

# The right to a fair trial at international criminal courts and tribunals – Are the standards of international criminal proceedings fair enough?

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*Since the establishment of the first ad hoc criminal tribunals and from the creation of the International Criminal Court, there has always been a discussion whether these international courts and tribunals are obliged to set the highest standards of fairness in their procedural practices, or whether it is sufficient if their proceedings and practice is just 'fair enough'. In essence, the human rights framework cannot be neglected when assessing the fairness of international criminal proceedings. As the fair trial provisions of the human rights framework inspired the international criminal courts and tribunals' own standards, as well as the recent trends show that international criminal courts and tribunals draw on international human rights jurisprudence in their own interpretation of those standards, the aim of this article is to explore whether the standards of fairness of the international criminal proceedings are set high enough to ensure compliance with the international human rights framework. The article focuses on providing a brief overview and a short comparative analysis of the standards of fairness at the selected international criminal courts and tribunals. It primarily explores the interplay between the international human rights framework and the statutory framework of the international criminal courts and tribunals, by examining the existing international human rights legal framework, and exploring the understanding and interpretation of standards of fairness, with an emphasis on the equality of arms principle as given by the jurisprudence of the international criminal courts and tribunals.*

*Keywords: Right to a fair trial; International criminal proceedings; Standards of fairness*

## 1. Introduction

The idea of creating an international criminal court to punish the most serious crimes of international concern dates back to the period after the First World War.<sup>2</sup> The attainment of that goal and the road from the Nuremberg and Tokyo Tribunals, through the establishment of the first *ad hoc* criminal tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the adoption of the Rome Statute and the establishment of the International Criminal Court (ICC) to the establishment of hybrid criminal courts and tribunals, such as the Extraordinary Chambers of the Courts of Cambodia (ECCC) has

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<sup>2</sup> A. Cassese & P. Gaeta & L. Baig & M. Fan & C. Gosnell & A. Whiting (eds.), *Cassese's International Criminal Law*, 3<sup>rd</sup> edn., Oxford University Press, Oxford 2013, p. 253.

been slow and troublesome. Trials for genocide, war crimes and crimes against humanity can take place in multiple jurisdictions and at both the international and national levels. The legal framework of the systems of international criminal courts and tribunals, including their Statutes and Rules of Procedure have played a key role in consolidating the substantive and procedural law for trying international crimes, and standardizing some of the structures and roles for international justice mechanisms and their actors.

The primary idea behind the efforts of the international community to create international criminal courts and tribunals was to ensure that serious violations of human rights and humanitarian law that shock the international community do not remain unpunished.<sup>3</sup> The period specific for the development of these institutions empowered to prosecute and punish serious violations of international humanitarian law and human rights law, aimed to show not only to the victims of these crimes, but also to the entire international community, including the perpetrators of these crimes that justice will be done and the international community is ready to fight impunity, to guarantee lasting respect for and the enforcement of international justice.<sup>4</sup>

It is difficult to categorize international criminal proceedings as fitting squarely into any of the models of system of justice,<sup>5</sup> as fragmentation and divergency can be observed not only among the international criminal courts and tribunals, but also within the different chambers of the same criminal court or tribunal. However, while the scope and the way the international criminal proceedings are conducted depends largely on the structure of the international mechanism and the system it follows, with differences between the proceedings, it should always be ensured that the goal to punish the perpetrators of the most serious international crimes is realized through just means. Thus, regardless of the mechanism, justice can only be done if the appearance of victor's justice is avoided.<sup>6</sup> Already when establishing the ICTY, the Secretary General of the United Nations stated that it was 'axiomatic' that criminal courts established by the international community should espouse the highest standards of human rights protection in their procedures.<sup>7</sup> Ensuring a fair trial is essential for all parties involved, and is an inevitable pre-requisite for effective and efficient international criminal justice systems based on the principle of rule of law.

The aim of this article is to explore whether the standards of fairness of the proceedings are set high enough to ensure compliance with the international human right standards. It focuses on examining the interplay between the international human rights framework and the statutory framework of the international criminal courts and tribunals. The article firstly explores and introduces the international human rights legal framework, setting out the elements of the right to a fair trial. The second chapter of this article explores the understanding and interpretation of standards of fairness, with an emphasis on the equality of arms principle as given by the jurisprudence of the international criminal courts and tribunals. The third chapter offers a brief comparison of the fair trial rights of the defendants as ensured by the Statutes and Rules of Procedure of the selected international and internationalized criminal courts and tribunals, namely the ICTY, the ICTR, the ICC and the ECCC. In addition, it also examines and discusses the selected challenges that the international criminal courts and tribunals face that may have an impact on the fairness of the proceedings. Furthermore, the fourth chapter of this article aims to discuss the common challenges that international criminal

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<sup>3</sup> J. P. W. Temminck Tuinstra, *Defence counsel in international criminal law*, Amsterdam Center for International Law, University of Amsterdam, (PhD thesis), January 2009, p. 1.

<sup>4</sup> 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Preamble.

<sup>5</sup> Y. McDermott, *Fairness in International Criminal Trials*, Oxford University Press, Oxford 2016, p. 10.

<sup>6</sup> Temminck Tuinstra 2009, p. 1.

<sup>7</sup> Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 106.

proceedings face, in general, regardless of the selected court.

