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Additional Article – The Rights of the Accused

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Question: *How can you represent these mass murderers, war criminals, human rights violators, genocide perpetrators?*

Answer: *If one of your nearest and dearest was charged with any of these crimes – or any crime for that matter, where there is the possibility of being locked up for years or maybe even a lifetime – what sort or representation would you want and what sort of trial would you expect? And what if your nearest and dearest professed his or her innocence but the evidence – at least from reading the indictment – seemed otherwise? What then? Would you not want a vigorous defence that left no stone unturned, challenged all of the evidence, raised every conceivable legal issue, took advantage of every weakness in the prosecution's case, and so on*?

A common answer to a common question – at least for those of us who defend.

I. Introduction

It is amazing how most demand the very best of a Defence, expect the highest quality of substantive and procedural justice and are willing to give the benefit of the doubt to their loved ones, even when faced with overwhelming evidence pointing to guilt. But when it comes to the *others*, they are incapable of mustering even a modicum of understanding or tolerance. The *others* are just guilty. None more so than in international criminal cases, where in the court of public opinion, as soon as an Accused is under investigation, he or she is guilty until proven innocent. A fair trial for *them* is a quick, inevitable conviction. Almost without exception, these fair minded individuals seem to have the need to prove their *bona fides* as unbiased advocates for human rights, so they follow up with the faux caveat: *but they should get a fair trial!* Understandable. In the court of public opinion, it is natural to believe what is reported in the press or to simply accept that where there is smoke there must be fire; if someone is indicted, it is because he or she *did it*.

Ask anyone what sort of rights they think they should have if they, or their loved ones, were accused of a crime. The first thing you may hear is the *right to a good Defence*. Press further and you hear a usual refrain as if it were a mantra (as it should be): having an open and transparent trial, enough time and resources to investigate and challenge the Prosecution's evidence and to gather Defence evidence, access to all of the Prosecution's evidence, a fair opportunity to question

Prosecution witnesses thoroughly, to have Defence witnesses heard, and to be judged fairly and impartially – having the Judge follow the procedure and apply the law correctly and even-handedly. And so on.

Instinctively, most, if not all, understand what sort of rights are fair trial rights, were the Accused in the dock. So why the dilemma when it is someone else? Perhaps it is the sheer nature of international crimes that evoke such passions and prejudices that impede one's ability to look beyond the mere accusation. Perhaps it is too much to expect from the average individual to suspend forming a judgement that naturally flows as part of human nature when hearing the charges, and to vacate the assumption that the Prosecution would not charge someone unless there was evidence that he or she *did it*.

In this lot, I also include the international tribunals' Judges. Yes, they may be "professional" Judges (per the parlance at the international tribunals) to the extent they studied law or meet the criteria to be appointed as Judges to the Court. I would even go one step further. Even career Judges – those who come to the international tribunals as experienced Judges in their national jurisdictions, with an appreciation for the strict application of fair trial rights, such as the presumption of innocence – are not immune from the natural human affliction of pre-judging an Accused, simply based on the charges in the indictment. That said, good Judges are mindful of this inherent inclination, and make concerted efforts to reserve forming any final opinions until all the evidence has been received and properly reviewed, without passion or prejudice. Of course, there is always the risk that this is a mere formality, that a guilty verdict is predetermined and the process of achieving it result-oriented. Therein lies the rub. This is why all fair trial rights are predicated on a having a resourceful Defence Counsel who will robustly defend the case, ensuring that his or her client is afforded all fair trial rights – both procedurally and substantively – not just seemingly.

II. Fair Trial Rights

When I think of the rights of the Accused, I think of due process, or even better, *the process that is due*. Where better to look for an expression of the rights that enable the process that is due to be afforded – both domestically and internationally – than *the International Covenant on Civil Rights and Political Rights* (ICCPR). These rights, commonly referred to as *fair trial rights* are found in other prominent legal instruments such as *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *The American Convention on Human Rights*, and *The African Charter on Human*

and Peoples' Rights. But in the international criminal tribunals, it is the ICCPR that takes centre stage.

Fair trial rights come in two categories: general and specific. The general rights go to the overall aspects of the proceedings and deal primarily with their integrity. The specific rights are those discrete rights that must be afforded on a personal level. Both are essential in ensuring a fair trial.

