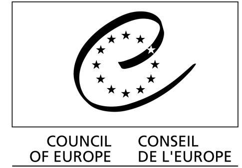

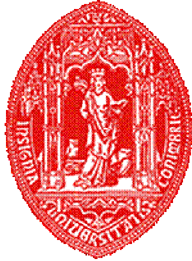
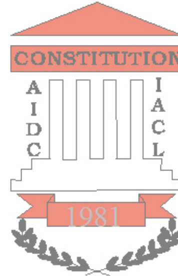

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REPORT

"HUMAN RIGHTS PROVISIONS IN CONVENTIONAL SOURCES OF INTERNATIONAL CRIMINAL LAW AND THEIR EFFECTS ON INTERNATIONAL CRIMINAL JUSTICE"

by

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Human Rights Provisions in Conventional Sources of International Criminal Law and their Effects on International Criminal Justice*

1. Introduction

The primary purpose of international criminal law is to address the most serious violations of fundamental human rights. It is therefore of great importance that this evolving branch of international law respects the very principles it is meant to serve. Criminal justice and human rights are closely related: the modern notion of human rights can find its origins in the first institutes protecting the rights of the accused in criminal proceedings, such as *habeas corpus*, due process, and the prohibition of torture. As criminal justice by definition implies the use of the coercive powers of the State and restrictions of individual freedoms, most constitutions and international human rights instruments contain a detailed rendition of rights guaranteed in the course of criminal proceedings. For instance, Articles 5-7 of the European Convention on Human Rights (ECHR) and Articles 9, 10, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), guarantee the rights to liberty and security, fair trial, humane treatment and the principle of *nullum crimen, nulla poena sine lege*. These provisions have always purported to shelter the individual from the overwhelming might of the State.

Criminal justice at the international level presents challenges to the classical concept of the rights of the accused in a liberal democracy; these challenges are due to some intrinsic features of international criminal law. Namely, international courts and tribunals do not possess a repressive apparatus of their own: they are entirely dependent on cooperation of states and occasionally on the limited coercive powers of the international community. This has had consequences on the conduct of investigations, collection of evidence and the apprehension of suspects. The immensely complex factual and legal issues raised at international trials cause the latter to last considerably longer, and restrict the use of some traditional institutes of criminal law, such as trial by jury. Finally, international courts deal only with the most serious crimes.

Persons arraigned before international criminal courts most oftenly come from the higher echelons of the political and military hierarchy, and, as a consequence, municipal legal systems are often unable or unwilling to prosecute them. As a rule, the accused have wielded, or still wield, great power and influence. They usually have an organization supporting them, both in the commission of crimes and in their attempts to escape responsibility, and are able to cover up their tracks, obstruct investigations and intimidate witnesses. This has justified the use of some unorthodox mechanisms of substantive criminal law, such as command responsibility and joint criminal enterprise[1], as well as procedural instruments similar to those used in national trials for organized crime, including special rules on the collection and admissibility of evidence, witness protection etc.[2] Also, international criminal trials frequently take place in post-conflict situations and can have significant impacts on international peace and security. All this extends the purpose of these trials much beyond mere deterrence and

[1] For a general overview, see Antonio Cassese, *International Criminal Law*, OUP 2003, pp. 179-200, 207-211.

[2] See e.g. Patricia M. Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal', *5 Yale H.R. & Dev. L.J. 217*.

allows them to become a major means to re-establish the fundamental principles of justice and further the process of reconciliation.[3]

The specific features of international criminal proceedings make it impossible to simply transpose human rights standards developed in the context of municipal criminal justice. This, however, does not mean that human rights of suspects in such proceedings can be flaunted under the pretext of pursuing some greater aim.

Concern for human rights has been reflected in rules governing the work of two active *ad hoc* international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as of the International Criminal Court (ICC), a permanent institution. To be sure, the statutes of the two tribunals are formally not treaties but were enacted by the UN Security Council. However, they ultimately derive their authority from the UN Charter and have been regarded in practice as treaties.[4] It is also believed that the general rules of interpretation of international treaties apply to these documents, while the ICC statute is undoubtedly an international treaty.

This paper will attempt to analyze the human rights provisions and safeguards in what can be regarded as contemporary conventional international criminal law, i.e. the statutes and the rules of procedure and evidence of the ICTY, the ICTR and the ICC). Particular emphasis will be put on any divergence between these standards and the standards of international human rights law which apply to national criminal proceedings.