## 2. The international human rights framework

International human rights instruments have had a pervasive effect and impact not only on national criminal proceedings, but also on the way international criminal proceedings are conducted at the various different international criminal courts and tribunals. In essence, taking into account that international criminal law is centered around individual criminal responsibility, it is agreed that the credibility of international justice depends largely on the respect of the rights of the accused and the human rights standards related to fair trial. Whether it is the standards of conducting an arrest, or the information that must be provided to an accused upon arrest, the entitlement to remain silent and not to self-incriminate oneself, as well as the rights of access to legal counsel, legislation and court practice of the international criminal courts and tribunals have been significantly impacted by judicial interpretation of generally worded human rights standards.

Despite the fact that the international human rights legal instruments are not themselves binding before the international criminal courts and tribunals, the fair trial standards enshrined in the statutes of the international criminal courts and tribunals largely reflect on the provisions contained therein.<sup>8</sup> Indeed, it is now well-established that the statutes of the international criminal courts and tribunals not only refer to but also mirror the rights established in many of the major international human rights instruments. Therefore, it is important to consider the international human rights standards as not only relevant, but also essential to international criminal proceedings. Indeed, the right to a fair trial is one of the most essential components of human rights<sup>9</sup> and forms fundamental part of international criminal procedure. It is established within the fundamental documents of the international criminal courts and tribunals, such as their statutes and rules of procedure.

The right to a fair trial as such is enshrined in numerous key international and regional human rights documents. The development of individual rights protection in criminal proceedings, both at the international and regional level, goes back to the drafting and ratification of these founding documents setting out the contemporary law of human rights. At the international level, the right to a fair trial was first articulated in Articles 10 and 11 of the Universal Declaration of Human Rights (UDHR).<sup>10</sup> The scope of the right to a fair trial was expanded by the International Covenant on Civil and Political Rights (ICCPR), which in its Article 14(1) articulates the entitlement to a fair and public trial.<sup>11</sup> Further minimum guarantees and aspects of the fair trial are set out in Article 14(3) of the ICCPR.

Article 14(3) of the International Covenant on Civil and Political Rights reads as follows:

“In the determination of any criminal charge against him, everyone 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 communi-

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<sup>8</sup> McDermott 2016, p. 17.

<sup>9</sup> A. Clooney & P. Webb, *The Right to a Fair Trial in International Law*, Oxford University Press, Oxford 2021.

<sup>10</sup> GA Res. 217A (III), Universal Declaration of Human Rights, 10 December 1948.

<sup>11</sup> 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

cate 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 court;

(g) Not to be compelled to testify against himself or to confess guilt.”<sup>12</sup>

These are all elements of fair trial rights,<sup>13</sup> which endorse the universal principle that criminal proceedings must be fair and legitimate. In relation to the fairness of the proceedings, it is thus important, when examining and assessing whether a trial adheres to the standards of fairness, to take into account the application and enforcement of the above-mentioned minimum guarantees of fair trial. Furthermore, with regards to the legitimacy of the proceedings, the fact that the defendant receives a fair trial is inherent to the legitimacy of international criminal courts and tribunals.<sup>14</sup> Although ensuring a fair trial, in itself, might not legitimize an international criminal court, an unfair trial certainly undermines its legitimacy.<sup>15</sup> At the regional level, including for instance the European level, fair trial rights have been first laid down by the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), with Articles 5 and 6 being the fundamental provisions guaranteeing the basic defence rights, largely reflecting the statutory provisions of the ICCPR.

### 3. Understanding fairness and the equality of arms principle

Given the unique nature and context of the international criminal courts and tribunals, a mere access to the court's doors is not sufficient to guarantee a fair trial in international criminal proceedings. Fairness is essential to enhance the process of legitimacy of international criminal courts and tribunals.<sup>16</sup> Fairness is a broad concept, applicable also in international criminal law, invoking and comprising of principles including equality, impartiality and consistency.<sup>17</sup> The requirement of the principle of fairness of the proceedings possesses a fundamental and practical value in internation-

<sup>12</sup> 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 14(3).

<sup>13</sup> *Salduz v. Turkey* (App. No. 36391/02) ECtHR [GC], (2008) paras. 51 and 55; *Dvorski v. Croatia* (App. No. 25703/11) ECtHR [GC] (2015) para. 76; *Ibrahim and Others v. the United Kingdom* (App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09) ECtHR [GC] (2016) para. 255; *Simeonovi v. Bulgaria* (App. No. 21980/04) ECtHR [GC] (2017) para. 112.

<sup>14</sup> J. Nicholson, 'Too High', 'Too Low', or 'Just Fair Enough'? *Finding Legitimacy Through the Accused's Right to a Fair Trial*, Journal of International Criminal Justice, Vol. 17, No. 2, July 2019, p. 2.

<sup>15</sup> A. Kiyani, *The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court*, African Journal of Legal Studies, Vol. 8, No. 1, June 2015, p. 27.

<sup>16</sup> Nicholson 2019, p. 3.

<sup>17</sup> McDermott 2016, p. 31.

al criminal proceedings whose modalities,<sup>18</sup> given the context in which they operate, are flexible, subject to the fact that this overarching principle and its independent significance has been upheld by the practice of the international criminal courts and tribunals.<sup>19</sup>

According to the Appeals Chamber of the ICTY in the case of *Tadić*, fairness is “central to the rule of law: it upholds the due process of law.”<sup>20</sup> Both the statutes of the *ad hoc* criminal tribunals<sup>21</sup> as well as the Rome Statute<sup>22</sup> declare a general obligation to ensure that the trial is fair and expeditious, conducted with full respect for the rights of the accused and with due regard for the protection of the rights of victims and witnesses. Thus, pursuant to the jurisprudence of the international criminal courts and tribunals, fairness is seen to be pertained not only to the accused, but is an attribute of proceedings that may be demanded by any participant in the proceedings, including the prosecution and victims.<sup>23</sup> While the ICTY has been more elaborative on the extension of the fair trial rights to prosecution, as seen for example in the case of *Haradinaj*<sup>24</sup> or *Milutinović*,<sup>25</sup> the ICC has remained more restrained.