1. *Right to a Fair Trial*

How fair is *fair*? For ourselves, a fair trial is a perfect trial. This is not only unrealistic, but beyond the meaning of the right to a fair trial. In the national context, one can think of fair trials in relative terms. What may fall short of a fair trial in a well-functioning judicial system may be more than fair in a developing country, where resources are sparse and the cultural understanding (or expectations) of human rights are less sophisticated. While this should not be countenanced, considering that justice and the contours of human rights are not dependent on serendipity, it is reality. At the international tribunals, however, there is no excuse for the quality of justice and fairness to be governed by cultural relativity or other extraneous factors, such as the financial and human resources the international community is willing to devote to a tribunal carrying out its mandate.

A fair trial is about much more than resources. It is about the entire process from the investigation of the case leading up to the arrest of the Accused, all the way to the end of the trial, and through the entire appeal process. Fairness is not a moment, but a continuum. Also, trials are organic. At every stage of the proceedings there are substantive and procedural requirements, which if not met, lead to unfair trials. So in answering the question of how fair is *fair*, it is necessary to ascertain whether an Accused is *actually* afforded the general and specific rights being discussed. Most of the specific fair trial rights are qualified rights, though there are thresholds that dictate how far Chambers can derogate from the letter and spirit of the conferred right before the right is effectively denied.

My measure of a fair trial is when a Chamber is even-handed, respectful, flexible, competent and patient. This means I am allowed to make my trial record, so all potential errors are properly preserved; I am provided sufficient time to examine and cross-examine witnesses; all submissions are decided transparently with reasoned opinions based on the applicable law and procedure, and not by fiat; and the Judges are not behaving as the midwife for the Prosecution in

delivering a guilty verdict by acting as the Second Prosecutor in bolstering the Prosecution's case or in weakening the Defence case. A fair trial is the sort of trial the Judge would want for himself or herself.

2. *Right to be Presumed Innocent*

It is a bit of an oxymoron when you think about it. Here is an Accused, charged with serious crimes confirmed by a Pre-Trial Judge, and the Trial Judges are to presume that the Accused is innocent. Precisely. Judges by and large seem to have an appreciation for this fair trial right, though it also appears that a few Judges find the presumption of innocence to be an indulgent pretence.

This right is the cornerstone of the adversarial systems adopted by the international tribunals. There can never be any excuse for denying this right. Whether the Judges of the Trial Chamber actually presume the Accused innocent cannot be easily discerned, if at all. One can, however, look at the decisions and legal reasoning of the Trial Chamber, the Judges' behaviour during the proceedings, and the quality of their "fairness" during the proceedings to get an inkling. Occasionally, an unexpected email to friends or an indiscreet comment at a cocktail party serendipitously comes to light, exposing a Judge's inability or unwillingness to afford the presumption of innocence to the Accused over which he or she sits in judgement.

3. *Right to an Independent and Impartial Tribunal*

This is rather straightforward. The term "tribunal" encompasses the institution itself, the Chambers, and the Judges that compose the Chambers. The staff associated with the tribunal, Chambers, and Judges, are effectively agents and therefore should be bound by the same ethical constraints as the Judges.

The term "independent" means that the institution, Chambers, and Judges should not be under any extraneous influence when carrying out any functions associated with the tribunal in general, and any case or party specifically. Judges should not be taking their cues from the governments, the UN, NGOs, and so on. It also means not taking their cues from fellow Judges, Prosecutors, or Defence Counsel; though it is expected that Judges will discuss and deliberate and even lobby positions they hold to be correct. What is inappropriate is for a Judge to cave in and abandon – or better yet, 'sell out' – an honestly held principled position for the sake of going along to get along or in exchange for a favour or reward. Politics and international criminal justice are

intertwined. It should not come as a surprise that there may be instances where a particular result is desirable to assuage a particular interested party or cause. Sad, but true.