2. International Criminal Procedure

2.1. Normative framework. - The normative framework of international criminal trials differs significantly from that of their municipal counterparts. Criminal procedure and the rights of the participants in the proceedings are laid down in the statutes of the respective courts they are supplemented by the more detailed rules of procedure and evidence (RPE), which are in the ICTY and the ICTR adopted by the judges themselves sitting in a plenary session, and in the case of the ICC by the Assembly of State Parties.

There are also significant normative differences between the ICTY and the ICTR on the one hand, and the ICC on the other, which are mostly the result of the *ad hoc* nature of the former. The Rome Statute is much more comprehensive than the Statutes of the ICTY and the ICTR, and more closely resembles the codified criminal procedure found in civil law countries.

2.2. Choice of a Procedural Model - Its Impact on Human Rights. - The drafters of the statutes of international criminal courts have always been faced with the choice between the adversarial and the inquisitorial model of criminal procedure. Generally, the adversarial model was chosen. Of course, neither model now exists in its pure form; in a sense, most models of criminal procedure are now 'mixed'.[5]

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[3] Also see Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' *95 A.J.I.L. 7.*

[4] See Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', *EJIL* 2000 11, p. 569.

[5] For more detailed comparisons of these two systems, especially as seen through the prism of international criminal law, see Antonio Cassese, *op. cit.*, pp. 365-387.

This also applies to international criminal justice. Although a fundamentally adversarial model was adopted at the international level, it has been heavily modified and has attained some features of the inquisitorial system.[6]

The first thing to go was the jury. It would be impossible to select a jury at the international level - the nationality and language abilities of the would-be jurors are reason enough. A jury in an international court could never provide the element of democratic legitimacy as in municipal trials. The extremely complex factual and legal issues which come before international courts, as well as the long duration of proceedings, would overwhelm any imaginable jury, and would actually render such trials unfair. Yet, trial by jury is regarded as a 'fundamental right' in many legal systems; the lack of such a system at the ICC was even raised as one of the principal legal reasons why the Unites States should not (or even could not) ratify the Rome Statute.[7] Nevertheless, even though trial by jury may be regarded as a fundamental *civil* right in some jurisdictions and undoubtedly does contribute to the legitimacy of the judicial process, it has never attained the status of a *human* right guaranteed by international law. Even those states that use juries do not object to their citizens being tried in jurisdictions where there are no juries; they do not even regard this as an obstacle to extradition.

The lack of a jury in international proceedings, and the ensuing amalgamation of the trier of fact and the trier of law have also led to the relaxing of formal rules of evidence found in adversarial systems. However, one of the hallmarks of the adversarial system has remained relatively intact, namely the limited scope of appeals. The appeals chambers of international courts do not conduct a retrial, but reverse factual findings made by trial chambers of first instance in specific cases only if “no reasonable trial chamber” could have established a given fact beyond all reasonable doubt, which is the same appellate standard of review as the one used in adversarial systems.

3. Rights of the Accused

3.1. Presumption of Innocence.- The presumption of innocence is a fundamental principle of criminal law, protected by international human rights treaties (see e.g. Article 14 (2) ICCPR, Article 6 (2) ECHR), as well as by the Statutes of the ICTY (Article 21 (3)), ICTR (Article 20 (3)) and the ICC (Article 66).

The right to be presumed innocent is comprised of two elements. The first one is absolute and is essentially procedural. As stated by Article 66 (2) of the Rome Statute: "[t]he onus is on the Prosecutor to prove the guilt of the accused." The burden of proof must always be borne by the prosecuting party. It is this aspect of the presumption of innocence, focusing on the judicial proceedings themselves, that is identical both on the international and the municipal level.

The second aspect of the presumption of innocence is much more elusive, and requires that the accused must be treated as innocent both within and *outside* criminal proceedings, i.e. that all public actors should refrain from asserting the guilt of an accused person as long as he/she is not convicted by a final decision of the competent court. However, the presumption of innocence is a purely legal construct - in free and democratic societies prosecutors generally do not institute criminal proceedings against innocent people. The precondition for the

[6] For a general appraisal of international criminal procedure, see the now standard reference work on the subject, by Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2002).