Therefore, the questions of procedural fairness indispensably involve the principle of equality of arms. According to the judgment of the ICTR in the case of *Prosecutor v. Kayishema and Ruzindana*, the Appeals Chamber recognized equality of arms as an important component of a fair trial.<sup>26</sup> While the international human rights framework explicitly enshrines the principle of equality of arms within the right to equality before courts and tribunals, as stipulated, for instance, in Article 14(1) of the ICCPR, the statutory frameworks of the international criminal courts and tribunals do not contain an explicit provision ensuring the equality of arms principle.

Nonetheless, the equality of arms principle has been repeatedly referred to in the jurisprudence of these courts and tribunals. In the case of *Prosecutor v. Tadić* tried before the ICTY, the Appeals Chamber defined equality of arms as requiring equality of the prosecution and defence before the Trial Chamber; in particular, requiring, every practicable facility the Court is capable of granting under the Rules of Procedure and the Statute of the Court when faced with a request by a party for assistance in presenting its case.<sup>27</sup> Quite the contrary, the ICC in the case of *Lubanga* considered that “it will be impossible to create a situation of absolute equality of arms”, adding later that a

<sup>18</sup> Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 356.

<sup>19</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Prosecution’s Motion Requesting Protective Measures for Witness R, Case No. IT-94-1-T, 31 July 1996, para. 4; ICTY, *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, para. 27.

<sup>20</sup> ICTY, *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 43.

<sup>21</sup> SC Res. 827, 25 May 1993, Statute of the International Criminal Tribunal for the Former Yugoslavia Annex (“ICTY Statute”), Article 20(1); SC Res., 955, 8 November 1994, Statute of the International Criminal Tribunal for Rwanda Annex (“ICTR Statute”), Article 19(1).

<sup>22</sup> 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3 (“Rome Statute”), Article 64(2) and Article 64(8).

<sup>23</sup> See for example, ICTY, *Prosecutor v. Prlić and others*, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducting the Time for the Prosecution Case, Case No. IT-04-74, Appeals Chamber, 6 February 2007, para. 14; ICC, *Prosecutor v. Lubanga*, Order relating to the request of the Office of the Public Counsel for the Victims of 16 September 2016, Opinion of Judge Herrera Carbuccia, Case No. ICC-01/04-01/06-3252, 21 October 2016, para. 6.

<sup>24</sup> ICTY, *Prosecutor v. Haradinaj et al*, Judgment, Case No. IT-04-94-A, Appeals Chamber, 19 July 2010, para. 49.

<sup>25</sup> ICTY, *Prosecutor v. Milutinović et al*, Decision on Prosecution’s Request for Certification of Rule 73bis Issues for Appeal, Case No. IT-05-87-T, 30 August 2006, para. 10.

<sup>26</sup> ICTR, *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 67.

<sup>27</sup> ICTY, *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 44.

“fact sensitive evaluation will be required whenever unfairness is alleged.”<sup>28</sup>

Given the complex nature of international criminal proceedings, including complicated legal as well as factual issues, their breadth, and often, asymmetrical relationships of the parties with the States where investigations must mainly take place,<sup>29</sup> establishing the principle of equality of arms between the prosecution and the defence is indeed challenging. Therefore, throughout all stages of the proceedings, the defendant should have right to be assisted by competent legal counsel,<sup>30</sup> as one of the most regularly recalled minimum guarantee of a fair trial. Moreover, the complexity of the case also requires that the defendant be assisted not only with a single legal counsel, but also an adequately funded defence team. In principle, the choice of defence counsel in proceedings rests mainly with the defendant, subject to certain restrictions.<sup>31</sup> Ensuring the right to effective legal assistance is therefore one of the most important prerequisites which guarantees and enhances the fairness of the proceedings.<sup>32</sup>

#### **4. Ensuring fairness of the proceedings at the international criminal courts and tribunals**

If we look back in time and examine the structure and systems of the Nuremberg and Tokyo Tribunals, one can find only a very few references to the rights of the accused.<sup>33</sup> Indeed, despite the fact that the right of access to a legal counsel was enshrined in the founding documents of the tribunals, only a handful of other procedural rights were explicitly enumerated and guaranteed.<sup>34</sup> In fact, the needs and the rights of the accused have been largely marginalized. It was only with the establishment of the ICTY and the ICTR that ensuring the standards of fairness of the proceedings and guaranteeing the accused his/her fair trial rights was gaining more priority.<sup>35</sup> According to the words of Theodor Meron, the former President of the ICTY, “apart from the European Court of Human Rights and the American Court of Human Rights, [...] there has not been any tribunal which devoted so much attention to elaborating and giving proper foundation to due process and fairness.”<sup>36</sup>

As will be discussed in this chapter, the statutory frameworks of the selected international criminal courts and tribunals articulate and largely resemble the international human rights framework,

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<sup>28</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1091, Decision on Defence’s Request to Obtain Simultaneous French transcripts, 14 December 2007, paras. 18–19.

<sup>29</sup> Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 353.