The term "impartial" simply means check your prejudices and passions at the entrance of the tribunal. Easier said than done. We expect (though it is not right) the Prosecution to be partial, doggedly pursuing an agenda it may believe in, though one that is not necessarily fair and impartial. The Prosecution is an independent and adversarial party. Experience shows that at the international tribunals the Prosecution is only interested in winning the case. This may appear as a perversion of justice – at least in civil law systems. Considering that the Prosecution in the international tribunals is not a magistrate or judicial officer but an adversarial party, it is almost understandable that the Prosecution would seek to win. This runs contrary to the ideal expected of the Prosecution in national and international settings. Their mandate is to do justice, not to convict – let alone convict by questionable means if necessary. Sadly, this ideal often disappears in the heat of battle or during some misguided career-advancing quest. Seeking to do justice may occasionally require the courage and intellectual integrity of confessing error for putting someone through the judicial meat-grinder.

This being reality, we expect Judges to be scrupulously fair and even-handed throughout the proceedings. This does not mean that Judges should balance the rights of the Accused against the rights of the victims. Judges should not short-change an Accused of his or her rights to make up for any impediments that victims may face in a particular case. Judges are akin to referees and should not take on the role of a player for one of the sides to assist in achieving certain goals. This does not mean that Judges cannot ask questions when necessary, but in doing so, they must be circumspect and such questioning should be limited to clarifying matters for the record. Anything more, particularly if in intervening a Judge is predominantly (and routinely) assisting one of the parties, is unfair and prejudicial. A victim is a victim of a crime, not the victim of a presumably innocent Accused. That only comes with a conviction based on proof beyond a reasonable doubt. This is too frequently muddled or ignored.

4. *Right to a Public Hearing*

The saying "nothing disinfects like sunlight" is particularly true in the courtroom. Transparency and public scrutiny motivate the Judges to ensure that the trial proceedings are fair. It is not a given that matters which deserve public scrutiny will always see the light of an open and public courtroom. When Judges know they are being watched, they tend to be measured and perhaps

more even-handed. If nothing else, those watching the proceedings can conclude for themselves whether justice is being done.

In national courts there are a few, carefully circumscribed, rare proceedings that would be closed to the public, which are usually dictated by criminal procedures which set out the high bar for closed hearings. Unfortunately, in the international tribunals the use of closed hearings is all too common and not necessarily always in keeping with the right to a public hearing. Witnesses are often heard in closed sessions, particularly Prosecution witnesses, when there is no need for such secrecy. The result is that witnesses are less restrained and more likely to embellish or confabulate, knowing that their testimony will not be seen or heard by others who may know the actual truth or have a more accurate recollection of the events. This tool envisioned to promote justice by obtaining evidence which might not otherwise be available, has transmogrified into an overly employed device that all too often thwarts justice. This is basically due to over-reaching by the Prosecution; seeking a conviction rather than seeking to do justice. It is very difficult for a Judge to deny a Prosecution request for a closed hearing since the responsibility is shifted from the Prosecutor to the Judge simply by the request. A much more stringent burden should be placed on the Prosecution to achieve a closed hearing of any sort.

The same goes with documents and submissions. To the extent possible, everything filed or used before the proceedings should be public. It is easy – and it occurs with some regularity – that submissions of a non-confidential nature are filed or treated as confidential. This prompts confidential decisions to be issued, which, unsurprisingly, are often based on suspect authority and dubious legal reasoning. Of course, there is the matter of embarrassment or the inconvenient truths that occasionally result from transparency. Instinctively, many Judges and prosecutors are quick to descend into a bunker mentality: best to keep these embarrassments or inconvenient truths under wraps, lest the integrity of the tribunal come into disrepute. Nonsense. Judicial institutions benefit by exposing, not hiding, weakness and irregularities. Though it is difficult to guard against bogus reactions, Defence Counsel are not entirely powerless – making the record and preserving these errors is the sword and shield of due diligence. If nothing else, the record is the historical memory of the proceeding. It is necessary for appellate review, but also for public scrutiny should the confidential material be declassified – and this does occur. The record exposes the true legacy of how a Chamber behaved and whether matters it handled in a non-public fashion during the proceedings were legitimate and fair.

5. *Right to be Tried Within a Reasonable Time (Expeditious Trial)*

This right seems rather straightforward, though I view this right as comprising three different (and not mutually inclusive) components. All three must be respected.

