defence. However, human rights observance in the administration of criminal justice varies widely among the large number of States that have already signed the Rome Statute so the risk will be greater that some States cooperating with the ICC will fail to respect the human rights of suspect, defendant or prisoner, and jeopardize the integrity of international criminal justice.

The Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures. Article 21(3) provides that:

> «The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.»

Article 55 of the Statute concerning the rights of persons during an investigation provides for various elements contained in the International Covenant on Civil and Political Rights, among other international human rights instruments. Article 55(2) vis-à-vis human rights observance in cooperating States is particularly important. It reads: «Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned» and then lists the right to be informed, to remain silent, to have legal assistance and to be questioned only in the presence of counsel.

Article 63 provides for the trial in the presence of the accused and addresses the situation where the accused continues to disrupt the trial. In such case:

> «the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have

proved inadequate, and only for such duration as is strictly required.»[46]

Article 64(2) provides explicitly that the Trial Chamber «shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.» Importantly, the «protection of the accused, witnesses and victims» figures also among the Trial Chamber's functions and powers (in Article 64(6)(e)). Provisions guaranteeing the rights of the accused to have a public trial, and not to make a confession except voluntarily after 'sufficient consultation with Defence counsel' are found in Articles 64 and 65 concerning the role of the Trial Chamber and the Pre-Trial Chamber and proceedings on an admission of guilt, respectively. The right of everyone to be presumed innocent until proved guilty is provided for in Article 66 in very economical wording.[47]

Article 67 on rights of the accused, provides detailed *minimum* guarantees, "in full equality" of the right of the accused to a fair, public and impartial hearing, to be informed promptly and in detail of the charges in a language which he or she understands and speaks, to prepare an adequate defence and communicate freely with counsel, to be tried without undue delay, to be present at trial and to conduct the defence in person, to have free legal assistance assigned by the Court in case he or she does not have legal assistance, to examine witnesses under the same conditions as witnesses against him or her, to have translation and interpretation as needed, not to be compelled to testify against himself or herself, and to have access to exculpatory evidence in the possession of the Prosecutor.

It is important to note also that the Rome Statute's provisions on the participation of victims and witnesses in the proceedings[48] and on evidence[49] are to be applied in ways that are not prejudicial to or inconsistent with the rights of the accused.

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[46] Article 63(2) of the Rome Statute.

[47] Article 66 provides that:

«1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.«

[48] *See* Article 68 of the Rome Statute.

[49] *See* Article 69 of the Rome Statute.

In conformity with international human rights standards, violation of the rights of the accused must be redressed with just compensation. In this regard, Article 85 of the Rome Statute, entitled «Compensation to an arrested or convicted person», provides in paragraph 1 that: «Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation» – a formula lifted word-for-word from Article 9(5) of the International Covenant on Civil and Political Rights.[50] The rest of Article 85 sets out a framework for compensation to be awarded to a person whose conviction has been reversed in circumstances amounting to a miscarriage of justice or to a person who has suffered such injustice and has already been released. Article 85(3) states that: «In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or termination of the proceedings for that reason.» However, Article 85 does not clarify what kinds of violations committed by whom should be considered of sufficient gravity to trigger the right of a person acquitted or released by the Court to receive compensation. Whether the obligations on the ICC imposed by Article 85 will prove to be sufficient to safeguard the integrity of international criminal legal process and the legitimacy of the Court, will depend very much on how Article 85 is eventually applied.

The Rome Statute's implementation framework of complementarity imposes direct obligations upon State Parties to support and cooperate with the ICC. Moreover, according to the Vienna Convention on the Law of Treaties,[51] even signatory States that have not ratified the Statute must «refrain from acts which would defeat the object and purpose of a treaty» – an important good faith obligation.[52] In particular, Part 9 of the

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[50] International Covenant on Civil and Political Rights, *adopted* 16 December 1966; *entered into force* 23 March 1976; UNTS No. 14668, vol 999 (1976) at 171.

[51] *Signed* at Vienna on 23 May 1969, *entered into force*, 27 January 1980.

[52] Article 18 of the Vienna Convention on the Law of Treaties, 1969, entitled »Obligation not to defeat the object and purpose of a treaty prior to its entry into force« provides that: A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Rome Statute on International Cooperation and Judicial Assistance makes clear that the ICC provisions entail mandatory obligations on domestic jurisdictions, thereby establishing a vertical rather than horizontal relationship, with the ICC prevailing. Article 86 provides that: «States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court». Article 88 is particularly important in relation to the observance of international human rights standards by cooperating domestic States because it obliges States Parties «to ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part». In the case of State non-cooperation, Article 87(7) basically provides the ICC with the option to refer the matter to the Assembly of States Parties or where the Security Council had referred the situation to the Court, to the Security Council. Article 89 concerns procedures for the surrender of a person to the Court. The rest of Part 9 covers the procedures for provisional arrest, competing requests for surrender of the suspect to the Court, contents of request for arrest and surrender, and other forms of cooperation and issues related thereto.