[7] See e.g. at http://www.cato.org/pubs/pas/pa-311.html .

initiation of criminal proceedings in most countries is the existence of reasonable grounds (sufficient evidence) to believe that a person has committed a crime. The very nature of international crimes, their manifest depravity, and the fact that they often directly or indirectly affect millions of people make it impossible to enforce a strict interpretation of this public aspect of the presumption of innocence. It cannot be expected of the multitudes of victims or witnesses to keep their silence or for the media and political factors to maintain the standards developed for "ordinary" crimes. However, this level of decorum can still be expected from court officials, such as the judges or the registrar, who must fully observe their impartiality.

3.2. Nullum crimen, nulla poena sine lege. - The principle of non-retroactivity of criminal law has long been an essential part of municipal legal systems. However, ever since the Nuremberg trials it has been accepted that the principle of non-retroactivity cannot be used to shield individuals from responsibility under international criminal law.

This understanding of *nullum crimen* is contained in international human rights instruments (e.g. Article 15 ICCPR, Article 7 ECHR). It is also a reflection of the principle that states cannot invoke their own internal law to justify their non-compliance with obligations under international law[8] and conveys the message that international law in these cases directly addresses individuals: it establishes the criminal responsibility of the perpetrator and protects the rights of the victim.[9] It should be borne in mind that the original source of international criminal law is in the provisions of international *customary* law, as subsequently codified by treaty. The provisions of the ICTY and the ICTR Statutes, as well as the Rome Statute of the ICC, are principally not of *substantive* nature, such as those found in the criminal codes of many states, but are essentially *jurisdictional*, establishing the crimes over which a particular international court has jurisdiction. This necessitates the use of customary law and makes the role of the courts in defining and interpreting the criminal offences themselves much greater than in most states with a civil law tradition.[10] The Statutes of the two *ad hoc* tribunals do not contain an explicit statement of the non-retroactivity principle, while Rome Statute contains provisions to that effect (Articles 22 and 23), and also prohibits the expansion of criminal law by analogy.

Its has not been claimed so far that the lack of an explicit statement of the *nullum crimen* principle in the statutes of the two *ad hoc* tribunals and the application of this principle in the jurisprudence of these tribunals has lead to any miscarriage of justice. The purpose of this principle has at all time been to shield the individual from the might of the state and to prevent punishment for acts which could not have been perceived as prohibited or criminal *by the perpetrator*. It cannot be seriously maintained that perpetrators of international crimes could not have foreseen that their commission would lead to their criminal responsibility, even if these acts were not explicitly prohibited *as such* under their own internal criminal law, or if their own law in some way justified their criminal acts. For instance, the fact that the category of crimes against humanity did not exist in the criminal codes of the countries of the former Yugoslavia does not mean that individuals could not be held accountable for such crimes, especially so because the "ordinary" crimes, of which the elements of crimes against humanity consist, such as murder, rape, assault and pillage, were punishable.

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[8] See e.g. Article 32 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001).

[9] For an interesting discussion of the principle of non-retroactivity in international human rights law, albeit in a somewhat different context, see the case of *Streletz, Kessler and Krenz v. Germany* before the European Court of Human Rights (App. no. 34044/96 ECHR 227, 22 March 2001).

[10] See in this regard Cassese, *op. cit.*, pp. 145-147.

The application of the *nulla poena sine lege* principle poses more serious questions, as international law does not define precise penalties for international crimes. The original idea was for states to incorporate rules of international criminal law into their own criminal law and thus adapt the former to their own penal systems. Article 24 (1) of the ICTY Statute prescribes that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." A similar provision can be found in Article 23 (1) of the ICTR Statute, and in the RPE of both tribunals (Rule 101 (b). The practical effect of these provisions - other than excluding the imposition of the death penalty - has not helped increase legal certainty in sentencing. There had been virtually no judicial practice regarding crimes against international law, both in the former Yugoslavia and in Rwanda, so recourse could only be made to the national courts dealing with "ordinary" crimes. The punishments in the criminal codes of the former Yugoslavia were much more lenient than those meted out by the ICTY - for instance, the maximum term of imprisonment was only 15 years.[11] The ICTY, on the other hand, has employed the penalty of life imprisonment;[12] it has also sentenced several defendants to more than 40 years.[13]