The first component is to ensure that the investigation and the charging of a crime occur within a reasonable period, to ensure that the Accused is not hampered in defending himself or herself as a result of the loss of evidence. In other words, when there is a case to prosecute, it should be done promptly and without undue delay. In the national context, especially given that the cases tend to be relatively small and the factual matrix rather discrete, the impediments for investigating, charging, and trying an Accused expeditiously are modest and few. In the international context however, save for the ICC, it often is the case that the tribunal was established many years after the fact. This component of being tried within a reasonable time is rarely important in the international context, and if raised, is not likely to get much traction.

The next component is to be tried reasonably quickly once charged. In other words, an Accused should not be languishing away for years in a detention facility waiting to be tried. But how quick is quick? It depends. There are good reasons for the Accused to want extra time to prepare his or her Defence. The Prosecution would have had years putting a case together. It would be unfair to rush the Accused to trial without providing for time to file all necessary legal challenges, to thoroughly review the case file, to investigate and gather evidence, and to prepare for all aspects of the trial diligently. Too often Judges use the Accused's right to a speedy trial to force an Accused who is not asserting that right to trial before Counsel has had time to adequately prepare.

The third component is to ensure that the trial does not drag on. But here again, what does having an expeditious trial mean? Some Judges are of the opinion that once the Accused has spent three, four, or even more years waiting for trial, an expeditious trial means truncating the proceedings by adopting modalities that limit the parties' abilities – especially the Defence –to challenge the evidence or put on evidence. In other words, to these Judges, an expeditious trial is a quick trial, even at the risk of denying other fundamental fair trial rights, such as the right to examine witness and to put on a Defence. This sort of rush to *get it over with* is perhaps Defence Counsel's dominant challenge at trial. It is supremely duplicitous to, on the one hand, keep an Accused years in detention waiting for trial, then trample over his or her rights by rushing the trial proceedings to get it over with, only to have the Accused wait in a detention facility for a year or more while the Judges casually draft the judgement. At least at the ICTY, the Chambers

finally got around to provisionally releasing Accused while judgements are being written. This modicum of respect for the rights of the Accused only came after numerous Defence challenges of decisions by the Appeals Chamber, which had departed from the ICTY Statute, imposing virtually insurmountable criteria for provisional release without any legal basis. So much for the presumption of innocence.

Suffice it to say, the right to be tried within a reasonable time must be viewed in conjunction with other rights; in particular, the right to have adequate time and facilities to defend against the charges, the right to confront witnesses, and the right to present witnesses.

6. Right to be Informed of Charges

In Franz Kafka's novel *The Trial*, the protagonist, Josef K is unexpectedly arrested by two unidentified agents from an unspecified agency for an unspecified crime on his 30th birthday. For two years Josef K tried to find out the charges against him. On his 32nd birthday, two other unidentified agents from an unspecified agency stab him to death – and as Josef K put it –*like a dog*. If only he knew the charges, perhaps Josef K would have been able to mount a Defence. Those familiar with *The Trial* know that it was not for want of effort that Josef K never learned the charges. I cannot think of a better example for all the reasons why it is important for an Accused to know the charges he or she is facing.

Indictments are vetted by a Pre-Trial Judge (generally at the ICTY it was more of a rubber stamping process), so there should be no dilemma in an Accused being afforded the right to know the charges against him or her. In theory perhaps, but not always in fact. The indictments at the ICTY and other *ad hoc* tribunals suffer from having all sorts of "background" information, which on its face appears non-essential, but which requires repudiation nonetheless because the narrative promoted by the Prosecution was either overly simplistic or outright inaccurate. Also, while it might be easy to identify the crime being charged by its nomenclature, the alleged activity associated with the crime would often be framed in an ambiguous or tangential manner. Then there are the modes of liability: the proverbial kitchen sink approach, charging everything under every conceivable mode of liability, irrespective of the evidence; the "something is bound to stick" approach. Not to mention the ICTY invention of joint criminal enterprise (JCE); especially the extended version, JCE III, where an Accused would be liable for anything and everything that an imagination can conceive as being a natural and foreseeable consequence of the initial agreement to carry out certain activity – which may not even have been criminal *per se*.