<sup>30</sup> ICTR, *Prosecutor. Akayesu*, Judgment, Case No. ICTR-96-4-A, Appeals Chamber, 1 June 2001, para. 76; ICTY, *Blagojevic and Jokić*, Judgment, Case No. IT-02-60-A, Appeals Chamber Judgment, 9 May 2007, para. 23.

<sup>31</sup> ICTY, *Prosecutor v. Prlić and others*, Decision on Appeal by Bruno Stojic against Trial Chamber’s Decision on Request for Appointment of Counsel, Case No. IT-04-74, Appeals Chamber, 27 November 2004, para. 19; ICTY, *Prosecutor v. Karadžić*, Decision on Request for Review of Registrar Decision and for Summary Dismissal, Case No. IT-95-5, Trial Chamber, 7 May 2012, para. 12.

<sup>32</sup> *Artico v. Italy* (App. no. 6694/74) ECtHR (1980) para. 33; *Goddi v. Italy* (App. No. 8966/80) ECtHR (1984) para. 27.

<sup>33</sup> K. S. Gallant, *Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard and What Might be Done About One of Them*, Criminal Law Forum, Vol. 14, No. 3, September 2003, pp. 317-334.

<sup>34</sup> United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, Chapter IV, Article 16

<sup>35</sup> X-J. Keita, *Evolution or Revolution: The Defence Offices in International Criminal Law*, A Compendium on the Legacy of the ICTR and the Development of International Law, Arusha, November 2014, p. 2.

<sup>36</sup> ICTY Global Legacy: Conference Proceedings, The Hague, 15-16 November 2011, ICTY Outreach Programme The Hague, 2012, [https://www.icty.org/x/file/Outreach/conferences\\_pub/global\\_legacy\\_publication\\_en.pdf](https://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf) (19 November 2021).

including provisions ensuring the standards of fairness. However, as will be shown, the selected challenges and criticism that the international criminal courts and tribunals have been facing still questions whether they meet the standards of fairness as set out by the international human rights framework also in practice.

#### **4.1. Fair trial rights at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda**

Following the adoption of the United Nations (“UN”) Security Council Resolution 827 on 25 May 1993<sup>37</sup> and, the adoption of the UN Security Council Resolution 955 on 8 November 1994,<sup>38</sup> the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda were established. The increasing emphasis on ensuring the fair trial rights of the defendant was also depicted in the inclusion of statutory provisions of both *ad hoc* criminal tribunals. Thus, it can be stated that the goal of establishing the *ad hoc* criminal tribunals was to bring perpetrators of the most serious violations of international humanitarian law and human rights law to justice, while conducting fair trial and ensuring the standards of fairness. In this regard, both *ad hoc* criminal tribunals have reiterated in their decisions that they aspire to set the ‘highest standards of justice’<sup>39</sup> and serve as a ‘model of fairness’<sup>40</sup> for other jurisdictions to follow. As remarked by the former UN High Commissioner for Human Rights, Navi Pillay, “the tribunals helped pave the way for the ideal of an additional layer of justice operating in the global sphere to be invoked in substitution or complementarity for the efforts or the failures of states in one of their core sovereign functions - the dispensation of criminal justice.”<sup>41</sup>

##### *4.1.1. Statutory provisions ensuring fair trial rights at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda*

The relevant human rights framework, including the provisions concerning fair trial as enshrined in Article 14 of the ICCPR are reflect and substantially largely resembling in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute. In other words, while Article 14 of the ICCPR provides the minimum fair trial standards to be followed in the criminal proceedings, the statutes of the *ad hoc* criminal tribunals are in general, substantially similar to these provisions. The statutory provisions ensuring the fair trial rights are identical in the statutes of both the ICTY and ICTR.

While Article 21(1) of the ICTY Statute and 20(1) of the ICTR Statute explicitly articulate the equality of arms principle, Article 21(2) and (3) of the ICTY Statute and Articles 20 (2) and (3) of the ICTR Statute ensure that the accused receives a fair and public hearing as well as the principle of presumption of innocence. Further minimum guarantees of fair trial rights, are listed in Article 21(4) of the ICTY Statute and Article 20(4) of the ICTR Statute, including the right to be informed of the charges promptly and in detail and in a language the accused understands; the adequate time

<sup>37</sup> SC Res. 827, 25 May 1993, Annex.

<sup>38</sup> SC Res. 955, 8 November 1994, Annex.

<sup>39</sup> ICTY, *Prosecutor v. Blaškić*, Decision on the objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, Case No. IT-95-14-T, Trial Chamber, 18 July 1997, para. 61.

<sup>40</sup> ICTR, *Prosecutor v. Ntagerura et al.*, Separate Opinion of Judge Pavel Dolenc, Judgment, Case No. ICTR-99-46-T, Trial Chamber, 25 February 2004, para. 5.

<sup>41</sup> ICTY Global Legacy: Conference Proceedings, The Hague, 15-16 November 2011, ICTY Outreach Programme The Hague, 2012, [https://www.icty.org/x/file/Outreach/conferences\\_pub/global\\_legacy\\_publication\\_en.pdf](https://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf) (19 November 2021).

and facilities in order to prepare a defence; the access to legal assistance of own choice and the ability to communicate freely with the counsel; trial without undue delay; the examination of witnesses; free assistance of an interpreter or the right to remain silent.