The Statutes of the two *ad hoc* tribunals do not prescribe strict ranges of punishments. The Rome Statute of the ICC (Article 77) introduces some changes in respect to penalties - so, for instance, the sentence of imprisonment is limited to a maximum of 30 years, or, if the crime is especially grave and if the individual circumstances of the convicted person so warrant, a sentence of life imprisonment can be imposed. The Statute also allows the imposition of fines, according to the criteria provided for in the RPE, as well as for the confiscation of the proceeds of the crime itself.[14]

3.3. Ne bis in idem. - The principle of *ne bis in idem* prohibits that the same person be tried twice for the same crime. It is fundamental in most legal systems and is protected by international human rights law (see Article 14 (7) ICCPR). A common exception to the rule is a re-trial in favour of the defendant, i.e. if he/she was found to be guilty in the first trial.

This principle is also protected by international criminal law (Article 10 ICTY Statute, Article 9 ICTR Statute, Article 20 ICC Statute), though in a somewhat modified variant, necessitated by the very purpose if international criminal justice. Namely, one of the main reasons for trying the perpetrators of crimes against international law before international courts is that states have been often been unable or unwilling to prosecute. The international community cannot tolerate that agents of a state commit atrocities against their own citizens with impunity and remain sheltered behind state sovereignty. This was also the motivation behind declaring the primacy of the existing international criminal tribunals over national courts. The ICC, on the other hand, is envisaged as complementary with municipal jurisdictions, but its

[11] Death penalty could also be imposed, although it was routinely substituted by a special sentence of 20 years imprisonment.

[12] Milomir Stakic was convicted of crimes against humanity in the Prijedor region of Bosnia, and sentenced to life imprisonment (IT-97-24-T, Judgment of 31 July 2003). The case is currently under appeal.

[13] In the *Delalic* (IT-96-21-T, Judgment of 16 November 1998, paras. 1193 and 1194) and the *Aleksovski* (IT-95-14/1-T), Judgment of 25 June 1999, para. 242) cases, the ICTY concluded that the requirements of Art. 24 of the Statute are merely indicative, and not mandatory for the court.

[14] For a detailed analysis see Susan Lamb, '*Nullum crimen, nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta, J. Jones, *op. cit.*, pp. 733-766.

task is also to check whether domestic courts conduct proceedings in an internationally acceptable manner.[15]

Therefore, Article 10 of the ICTY Statute (and, in the same words, its counterpart in the ICTR Statute), states that "[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal" and that "[a] person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted." Article 20 (3) of the ICC Statute similarly prescribes that "[n]o person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

From the standpoint of human rights, the principal shortcoming of Article 20 of the Rome Statute is that it does not address a major issue of contemporary international law linked to individual responsibility for mass atrocities, namely, the conflict between the victims' right to justice and effective remedy and the sovereign right of states to proclaim amnesties and confer pardon. Although, in exceptional cases, amnesties and pardons may further the process of reconciliation, they must never be allowed to favour impunity and injustice.

4. Due Process

Statutes of the international criminal courts and tribunals guarantee almost all due process rights found in most adversarial, as well as inquisitorial systems, such as the right of the accused to be informed of the charges against him/her, the right of the accused to remain silent, or the duty of the prosecution to disclose exculpatory evidence, as well as the essential structural principles, such as the impartiality and independence of judges.[16] Only rights with specific manifestations on the international level will be considered here.

4.1. Detention on Remand. - Detention is an essential ingredient of criminal procedure: it is meant to secure the presence of the accused at the trial and preserve the integrity of evidence. According to the jurisprudence of human rights bodies, as well as the general practice in most countries with a civil law tradition, the presumption of innocence requires that detention be used sparingly, only when sufficient and substantiated cause can be shown. The European Court of Human Rights has opined that in no case, however serious, should detention be regarded as mandatory. However, at the international level detention is rule rather than

[15] Despite the fact that the Rome Statute is a treaty and that the ICC's jurisdiction is primarily based on the consensus of the parties to the treaty, Article 13 of the Rome Statute empowers the Security Council, acting under Chapter VII of the UN Charter, to refer to the Court a 'situation', even if there is no other basis for the Court's jurisdiction, i.e. according to the territoriality and personality principles. This was apparently done in order to avoid setting up new *ad hoc* tribunals. See Luigi Condorelli and Santiago Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' and 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, J. Jones, *op. cit.*, pp. 571-582, 627-656.

