

article

- 2(3). Each State Party to the present Covenant undertakes:
- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

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Will the International Criminal Court be fair and impartial?

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The Centre for Criminal Jurisprudence of the Peoples' University (Renmin) in Beijing and the Asian Legal Resource Centre are to be commended for having organized the "International seminar on major issues relating to the International Criminal Court". Because China is Asia's regional superpower, there is great significance of holding this international seminar on the International Criminal Court (ICC) in China. This is not only because it brings together academics, practitioners and government officials from China and abroad, but also because it stimulates wider debate in official circles on the potential value of the ICC for China and the region.

The future prospects for the effective enforcement of international criminal law depend much upon the degree to which the new ICC is perceived to be fair and impartial. This in turn hinges on the ICC's level of respect for the rights of suspects, the accused and convicts at various stages of its procedure.

This paper highlights the right to fair trial in international criminal justice from the Nuremberg and Tokyo trials, to the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Court for Rwanda (ICTR) and the ICC. It argues that respect for the human rights of the alleged offender

This is the edited text of a paper presented at the "International seminar on major issues relating to the International Criminal Court", held in Haikou, Hainan, People's Republic of China, 9-12 February 2003, organized by the Research Center for Criminal Jurisprudence at Renmin University, Beijing, and the Asian Legal Resource Centre.

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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.¹

“Because all those brought to trial at Nuremberg and Tokyo were from the defeated countries, the defence could argue convincingly that the trials were politically one-sided”

The Nuremberg and Tokyo International Military Trials: Fair and impartial?

The Nuremberg and Tokyo Charters each contained 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 understood, as well as the right to have the charges explained to them. Defendants could conduct their own defence or request the assistance of counsel. They could present evidence at trial and cross-examine prosecution witnesses.

Despite these and other rights to fair trial, the Nuremberg and Tokyo Trials became widely criticized for having been unfair. Serious substantive and procedural shortcomings in both sets of trials led many to denounce them as ‘victors’ justice’. Numerous scholars agree that both international military tribunals violated the fundamental principles of *nullum crimen sine lege* and *nulla poena sine lege*, i.e. that there shall be neither crime nor punishment unless law so declares.² It is well known that the tribunals prosecuted individuals for ‘crimes against peace’ and ‘crimes against humanity’ which, prior to World War II, were not defined for the purposes of imposing individual criminal responsibility. This explains why the United Nations War Crimes Commission established by the Allied Powers in October 1943 had considerable difficulty reaching consensus as to whether to prosecute individuals only for war crimes (already established as legal category) or also for crimes against humanity (which was new but arguably within the spirit of the ancient customary *jus in bello*)—as well as for the planning, preparing, initiating or waging of a war of aggression, or ‘crime against peace’ (which was not established at all as a crime giving rise to individual responsibility).³

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.⁴ Also, the international military tribunals could and did in fact enforce the death penalty.⁵ Trial *in absentia* and enforcement of the death penalty at Nuremberg and Tokyo have to be considered all the more serious together with the fact that no one convicted of a crime by either international military tribunal had a right to appeal against his or her conviction.⁶

Because all those brought to trial at Nuremberg and Tokyo were from the defeated countries, and the judges were drawn only from the victor nations,⁷ 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 Allied war criminals, that not a single Allied commander or soldier had to answer for the indiscriminate bombing of Dresden, Hiroshima,

Nagasaki, or other civilian targets, reinforces the impression of 'victors' justice'. While this defence argument failed to sway the bench, except for Justice Pal,⁸ post-Second World War learned legal opinion could not ignore it.

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, 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 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) 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 be carried out according to law and subject 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 UDHR recognizes the right to fair trial as a fundamental human right.⁹ The "right to be presumed innocent until proved guilty according 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 ICCPR, which provides the accused with the following rights:

- Equality before the courts;
- A fair and public hearing;
- The presumption of innocence until proved guilty according to law;
- The informing of any charge promptly and in detail;
- Adequate preparation of a defence;
- Trial without undue delay;
- Presence at trial;
- The presenting of a defence in a language of one's own choosing;
- The examination of witnesses on an equal basis as the prosecution;
- The benefit of an interpreter where required;
- The right to remain silent;
- The right to an appeal;

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“International humanitarian law guarantees the right to fair trial to prisoners of war in international armed conflict, and also sets a minimum standard for non-international armed conflict”

- Compensation in case of a miscarriage of justice; and,

- Benefit from 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 offence for which he or she has been convicted or acquitted.

Finally, where the right to fair trial has been breached, the ICCPR 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, the Convention on the Rights of the Child, the Convention against Racial Discrimination, and the Convention on Discrimination against Women. 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,¹⁰ among others.¹¹ The European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights also guarantee the right to fair trial.

International humanitarian law guarantees the right to fair trial to prisoners of war in international armed conflict, and also sets a minimum standard for non-international armed conflict. In particular, Chapter III of the Third Geneva Convention of 1949 concerns penal and disciplinary sanctions that may be imposed by the Detaining Power. Chapter III encourages the Detaining Power to exercise the greatest leniency and adopt disciplinary rather than judicial measures (article 83). It also guarantees that a prisoner of war shall be tried by a military court, not 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 prisoners of war

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.