While the indictment would list alleged crimes, trying to figure out what exactly was being alleged and charged was a bit of a guessing game. Preparing a Defence for a case based on an opaque charging documents is akin to driving at night in heavy fog: not knowing when you are on the road heading in the right direction, and when you are slightly off or way off and about to hit something or go off the edge. Even after submissions on the scope of the indictment, issues of notice of the actual charges and modes of liability would persist.

So being informed of the charges does not just mean being presented with the charging document. It actually means having a charging document that is clear and concise, and where the crimes charged along with the predicate facts are obvious. There is no need for the Prosecution to take a Kafkaesque approach so as to gain an advantage by cleverly arguing at the close of the evidence that some mode of liability or some act is implicitly stated or was to be understood.

7. *Right to Adequate Time and Facilities - Equality of Arms*

The right to adequate time and facilities basically means that an Accused should not be forced to show up to a gunfight with a pocketknife. The principle of equality of arms is effectively part and parcel of the right to have adequate time and facilities. The Prosecution has enormous resources available in comparison to what is allocated to the Accused who are often indigent and dependent on court-appointed Counsel. Also, the Prosecution has an enormous advantage in that it has spent years putting a case together, often with the cooperation of and the assistance from foreign governments, humanitarian agencies, NGOs and others who are normally not inclined to assist the Accused, or are simply out of reach.

The right to adequate time and facilities, including the right to equality of arms, is all about giving the Accused a fair chance to defend himself or herself against the charges. It is not about applying a mathematical formula to a set of values in order to come up with a ratio such as: $\Delta = x\%\prod$ (funds and resources allocated to the Defence = x% of funds and resources allocated to the Prosecution).

Naturally, the Prosecution has the burden of proof and must also put a case together, so it is understandable that the time and facilities available to the Prosecution will be greater to those available to the Accused. But the Accused and his or her Defence team must be afforded sufficient time and facilities to mount a credible Defence. This means having enough time to review and digest the disclosure material, to conduct a proper investigation, to file relevant and

necessary submissions and to generally prepare for trial. Once in court, time and facilities must be relatively equal. This means that in a multi-Accused case, the Trial Chamber should not be imposing strict time limitations on the Accused – as if they area monolithic group – in ensuring equal time with the Prosecution. Each Accused must be viewed separately.

At the ICTY, the Registry employed a formula for the amount of funding it would make available to an Accused, dependent on the level of complexity of the case (not on the amount of resources allocated to the case by the Prosecution). Overall, the funds allocated were moderately sufficient for a very basic Defence. As for time and facilities allocated by the Trial Chamber to the Defence, it appeared that it all depended on the quality and experience of the Judges, often giving rise to unintended perceptions that some Accused enjoyed more rights than others – simply on the basis of how the trial proceeding are conducted. Considering that the cases were ethnically driven because the alleged crimes were associated to particular ethnic groups, the disparate treatment of the Accused at trial, based in part on the makeup and experience of the Trial Chamber, resulted in undermining the credibility of the ICTY as a fair and impartial tribunal.

8. Right to Defend Yourself or be Defended by Competent Counsel

Slobodan Milošević, the former President of Serbia, learned the hard way the limits of the right of an Accused to defend himself as his own Counsel. This is a qualified right, which means that the Trial Chamber can and will intervene and appoint Counsel to assist or take over, if an Accused is unable to meaningfully act as his or her own Counsel. The ICTY has been relatively creative in fashioning remedies that strike an appropriate balance of allowing an Accused to conduct his own Defence and to protect the Accused from his own inability (or recklessness) to properly defend himself. Generally this has been achieved by appointing Stand-by Counsel, as well as providing the Accused with legal consultants to help prepare the Accused for the examination of witnesses and for the filing of submissions. It has also lead to abuses, but the blame there rests squarely on the Trial Chambers; a Presiding Judge (and his Wing Judges) ought to know how to control courtroom proceedings.

As for being represented by competent Counsel, all this means is that you have a Defence Counsel who meets the qualifications to be on the list of appointed Counsel. Of course, it is also difficult to judge the quality of lawyering without presuming to know the instructions of the Accused to his or her Defence Counsel and whatever strategies and tactics have been selected.