[16] See e.g. Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', *44 Harv. Int'l L.J.*, p. *271.*

exception, both in law and in actual practice. Thus, for instance, while very little criticism has been levied against the ICTY regarding the living conditions in the ICTY's Detention Unit, conditions for ordering detention and duration thereof have raised serious questions pertaining to the protection of the detainees' human rights. In contrast to the prevailing European human rights standards, the ICTY RPE state that upon arrival in the seat of the ICTY, the accused *shall be detained* in a facility provided by the host country (Rule 64), and that the accused may temporarily be released until the beginning of their trials if the accused and the states to which they ask to be released *provide sufficient guarantees* that the accused shall appear before the Tribunal for trial (Rule 65). A pre-trial judge's detention order is strictly formal: the judge does not assess whether there are grounds for ordering detention, but is bound by Rule 64 to issue such a decision automatically, irrespective of the circumstances of the case. The rules prescribe no limits on the duration of detention: even those accused that were temporarily released pending trial must eventually be detained for the duration of their trials.

The process of state cooperation with international courts regarding the apprehension of their nationals charged with crimes against international law is always complicated and fraught with political difficulties, even intentional obstructionism. An international criminal court cannot therefore be expected to release a defendant charged with the most grievous crime, who has sometimes avoided arrest for considerable time, without firm guarantees from both the defendant and the state to whose custody he/she is to be released.

Nevertheless, the excessive length of detention remains the biggest problem in the sphere of the human rights of detainees. For example, Momčilo Krajišnik was arrested and placed in ICTY detention on 3 April 2000, and his trial has begun on 4 February 2004, meaning that the total time of his pre-trial detention amounted to 3 years and 10 months. However, as stated by some commentators, the length of detention does depend on the circumstances of each case; the European Court of Human Rights has found an instance of detention of six years to be consistent with the ECHR.[17]

Another major problem is the absence of a remedy for compensation for persons who were unjustly detained or convicted. Almost all democratic legal systems afford the wrongfully convicted or detained persons the right to rehabilitation and compensation from the state. Article 5 (5) and Article 9 (5) ECHR provide for a right to compensation for unlawful detention, while Article 3 of Protocol No. 7 to the ECHR and Article 14 (6) of the ICCPR stipulate such remedy in respect of wrongful convictions. The statutes of ICTY and ICTR have not established such mechanisms, but this shortcoming was removed in the Rome Statute of the ICC (Article 85):

"1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. 2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her. 3. 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 a termination of the proceedings for that reason."

[17] See Robinson, *op. cit.*, p. 583.

4.2. Right to Trial within Reasonable Time. - The right to a trial within a reasonable time and without undue delay is laid down in international human rights treaties, as well as in the statutes of international courts and tribunals. This has probably been the single most invoked upon right before the European Court of Human Rights, under Article 6 (1) of the ECHR. As noted, the fact that the accused before international courts remain in detention for the duration of their trials makes it all the more important that the latter be conducted expeditiously. This is not always possible, due to the complex legal and factual issues involved and the limited resources at the disposal of the international courts. Furthermore, because international courts have to rely on state cooperation to obtain key evidence, documents and witnesses, as well as to apprehend the accused, delays in criminal proceedings are not always imputable to the court itself.

Language issues also plague international courts, and the costs of interpretation and translation comprise a major part of their budgets. The desire of several accused to act as their own counsel may also greatly contribute to prolong a trial (see 4.3). It can be concluded that all these factors warrant a more lenient standard of reasonableness as to the duration of the proceedings.[18]

4.3.. Appointment of Counsel and the Right to Self-Representation.- Both national legal systems and international human rights law guarantee the right of defendants in criminal trials to represent themselves, without the assistance of counsel. However, there are fundamental differences between adversarial and inquisitorial systems regarding the scope of the right to self-representation, and these differences have also emerged on the international level. [19]

To date, three persons accused before the ICTY have, with mixed success, invoked their right to represent themselves: Slobodan Milošević, Vojislav Seselj and, most recently, Momcilo Krajisnik.