According to the ICTY, the human rights standards, must be interpreted within the context of the unique object and purpose of the International Criminal Tribunal, also particularly recognizing the mandate to protect victims and witnesses.<sup>42</sup> While as stated above, both of the statutes are substantially similar to the human rights standards set out by the ICCPR, in some cases, the practice of the *ad hoc* criminal tribunals have expanded the scope of protection, for example, by acknowledging that in the case when the accused exercises his/her right to remain silent in accordance with Article 21(4) of the ICTY Statute and Article 20(4) of the ICTR Statute, there should be no negative repercussions and such decision should not negatively affect the accused.

#### *4.1.2. The selected challenges impacting the standards of fairness of the proceedings at the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda*

Regardless of the fact that, as mentioned above, the interests and the rights of the accused have gained increasing priority when establishing the ICTY and the ICTR, not a lot of deliberations were given to the organization of the Defence. Considering the concise wording of the statutory provisions outlining the fair trial rights of the accused, the lack of organization support for the Defence hinders the equality of arms principle. Moreover, putting Defence outside of the official organs of the tribunals, not only disproportionately restricted the time and resources provided for the investigations carried out by the Defence,<sup>43</sup> but also questioned the fairness of the proceedings. Hence, the equality of arms principle was not fully depicted in the structures of the *ad hoc* criminal tribunals due to the fact that the Defence Counsel remained largely as outsider, not listed among the recognized organs of the tribunals which included the Chambers, Prosecution and Registry.<sup>44</sup>

Indeed, Defence counsels and the defence teams in general possess an important mandate to ensure the fairness of the proceedings, and undoubtedly play an essential role for ensuring the fair trial rights of the defendant. Therefore, integrating the Defence counsels within the structures of the courts and ensuring their institutional presence is essential. As was criticized by some, the adopted procedural reforms resulting in lacking of institutional support for the defence were inconsistent with the standards of fairness of the proceedings and the equality of arms principle.<sup>45</sup>

In relation to the complexity of the proceedings compromising the protection of defendants fair trial rights and the overall fairness of the proceedings is also the length and efficiency of the proceedings. Given the amount of evidentiary materials to be examined and assessed during the proceedings, the judges of the ICTY and the ICTR, in an attempt to expedite the proceedings and ensure the accused's right to fair trial, introduced various procedural reforms. Such reforms, among

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<sup>42</sup> ICTY, *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, Trial Chamber, 10 August 1995, para. 70.

<sup>43</sup> J. I. Turner, *Defense Perspectives on Fairness and Efficiency at the International Criminal Court*, in K. J. Heller & F. Mégret & S. M. H. Nouwen & J. D. Ohlin & D. Robinson (eds.), *Oxford Handbook on International Criminal Law*, Oxford University Press, Oxford 2017[2020], p. 2

<sup>44</sup> Keita 2014, p. 2.

<sup>45</sup> Turner 2017 [2020], p. 2; G-J. A. Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, *Fordham International Law Journal*, Vol. 28, No. 6, 2004, p. 1580; ICTY, *Prosecutor v. Milošević*, Dissenting Opinion of Judge David Hunt, Case No. IT-02-54-AR73.4, Appeals Chamber, 21 October 2003.



others, included reducing the amount of oral evidence, in favor of permitting written statements,<sup>46</sup> or restricting the parties' time allocated for witness examinations and cross-examinations.<sup>47</sup> Some critics even argued that the tension between the judicial activism at the ad hoc criminal tribunals aimed at speeding up the proceedings collided with the fairness and truth-determination.<sup>48</sup>

## 4.2. Fair trial rights at the International Criminal Court

The drafting of the Rome Statute was a significant opportunity to examine the set of fair trial rights of the defendant in international criminal proceedings again. On 17 July 1998, the Rome Statute was adopted, establishing a permanent court called the International Criminal Court, with a mandate not limited in its temporal or geographic scope.<sup>49</sup> The improvement in the consideration given to the fair trial rights of the accused, from the establishment of the *ad hoc* criminal tribunals, is even more visible when it comes to the Rome Statute. When comparing the statutory provisions of the *ad hoc* criminal tribunals with those of the Rome Statute, the relevant provisions of the Rome Statute ensuring the fair trial rights of the defendant are more comprehensive and detailed.

### 4.2.1. Statutory provisions ensuring fair trial rights at the International Criminal Court

Articles 66 and 67 of the Rome Statute greatly resemble Article 14 of the ICCPR, however, contain more detailed provisions. The minimum fair trial guarantees as listed in Article 67(1) of the Rome Statute, substantially mirroring Article 14 of the ICCPR, include the ensurance of the right to be informed of the charges promptly and in detail and in a language the defendant understands; adequate time and facilities in order to prepare a defence; the right to access legal assistance of own choice, the ability to communicate freely with that counsel and entitlement to legal aid; a trial without undue delay; to access free interpreter, to examine witnesses and not to self-incriminate oneself. In addition, the presumption of innocence is ensured under Article 66 of the Rome Statute.

In comparison with the statutes of the *ad hoc* criminal tribunals, the Rome Statute in Article 67(1) (e) provides a more detailed right of the accused to examine or have examined the witnesses against him or her, and enables the accused to raise defences and to present other evidence admissible under the Rome Statute. In addition, Article 67(2) of the Rome Statute contains a provision outlining the disclosure of evidence by the Prosecutor, obliging the Prosecutor to also disclose evidence that tends to show the innocence of the accused.