This is 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, 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 relating to international armed conflict supplements the provisions in the Third and Fourth Geneva Conventions. Article 3 common to the four Geneva

Conventions, applicable to 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, 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.

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.¹² Neither statute allows for trial *in absentia* and in line with the abolitionist trend in modern international human rights law, nor do they provide 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 ICCPR, 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.”¹³

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*. In that instance

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“The Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures”

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.¹⁴ 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.¹⁵

The right not to be subjected to double jeopardy also figures in the ICTY and ICTR statutes, 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.¹⁶ This guarantee was absent from 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 & 19 of the ICTY and ICTR statutes respectively provide that the Trial Chambers shall ensure that trials are

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 & 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 ICCPR.¹⁷

The right to fair trial in the ICC

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—follows the ICCPR, among other international human rights instruments. Article 55.2—concerning 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...

The article 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.

Article 64.2 provides 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 in articles 64 & 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 economical wording.¹⁸

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;
- Be informed promptly and in detail of the charges in a language which he or she understands and speaks;
- Prepare an adequate defence and communicate freely with counsel;
- Be tried without undue delay;
- Be present at trial and to conduct the defence in person;
- Have free legal assistance assigned by the Court in case he or she does not have legal assistance;
- Examine witnesses under the same conditions as witnesses against him or her;
- Have translation and interpretation as needed;
- Not be compelled to testify against himself or herself; and,
- 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 and on evidence (articles 68 & 69) are to be applied in ways that are not prejudicial to, or inconsistent with, the rights of the accused.

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”,

“The Rome Statute imposes direct obligations upon State Parties to support and cooperate with the ICC”

provides in paragraph 1 that, “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” This remedy is lifted word for word from article 9.5 of the ICCPR. 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 imposes direct obligations upon States Parties to support and cooperate with the ICC. Moreover, according to the Vienna Convention on the Law of Treaties, even signatory states that have not ratified the statute must “refrain from acts which would defeat the object and purpose of a treaty”.¹⁹ In particular, Part 9 of the Rome Statute 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 related issues.

Even after trial and conviction, 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.²⁰

Concluding remarks

Many governments are likely to wait until the ICC demonstrates its trustworthiness in rendering fair and impartial justice before seriously considering joining the ICC regime. An important test will be whether the ICC can meet the high standard of protection for the human rights of the suspect, accused and convict, and ensure that states cooperating with it also meet this standard.

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 the suspect, accused or convict, it will lose legitimacy and eventually become ineffective.

“If the ICC lends the impression of being driven by politics rather than justice it will lose legitimacy and eventually become ineffective”

End Notes

¹ For fuller treatment of these arguments, see Lyal S Sunga, 'Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC', *Le droit pénal à l'épreuve de l'internationalisation*, Marc Henzelin & Robert Roth (eds), LGDJ, Bruylant & Georg, Paris, Brussels & Geneva, 2002, pp. 217–39.

² See for example the remarks of Professors Telford Taylor, Cherif Bassiouni, Richard Falk and Yasuaki Onuma in Duane W Layton, 'Forty years after the Nuremberg and Tokyo Tribunals: The impact of the war crimes trials on international and national law', *American Society of International Law Proceedings*, vol. 80, 1986, p. 56. See further, Lyal S Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff, Dordrecht, 1992, ch. II.

³ See *History of the United Nations War Crimes Commission and the development of the laws of war*, HM Stationery Office, London, 1948.

⁴ 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.

⁵ 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*.

⁶ 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 the *London Agreement*.

⁷ At the Tokyo Trials, one judge and one prosecutor were drawn from each of 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.

⁸ See Elizabeth S Kopelman, 'Ideology and international law: The dissent of the Indian justice at the Tokyo war crimes trial', *New York University Journal of International Law and Politics*, vol. 23, no. 2, 1991, p. 413.

⁹ Article 10 of the UDHR 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.”

¹⁰ 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 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”. This provision could apply to any person who has suffered abuse at the hands of domestic or international authorities in the course of international criminal proceedings.

¹¹ See, the Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, adopted 17 December 1979, UN Doc. A/34/46. 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, 1990, 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, 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 GA Res. 43/173, adopted 9 December 1988, UN Doc. A/43/49. The Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 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. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted 25 May 1984 by the Commission on Crime Prevention and Control, Res. 1984/50, UN Doc. E/1984/92.

¹² 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 interpretative statement, endorsed also by the governments of France and the United Kingdom. This statement 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. This was 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.

¹³ Michael P Scharf, 'A critique of the Yugoslavia war crimes tribunal', *Nouvelles Etudes Penales*, no. 13, 1997, pp. 262-3.

¹⁴ 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.

¹⁵ *Prosecutor v. Dusko Tadic*. 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.

¹⁶ Article 10.1 of the ICTY Statute and article 9.1 of the ICTR Statute.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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.

²⁰ 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.”