The Chamber presided by the late judge Richard May allowed Milošević to defend himself with the help of three "legal assistants" of his own choosing, although it also appointed three experts in various fields of law as *amici curiae*, whose task was to monitor, as officers of the Tribunal, the impartiality and fairness of the trial and to defend, where appropriate, the interests of the accused.

In contrast, Judge Wolfgang Schomburg's Chamber appointed stand-by counsel for Vojislav Seselj, also against his explicit objections.[20]

Due to Milosevic's health problems, the Trial Chamber later found it necessary to appoint two defence counsel while retaining only one *amicus curiae*. However the appointed counsel themselves appealed the decision on the assignment of counsel to the Appeals Chamber, when they were faced with obstruction by defence witnesses, selected by Milošević: they refused to appear before the Tribunal because Milošević had been deprived of his right to self-representation. The counsel requested the Tribunal to allow them to withdraw from the proceedings due to the total absence of cooperation and communication with their client and the ensuing ethical problems. The Appeals Chamber[21] *did not* reverse the Trial Chamber

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[18] See Cassese, *op. cit.*, pp. 398-400.

[19] For more, see Nina Jorgensen, 'The Right of the Accused to Self-Representation before International Criminal Tribunals', *98 A.J.I.L. 711*, pp. 718-722.

[20] See *Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj in His Defence*, 9 May 2003. The case of Seselj is currently in the pre-trial stage.

[21] *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel*, 1 November 2004.

decision as to the assignment of counsel as such - Milošević is still represented by counsel assigned to him, contrary to his wishes. The Appeals Chamber found that the Trial Chamber had discretion with regard to the management of the proceedings, that it had not abused its powers, and that it had been guided by its duty to complete the trial within reasonable time. The Appeals Chamber changed the modalities of the duties of the appointed counsel so that Milošević now conducts the examination-in-chief of witnesses and controls the presentation of evidence of the defence, while counsel play a subsidiary role.

The question of assignment of defence counsel against the express wishes of the accused in any given case can be approached by three alleys. The first issue is one of principle - whether the right of the accused to represent him is absolute or subject to specific restrictions. Many European legal systems, such as the French, German, Belgian, and the one in Serbia and other countries of the former Yugoslavia, recognize the institute of mandatory defence for certain serious crimes, presuming that the accused in such cases may not be able to defend himself successfully. However, there are fundamental differences between inquisitorial and adversarial systems as to the appointment of counsel, and, more importantly, as to the role the advocate plays in the proceedings. In inquisitorial systems, the accused is by appointing counsel not prevented from actively participating in the proceedings. On the other hand, in adversarial systems the right to self-representation is almost absolute, but as soon as a defendant appoints counsel he can no longer participate in the proceedings in an active manner.

Article 21 (4.d) of the ICTY Statute, which relies heavily on Article 14 (3(4)) of the ICCPR, prescribes that an accused shall have the right to defend him/herself but will be assigned legal assistance in *any case where the interests of justice so require*, and without payment by the accused if he/she does not have sufficient means to pay for it. An identical provision can be found in the ICTR Statute (Article 20 (4.d)) and the Rome Statute of the ICC (Article 67 (1.d)). In other words, appointment of counsel is not limited only to situations where an accused cannot afford to hire an attorney. This is also the position of the European Court of Human Rights stated in its judgment in *Croissant v. Germany*.[22]Another relevant precedent is that of the Human Rights Committee, which in its views on *Michael and Brian Hill v. Spain*[23], stated that the complainant, who had been accused before a Spanish criminal court, must have been allowed to represent him in the circumstances of that particular case, but still did not say that the right to self-representation was absolute.

The second question is whether interests of justice in a particular case require the imposition of a defence counsel. In the Milošević case, it appears that, in any inquisitorial system, the inefficiency and irrelevance of Milošević's defence would constitute sufficient grounds to impose defence counsel. The ICTY judges have, however, adopted a different approach.

The final question is not one of law, but of judicial policy - although the Chamber had *the right* to assign defence counsel to Milošević, the question arises whether it *should have done so*. In this case, the Chamber should have been guided by the principle that the public impression of a fair trial is as important as the trial itself. [24]

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[22] Judgment of 25 September 1992. Series A No 237-B. The Court found that the provision of the German Code on Criminal Procedure on mandatory assignment of counsel in specific circumstances was compatible with the ECHR.

[23] Communication No. 526/1993.