There may be very good reason not to go down a particular path that under normal circumstances would be expected. Suffice it to say, this right is about providing the Accused with a gladiator who will do his or her utmost in defending the Accused. This includes thoroughly preparing the case for trial, doing a comprehensive investigation, challenging all legal and factual issues, fearlessly battling the Prosecution during the trial, and, when necessary, standing up to the Judge and making the record, i.e., preserving all errors for appeal. This is also required of Defence Counsel during the appeal process.

9. Right to Confront Witnesses

Cross-examination has been characterised as the greatest legal engine to get to the truth. Confronting a witness means *to have a go* at the witness through a series of leading and non-leading questions to expose nuances, omissions, inconsistencies and lies. This right cannot be fully enjoyed by an Accused if his or her Defence Counsel is not provided with sufficient time and leeway to ask all relevant and necessary questions. This does not mean that witnesses should be abused, but likewise, they should not be shielded from a thorough test of their testimony. It is not a matter of tearing into witnesses to break them down, for that rarely ever happens outside of television and movie trials. It is about challenging the source of the evidence, the quality of the perceptions, the purity of the memory and any latent agenda (bias, interest in the outcome, etc.) that may influence the weight to be afforded, if any, to the witnesses' testimony. If a witness gives evidence for one side, the other side is entitled to test it. Simple.

To some Judges at the international tribunals, cross-examination is viewed as a game, associated with legal television shows, with all the melodrama played out in courtroom scenes. In the civil law system, the Judges ask the questions and generally, the Prosecution and Defence are restricted to non-leading questions. This may be fair in that system, where the Judges have access to the case file and are expected to have reviewed it carefully before the trial begins. In the adversarial systems, however, the Judges do not have access to the file and are certainly not in a position to know what is salient to the Defence case, and are thus incapable of appreciating some lines of the cross-examination. While Judges are entitled to ask questions, they certainly should not interfere with the cross-examination by jumping in and disrupting the flow of the questioning. But they do. There was a conflict at the ICTY from the very beginning due to civil law system Judges' lack of familiarity with the adversarial system chosen by the Tribunal at its inception. As a result we saw an effort to "combine the best of both systems", an effort that the

two systems had not accomplished for about 200 years for good reason. A combination does not work; they are separate and distinct systems with very different approaches.

10. Right to Present Witnesses

If the Prosecution is going to bring witnesses to prove the crimes that the Accused is alleged to have committed, then the Accused should have an equal opportunity to call witnesses in defending against the allegations, and in support of his or her theory of the case. Sauce for the goose is sauce for the gander.

Witnesses called by the Accused, as those called by the Prosecution, can only testify to what is relevant and necessary. The Trial Chamber must provide sufficient time for the Accused to present his or her evidence through the Defence witnesses. With large war crimes cases, some Trial Chambers try to control the proceedings by allocating specified hours to the parties to put on their cases. While it may sound reasonable, unless flexibility is shown – which is not always the case – the artificial time limits imposed by the Trial Chamber can effectively amount to a denial of the right to present a proper Defence case.

11. Right to Understand the Proceedings in one's Language

Josef K would not have fared any better if he had been accurately informed of the charges against him and if all proceedings were properly followed, if he did not understand the language in which the charges were drawn and the proceedings held. Having a right to be presented with the charging document or having the right to be present during the trial is meaningless unless the Accused is capable of understanding the charges and proceedings in a language he or she can follow. The Accused must be able to communicate with his or her Defence Counsel in order to receive advice and to provide instructions. The right to participate in one's Defence does not mean simply being present, it means having the capacity to participate meaningfully. To this end, it merits questioning the wisdom of not providing the trial transcripts in the language of the Accused. How can an Accused before the ICTY or any other international or hybrid tribunal expect to fully participate during all of the proceedings if he or she does not have actual access to the trial transcripts? This, in my opinion, has been a major shortcoming at the ICTY and one that calls into question whether some of the Accused who have decided to represent themselves enjoyed the same rights as those who selected to have Defence Counsel represent them. And what of the appeal proceedings: should the Accused not be afforded the opportunity to review the trial record in order to determine potential errors of fact? Is this also not an infringement on

the right to equality of arms? The Prosecution certainly benefits by having the trial transcript in a language that is not understood by the Accused.