Additionally, there even exist multiple examples where the ICC has developed and applied higher standards of fairness, going beyond the requirements established by the international human rights framework and the subsequent jurisprudence of the human rights courts and bodies.<sup>50</sup> One such example could be the right of the accused to have the assistance of interpretation and translation as enshrined in Article 67(1)(f). According to Article 50, the working languages of the Court are English and French. However, it is often the case that the accused claims that he or she does not fully

<sup>46</sup> M. Langer, *The Rise of Managerial Judging in International Criminal Law*, American Journal of Comparative Law Vol. 53, No. 4, Fall 2005, p. 900.

<sup>47</sup> Turner 2017 [2020], p. 2; Langer 2005, pp. 899-900.

<sup>48</sup> Ibid. 908.

<sup>49</sup> 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90.

<sup>50</sup> Y. McDermott, *International Criminal Procedure and the False Promise of an Ideal Model of Fairness*, in John D. Jackson & S. J. Summer (eds.), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms*, Hart Publishing, Oxford 2018, p. 196.

understand and speak either of the working language of the Court. According to the wording of Article 67(1)(f) of the Rome Statute, the accused shall be guaranteed in full equality “to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks.” As was further held by the Appeals Chamber in the case of *Katanga*, the Court must pay attention and give credence to such claims of the accused alleging that he or she does not fully understand and speak the working language of the Court as “it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks.”<sup>51</sup>

When interpreting the necessity of the provision of interpretation and translation rights, the Appeals Chamber employed a rather high standard of fairness to the accused, holding that language request should be granted except it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court. Hence, if there are doubts if the person fully understands and speaks the language of the Court, the language being requested should be accommodated.<sup>52</sup> In addition, according to the findings of the Appeals Chamber, an accused fully understands and speaks a language “when he or she is completely fluent in the language in ordinary, non- technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer”.<sup>53</sup>

The minimum guarantee of the accused to have the assistance of interpretation and translation in cases where he or she does not fully understand and speak the language and the subsequent interpretation and understanding of this right as developed by the case law of the ICC illustrated above, appears to apply a higher standard than the one required under the international human rights framework as set out by the ICCPR or the ECHR. According to Article 14(3)(f) of ICCPR and Article 6(3) of ECHR, the person charged with a criminal offence has the right to have access to the assistance of interpretation if he or she “cannot understand or speak the language used in court.”

Besides the above-mentioned extensions of minimum fair trial guarantees as enshrined in Article 66 and 67 of the Rome Statute, the Statute goes even further in applying the human-rights based approach towards the proceedings in more general. In particular, the human rights framework and the practice of international human rights bodies with regard to the standards of fairness of the proceedings and the individual fair trial rights of the defendant has gained a rising influence on the scope and the interpretation. The Rome Statute itself emphasizes in Article 21(3) concerning the sources of law applied by the ICC that the application and interpretation of law must be consistent with internationally recognized human rights. Hence, the human rights framework is firmly rooted in the statutory provisions of the Rome Statute as well as the practice of the Court. As seen in the jurisprudence of the ICC, the Court has been constantly including references to the international human rights standards<sup>54</sup>, including the increasing references to the interpretation of fair trial rights given by the European Court of Human Rights (“ECtHR”).

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<sup>51</sup> ICC, *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled ‘Decision on the defence request concerning languages’, Case No. ICC 01/04/01/07, Appeals Chamber, 27 May 2008, para. 59.

<sup>52</sup> ICC, *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled ‘Decision on the defence request concerning languages’, Case No. ICC 01/04/01/07, Appeals Chamber, 27 May 2008, para. 61.

<sup>53</sup> *Ibid.* para. 61.

<sup>54</sup> See for example, ICC, *Situation in the Democratic Republic of Congo in case of the Prosecutor v Thomas Lubanga Dyilo*, Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, Case No. ICC-01/04-01/06-108-Corr, 20 May 2006, para. 37.

For instance, in one of the latest judgments of the ICC in the case of *Ongwen*, the Trial Chamber has tackled complex legal issues, which required the support through references to the sources of other human rights courts and bodies. It made several references to the jurisprudence of the human rights courts, bodies, in particular it referred to the case law of the ECtHR, the Inter-American Court of Human Rights as well as the African Commission of Human Rights in its findings on what in fact constitutes torture and it further elaborated upon the elements of the crime of torture as a crime against humanity or war crime.<sup>55</sup>

#### 4.2.2. Challenges impacting the fairness of the proceedings at the International Criminal Court

Despite the positive examples of employing high standards of fairness at the ICC, a number of challenges remain and there are multiple practical aspects where the ICC falls short of securing the highest standards of fairness. An online survey conducted in 2016 with a small sample of the ICC Defence counsels, including members of the Defence teams, outlining a preliminary examination of their views on the fairness and efficiency of the procedures before the ICC showed that concerns among the Defence counsels about procedural unfairness remain.<sup>56</sup> However, on the contrary to the criticism that the afore-mentioned *ad hoc* criminal tribunals faced regarding the reforms the judicial activity and approaches to expediting proceedings for the price of undermining and compromising the fairness of the proceedings, the surveyed defence attorneys did not associate their concerns about the fairness of the proceedings with the judges' preoccupation with expediting the proceedings, ensuring their efficiency.<sup>57</sup>

The defence attorneys' concerns about the fairness of the proceedings were largely connected with their views that judges undermine the accused's right<sup>58</sup> as well as with their complains about the Registry's failure to provide the defence with sufficient resources and support to enable adequate investigation and trial preparation.<sup>59</sup> Similarly to the *ad hoc* criminal tribunals, the ICC is also committed to ensuring the principle of equality of arms throughout the entire proceedings. Pursuant to the jurisprudence of the ICC, the equality of arms principle is to be understood and interpreted as the procedural equality<sup>60</sup> between defence and prosecution, not equality of resources.<sup>61</sup>

The discrepancies between the positions of defence and prosecution in the proceedings before the ICC are largely reflected in the manner the investigations are conducted, as well as the perception of the role of defence by the State Parties. For instance, pursuant to Article 57(3)(b) of the Rome Statute, the Defence must request the Pre-Trial Chamber for judicial assistance to seek and attain cooperation with the domestic authorities of the States, to assist the defence in the preparation of their case. This, however, creates unnecessary hurdles for the defence, particularly, if they must turn to and request the Pre-Trial Chamber of the Court to issue an order to gain the necessary information.