Even after trial and conviction, the issue will not recede because prisoners shall serve sentences in the detention facilities of cooperating States which are legally bound to observe the minimum standard of human rights for detainees.[53]

VI. Concluding Remarks

The prospects for the entering into force of the Rome Statute in 2002 or 2003 appear good, despite reluctance or opposition on the part of a number of influential Governments. Even the isolationist United States administration under President George Bush, which apparently has been seeking ways to "unsign" the Rome Statute may reconsider the merits of

[53] Article 103(1)(a) of the Rome Statute provides that a: «sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons». Article 103(3)(b) provides that, in exercising its discretion to designate where a prison term shall be served, the Court shall take into account the «application of widely accepted international treaty standards governing the treatment of prisoners».

international cooperation to fight crimes under international law after the coordinated 11 September 2001 highjackings and terrorist attacks that obliterated the twin World Trade Centre Towers in New York and damaged the Pentagon building, killing more than 3,000 people and causing more than 100 billion dollars in property damage. This tragic event has highlighted the value of multilateral strategies over purely unilateral approaches to fight crimes of international concern, but it remains to be seen whether this will eliminate US Government opposition to the ICC.[54]

However, the ICC's performance early on will prove critical to its legitimacy and effectiveness over the longer term. Many Governments are likely to wait until the ICC proves it can be trusted to render fair and impartial justice before they give serious consideration to joining the ICC regime. An important test will be whether the ICC can meet the high standard of protection for the human rights of suspect, accused and convict, that has developed in international human rights law since 1945, and ensure that States cooperating with it also meet this standard.

Without an effective ICC, ordinary people in troubled lands may be left to the mercy of domestic courts where they still function. Look at the case of Rwanda where less than strict observance of human rights standards in criminal law enforcement lead quickly to gross injustice as the Government of Rwanda rounded up thousands of persons suspected of having committed acts of genocide and associated violations in 1994. At the time of writing, seven years after the genocide, the Government still did not have adequate means to bring these thousands of prisoners to trial. By October 2001, there were still more than 100,000 detainees being kept in extremely overcrowded and unhygienic prisons and cachots throughout the country, none of whom had ever been brought to trial, never mind accorded the benefit of pre-trial hearing, and the time was

[54] In an editorial of 20 August 2001, *Newsday* magazine reported that «House Republicans put the White House on notice last week that they intend to hold up payment of $582 million in back dues to the United Nations – unless the Bush administration agrees to link the dues payment to new legislation that would put Americans beyond the reach of the International Criminal Court» and that President Bush was «quietly trying to find ways to reverse Clinton's signing.» After 11 September 2001, the US Senate reversed this position and indicated it would approve payment to the UN in order to stem international criticism of the US at a time when it needed international support to fight terrorism.

still running.[55] It has taken more than six years just to develop dossiers stating the grounds for arrest and detention.[56] So even in the case of Rwanda, where one has to sympathize deeply with the Government, which is dominated by the ethnic minority Tutsi group that suffered the loss of around one million in the genocide, indefinite pre-trial detention cannot be excused, particularly given the terrible prison conditions throughout Rwanda.

The well-being of millions of people over the coming years may depend upon the fairness, legitimacy and effectiveness of the ICC once its starts functioning. The challenge for the ICC will be to guard with great vigilance at least the minimum standards of human rights protection for every individual touched by the workings of international criminal justice. If the ICC lends the impression of being driven by politics rather than justice, or if it fails to guard the human rights of suspect, accused or convict, it will lose legitimacy and eventually become ineffective.

[55] As of March 2001, there were some 92,000 detainees in prisons and 20,000 in cachots throughout Rwanda, including some 3,400 women, 3,500 minors who were under 18 years of age at the time they were alleged to have committed the crime. *See* the Observations and Recommendations concerning Human Rights Developments in Rwanda of the Special Representative of the United Nations Commission on Human Rights, Mr. Michel Moussalli, following his visits to Rwanda in October 2000 and February, March 2001 (Addendum to UN Doc. A/55/269 of 4 August 2000). UNICEF reports that 106 children under the age of 3 are with their detained mothers, who have been languishing in extremely overcrowded and unhygienic conditions for alleged involvement in genocide and associated violations.

[56] Because many were imprisoned on the basis of false denunciations or on other completely arbitrary grounds, it is impossible to tell how many among the enormous number of detainees actually are likely to bear guilt for involvement in the genocide. *See* Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1997/66; E/CN.4/1998/60 19 February 1998.

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