[24] See Vojin Dimitrijević, 'Justice Must Be Done and Be Seen to Be Done: The Milosevic Trial', *East European Constitutional Review*, 1-2/2002, pp. 59-62.

To conclude, the right to self-representation is not absolute, in national legal systems, in international human rights law and in international criminal law. It must not be used to stage a mockery of the proceedings or as an excuse to avoid the sole purpose of a criminal trial - the determination of a defendant's guilt or innocence. However, utmost caution must be exercised and both fairness and the *appearance* of fairness must always be maintained. *Inter alia,* this means that alternative modalities, which are foreign to traditional adversarial systems, have to be taken into consideration in order to assure the active involvement of the accused in his trial, if the accused so desires.[25]

5. Rights of Victims

The accused is in the central focus of criminal proceedings – it is his rights and liberty that are in jeopardy. On the other hand, the purpose of international criminal law is to redress most serious and massive human rights violations, which endanger the very fabric of the international community and of civilized society. It is therefore very important for the victims of such atrocities to appear in court, to confront those who have violated them and to obtain some measure of satisfaction. Their voices must be heard, their pain and anguish known, and their names must not be forgotten.

The position of victims before the ICTY and the ICTR has been similar to that in adversarial systems, although both the judges and the prosecution have tried to accommodate their requests. The Rome Statute grants some special rights to victims, expanding their role in the criminal proceedings and thereby again deviating from the traditional adversarial model. It establishes an effective remedy through which victims can obtain at least some compensation for the violations of their human rights. In cases of massive atrocities, victims usually cannot obtain any reparations from the perpetrator(s), as most of them do not possess enough assets, or are not under the jurisdiction of a specific state. Their best chance to secure compensation, and at that a very flimsy one, has been to sue the state itself, given that perpetrators of massive human rights violations have usually been agents of a state, which entails the responsibility of the latter. However, this route is almost invariably fraught with practical and legal difficulties, such as sovereign immunity or expiry of the statute of limitations regarding compensation. The Rome Statute (Article 75) gives the Court the authority to determine the scope and amount of any damages suffered by the victim, and to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The Rome Statute goes even further in Article 79, which provides for the establishment of a trust fund for victims, to which states parties to the Statute will contribute, and from which the victims will be compensated, if compensation cannot be obtained from the perpetrator himself. The success of this mechanism will entirely depend on the willingness of states to contribute to this fund.[26]

Also, Article 68 of the Rome Statute, entitled "Protection of the victims and witnesses and their participation in the proceedings", provides for measures to safeguard the dignity and physical and mental integrity of the victims if they appear before the court as witnesses, such as conduct of proceedings in camera or the presentation of evidence by electronic means.

6. Conclusions

The Statutes and the rules of the international criminal courts and tribunals are in general conformity with the body of international human rights law, though with certain

[25] See also Jorgensen, *op. cit.*, pp. 725-726.

[26] As of June 2005, states have pledged 400.000 euros. See at http://www.icc-cpi.int/library/about/newsletter/4/pdf/ICC-CPI_NL4_En.pdf .

qualifications. It is sometimes not possible to apply these standards in the same manner in municipal and international criminal proceedings. Yet, this does not mean that international criminal courts can disregard long-established rules of judicial propriety and due process. The respect of human rights of all participants in criminal proceedings is a value in and of itself.

There are, however, at least two more reasons why international courts must exercise extreme caution and restraint.

The first is that, unlike most national courts, international criminal courts are under no regime of external judicial control and review of their respect for human rights of participants in proceedings before them. No defendant whose human rights have been violated before an international court can file a complaint to the European Court of Human Rights, to a UN treaty body, or even to the national courts of the Netherlands, Tanzania or, for that matter, any other state. It is this lack of external control - which would have been complicated and highly impractical even if it were jurisdictionally possible - which mandates that international courts and tribunals must maintain an equivalent level of protection of fundamental rights.

Secondly, as the main purpose of international criminal justice is to redress most grievous violations of human rights, these same human rights must be respected in the course of international criminal proceedings. If international courts are to aid in any way the process of reconciliation and transitional justice, they must follow the highest standards of fairness, for the people on all sides of wars and conflicts have to acquire trust in these judicial institutions and believe in the veracity of their decisions. It does not suffice that justice is done before international courts, but it must also be seen to be done.