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<sup>55</sup> ICC, *Prosecutor v. Ongwen*, Judgment, Case No. ICC-02/04-01/15, Trial Chamber, 4 February 2021, para. 2071.

<sup>56</sup> Turner 2017 [2020], p. 4.

<sup>57</sup> *Ibid.* 4.

<sup>58</sup> *Ibid.* 4.

<sup>59</sup> Turner 2017 [2020], p. 9.

<sup>60</sup> International Bar Association (IBA), 'Fairness at the International Criminal Court' An International Bar Association's Human Rights Institute Report', August 2011.

<sup>61</sup> See for example C. C. Jalloh & A. DiBella, *Equality of Arms in International Criminal Law: Continuing Challenges*, in W. A. Schabas & Y. McDermott, & N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Routledge, London and New York 2018.

### 4.3. Fair trial rights at the Extraordinary Chambers of the Courts of Cambodia

Following the negotiations and agreement with the UN, the Cambodian Parliament ultimately adopted in 2001 (and amended in 2004 in light of an agreement of 2003 with the UN) a law establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) for prosecuting crimes committed during the period of Democratic Kampuchea (1975-1979).<sup>62</sup> The ECCC is a so-called hybrid criminal court, with staff and members partly from Cambodia and partly from international arena.

#### *4.3.1. The statutory provisions ensuring fair trial rights at the Extraordinary Chambers of the Courts of Cambodia*

In the case of the legal representation before the ECCC and the fair trial rights of the defendant, such rights must be upheld during all stages of the proceedings and must also be in conformity with the international human rights law standards. As mentioned above, being a hybrid tribunals, the functioning and the structure of the ECCC is governed by several main documents. The main laws governing the functioning and structure of the ECCC include the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“Agreement”),<sup>63</sup> the ECCC Law,<sup>64</sup> Internal Rules of the ECCC,<sup>65</sup> and the 1993 Constitution of Cambodia.

Article 13 of the Agreement sets out the rights of the accused, by referring to the rights of the accused as enshrined in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights, including the right to a fair and public hearing or the right to engage a counsel of the accused’s choice, to have adequate time and facilities to prepare their defence and to access to legal aid. In particular, according to Article 13 (2), the UN and the Royal Government of Cambodia agree that the provision on the right to defence counsel in the ECCC Law mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the ICCPR. Article 24 (new) of the ECCC Law stipulates the right of access to a counsel of own choosing, or legal assistance assigned and the right to interpretation during the investigation for suspected persons. Further minimum fair trial guarantees are listed in Article 35 of the ECCC Law including, for example, the right to information about the charges against the accused, the right to be presumed innocent, the right to have adequate time and facilities to prepare one’s defence, the right to communicate with counsel of own choosing, the right to be defended by counsel of choice or to access legal aid. Similar fair trial guarantees are stipulated also in Rules 21 and 22 of the Internal Rules, including the right to be defended by a lawyer of one’s own choice and the equality of arms principle.

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<sup>62</sup> Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 264.

<sup>63</sup> 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 2329 UNTS 117.

<sup>64</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as promulgated on 27 October 2004 (NS/RKM/1004/006), [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf) (7 July 2021).

<sup>65</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, as revised on 16 January 2015.

#### 4.3.2. Challenges impacting the fairness of the proceedings at the Extraordinary Chambers of the Courts of Cambodia

Indeed, the scope and the way that pre-trial proceedings, including the way investigation are conducted, can have an impact on the equality of arms principle also in the pre-trial phase of the proceedings. A good example to illustrate this is the investigation and the pre-trial phase conducted before the ECCC.

The ECCC, being a hybrid tribunal based on Cambodian law, puts an emphasis on the importance of the pre-trial proceedings and investigations. However, the responsibility to conduct the in-depth pre-trial investigations is vested in the hands of the Co-Investigating Judges, and parties, including the defence, play a very limited role.<sup>66</sup> This, in turn, however, reduces the role that defence counsels can play in the pre-trial proceedings and may impact the fair trial rights. In particular, Rule 55 of the Internal Rules of the ECCC,<sup>67</sup> Article 5 of the Agreement between the UN and the Royal Government of Cambodia,<sup>68</sup> and Article 23 new of the ECCC Law confers the powers to conduct a judicial investigation to the Co-Investigating Judges (one Cambodian and one international) and the Co-Prosecutors, a Charged persons (including his legal counsel) or a Civil Party may request the Co-Investigating Judges to undertake such investigative actions as they consider useful for the conduct of the investigation. However, such request might be rejected by the Co-Investigating Judges. Co-Prosecutors may only conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses as set out by Rule 50 of the Internal Rules.