12. Right Against Self-incrimination

The right not to answer questions that are likely to be incriminating is sacrosanct. Put differently, no one should be compelled to testify against himself or herself. Another way of putting it is the Prosecution, with all its resources and authority, must not only prove accusations beyond a reasonable doubt, but must also do so without coercing the Accused into being a witness for the Prosecution. Suffice it to say, the right against self-incrimination belongs to the Accused, as does the right to waive or not to waive this right. Before the international tribunals where the facts are voluminous and complex, the wiser course of action is for Defence Counsel to advise the Accused not to waive this precious right during the investigative stage, and only with the utmost care and deliberation, advise the Accused to take the stand.

13. Right to Appeal

The purpose of making a record of errors and being duly diligent during pre-trial and trial proceedings is to make sure all errors are properly preserved for higher court review. This right has its limits. Not every error can be appealed and not every error found to have been committed by the Trial Chamber will result in a reversal of the trial judgement. Appeals Chambers are reticent to second-guess a Trial Chamber's factual findings. Nonetheless, a good record will often expose a Trial Chamber's failure to consider relevant evidence which, had it been properly considered, might have resulted in a different outcome.

One drawback at the international tribunals is that there is no third instance appeal or *en banc* review. This means that the Accused is deprived of the opportunity to have a third instance review to reconcile inconsistencies in decisions, to provide big picture analysis and correct policy errors. It also means that there is no scrutiny of the Appeals Chambers. This, in my opinion, has led to a loss of confidence in some of the outcomes of the Appeals Chambers – which are often considered or perceived to be politically driven results.

14. Right Against Double Jeopardy

Unlike in some common law systems, where the Prosecution has no right to appeal against the acquittal at trial, the international tribunals, following the civil law system, do permit such appeals. Double jeopardy, i.e., not to be tried twice for the same offence, applies after the

conclusion of the second instance proceedings. The fact that an Accused has been tried and acquitted in national proceedings does not necessarily mean that he or she may not be exposed to criminal proceeding before an international tribunal. Generally this depends on the quality of the proceedings at the national court (bogus trials do not count as trials) and the actual charges that were tried.

15. *Right to Provisional Release*

The statutes of the international tribunals provide for provisional release while awaiting trial. At the ICTY, it is now even possible to be provisionally released while awaiting the trial judgement, even in the absence of any humanitarian reasons. During the first few years of the ICTY, it was an inevitable conclusion that no one would be provisionally released save for humanitarian reasons. However, with governments putting up guarantees for their citizens detained on charges of crimes against humanity and war crimes, the Chambers at the ICTY came around and began provisionally releasing Accused, albeit under some very strict conditions.

One new development that seems to be emerging at the ICC is to not arrest some Accused who voluntarily surrender, and thus to allow them to act as totally free citizens while awaiting trial. In other words, there are no provisional release conditions placed on them at all. This fully respects the presumption of innocence and allows the Accused to enjoy all civil and political privileges, including running for political office.

16. The Right to be Compensated if Wrongfully Arrested, Tried and Convicted

What of those Accused who spend three or four years in detention waiting for trial, a couple more years in trial, another year or so waiting for the judgement, and are acquitted with no appeal following, or convicted with a reversal of the entire judgement on appeal? Where do these Accused go to get back the years spent in detention? Where do they go to re-gain the loss of their personal dignity, not to mention the physical and emotional price paid during the meat-grinding pre-trial, trial, and appeal process? Where do they go for compensation for the pain and suffering and humiliation they and their families have had to endure? Nowhere. No accountability for such errors. With no accountability, there is no incentive for Prosecutors and Judges to ensure that such errors do not occur. The flip side is that were compensation to be had, Judges might be more inclined to convict all. A dubious possibility.

III. Conclusion

In a nutshell, these are the basic rights of an Accused. The legacy of the ICTY shows that for the most part these rights have been afforded to the Accused, albeit not always consistently, and occasionally begrudgingly. Were it not for dedicated Defence Counsel pressing for the fair trial rights of their clients, there is no telling what the ICTY legacy would be. Certainly it would be far worse.