### 5. Common challenges to the fairness of the proceedings

Although the ECtHR<sup>69</sup> as well as the international criminal courts and tribunals themselves<sup>70</sup> have repeatedly reiterated that the right to fair trial applies to all stages of the proceedings, including the pre-trial investigation stage, the manner in which the investigations are carried out as well as the realization of fair trial rights vary across the jurisdictions. Thus, differences can be found not only within the structure and organization of the selected international and internationalized courts and tribunals, but also in the rights of the defendant applicable at different stages of the proceedings.

While the major differences between domestic and international criminal proceedings primarily lie in the complexity, breadth, number of evidence and witnesses and length of the trial itself, an important element specific to international criminal proceedings is also an arrest and detention of

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<sup>66</sup> G. Sluiter & M. Tiernan, *The Rights to an Effective Defence during ECCC Investigations*, Journal of International Criminal Justice, Vol. 18, No. 3, July 2020.

<sup>67</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, as revised on 16 January 2015; Article 23 (new) ECCC Law.

<sup>68</sup> 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 2329 UNTS 117.

<sup>69</sup> See for example, *Salduz v. Turkey* (App. No. 36391/02) ECtHR [GC] (2008); *Dvorski v. Croatia* (App. No. 25703/11) ECtHR [GC] (2015) para. 76.

<sup>70</sup> See for example, ICC, *Situation in the Democratic Republic of Congo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 31 March 2006, paras. 34-35; ECCC, Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, Ieng Thirith et al., Case No. 002/19-09-2007-ECCC/OCIJ, D264/2/6, Pre-Trial Chamber, 10 August 2010, para. 13.

the defendant throughout the pre-trial phase of the proceedings, as well as during trial and appeal. While the remand of the defendant in pre-trial detention is an exceptional measure of last resort, used under strict and specific circumstances laid out by the criminal procedure codes of the individual States, international criminal proceedings are characteristic for keeping the defendants in detention throughout the entire proceedings, including the pre-trial phase.

It is argued that the need to keep the defendant in detention during the pre-trial phase is warranted by the necessary reliance that international criminal courts and tribunals have on the cooperation of the states forcefully to ensure that the defendants will appear again in the session of the courts, once summoned to resume their participation in trial or appellate proceedings.<sup>71</sup> This, however, can impact the level of assuring the presumption of innocence of the defendant, an important principle and pre-requisite of the fair trial rights acknowledged by the international community and enshrined in numerous key international human rights instruments. This, in turn, impacts a number of fundamental rights of the defendant, such as the right to remain silent and not to incriminate oneself.

## 6. Conclusion

Although the prosecution and punishment of international crimes by international criminal courts and tribunals had undoubtedly contributed to the lasting respect and enforcement of international justice, it is not flawless. Prosecuting serious international crimes through international criminal proceedings is a complex procedure, involving extensive amounts of evidence, a large number of victims and witnesses, complex nature and elements of crimes. In fact, there are many elements of international criminal proceedings that represent a myriad of essential advantages that the international criminal trials have contributed with to putting an end to impunity. However, as was illustrated in this article, certain areas of concern remain, also with regard to guaranteeing the fairness of the proceedings.

As shown above, international criminal courts and tribunals play a key role in setting the highest standards of fairness. The application and interpretation of human rights standards in international criminal proceedings by the international criminal courts and tribunals, however, lacks a supervisory treaty body or an oversight mechanism. Hence, on the one hand, the international criminal courts may ensure higher standards of protection than those enshrined by the international human rights framework, but on the other, due to their complex nature, they may depart from the jurisprudence of the human rights courts and bodies. Undoubtedly, there exist multiple examples of good practice where international criminal courts and tribunals have developed and applied the highest standards of fairness in relation to the conduct of proceedings in general, and the rights of the accused, in particular. One such example was illustrated above regarding the high standard for ensuring the rights of the accused to have translation and interpretation assistance. Nonetheless, it was also suggested by this article that there still remain multiple factors hindering the application of the highest standards of fairness in practice.

Fairness is a broad concept and given the uniqueness of the institutions, the international criminal courts and tribunals operate under constant challenges to their legitimacy and functioning. Nevertheless, international criminal courts and tribunals should indeed act as a guiding example for domestic courts and justice systems in relation to how criminal proceedings should be conducted in compliance with the standards of fairness and the international human rights framework. Setting the highest standards of fairness encourages state cooperation, which enhances the Court's effectiveness. Simply taking into consideration the character of international criminal proceedings in

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<sup>71</sup> Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 270.

terms of their mixed nature with foundations in human rights law and impact on domestic proceedings, the international criminal courts and tribunals should further aim at developing human rights standards, despite not being human rights courts. However, the focus should be on ensuring the standards of fairness in practice and identifying and improving those aspects of practice where the proceedings fell short of their potential of being a role model of fair trial practice, rather than the statutory provisions outlining the fair trial rights which are largely built on the international human rights framework.

Therefore, there always needs to be the right balance between, on the one hand, an exclusive concern for the rights of the accused, and on the other hand, the accuracy of outcome of the proceedings. As a common practice, given the far-reaching consequence of the decisions of the international criminal courts and tribunals, it is indispensable to take a human-rights based approach to international criminal proceedings.

Considering the difficult environment in which the international criminal tribunals and courts operate and the evolving challenges they constantly face, constant re-evaluation of the compliance with fundamental human rights standards as well as the sustainability of the proceedings is also needed. To protect the integrity of the proceedings, the international criminal courts and tribunals should safeguard the fundamental rights of the accused to adequate and effective legal assistance, the independence of the defence and the principle of equality of arms.