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EVOLUTION OF INTERNATIONAL FAIR TRIAL STANDARDS FROM NÜRNBERG TO INTERNATIONAL CRIMINAL COURT

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1. Brief overview of international tribunals' development: from Nürnberg to ICC

Celebrating 75th anniversary of the London Charter from 1945, it is worth recalling the significance of the International Military Tribunal in Nürnberg and its impact on evolution of the international criminal law and jurisdiction.

In the spirit of the saying that "the history is always written by the winners", the winners of World War II laid the foundation of modern international criminal law by creating international tribunal as a result of their joint political agreement. The establishment of the International Military Tribunal in Nürnberg was thus considered consistent with the purpose of maintaining international peace and security.[3] The members of Nazi Party were prosecuted and punished for their involvement in committing most severe international crimes by the Allies' consent to align the various legal systems of the victorious powers. Holding the postwar trials in the city of Nürnberg was chosen because it was a city of annual Nazi propaganda rallies and the trials marked the symbolic end of Hitler's government.

Since the establishment of international tribunals, there is a new meaning of justice.[4] There are also considerations that the politics of war crimes trials are all around us and that quantitatively, failures in this field are more numerous than successes.[5] However, it is worth paying attention to the views that the link

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[3] Virginia Morris & Michael Scharf, An insider's guide to the International Criminal Tribunal for The Former Yugoslavia 18-22 (1995), cited by Michele Caianiello & Giulio Illuminati, From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court, 26 N.C. J. Int'l L. & Com. Reg. 407 (2000), p. 421.
[4] Norbert Ehrenfreund, The Nuremberg Legacy, How the Nazi war crimes trials changed the course of history, Palgrave Macmillan, 2007, p. 153.
[5] Caianiello & Illuminati, op. cit., p. 408.

of the international law and world policies might be understood as an attempt to establish the political nature of legal justice for violations of international humanitarian law.[6]

The roots of modern international criminal law are to be found after World War II, within The Declaration of the Four Nations signed on October 30, 1943, at the Moscow Conference by the United States, the United Kingdom, the Soviet Union and China.[7]

London Charter from 1945 is an Agreement for the prosecution and punishment of the major war criminal by the European Axis between the Government of the UK, USA, French Republic and SSSR.[8] According the London Charter, the German officers and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the free Governments that will be created therein. For the major criminals whose offences have no particular geographical location will be punished by the joint decision of the Governments of the Allies.

The International Military Tribunal (IMT) in Nürnberg was established by the London Charter with the purpose for trial and punishment of the major war criminals of the European Axis for the crimes against peace, war crimes and crimes against humanity. The procedure was consisted of the following phases: 1) prosecution's preliminary statement; 2) prosecution and defence evidence; 3) hearing the witness, 4) words of defence and charge, 5) statement of the accused and 6) verdict.[9] The first General Assembly of the United Nations unanimously affirmed the legal principles laid down in the Charter and Judgment of the IMT and had a crucial role in codification of the main legal principles of contemporary international criminal law and jurisdiction. The aggression, war crimes and crimes against humanity were punishable crimes for which even a head of state could be held to account.[10] All Nürnberg principles are very important legacy for the evolution of the international criminal justice,[11] specially Principle V – which stipulated that any person charged with a crime under international law has the right to a fair trial on the facts and law; and Principle VI regulates which crimes are punishable as crimes under international

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[6] More details: Kingsley Chiedu Moghalu, Global justice the politics of war crimes trials, Praeger Security International, Westport, Connecticut - London, 2006; Michael Salter, Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg, Controversies regarding the role of the Office of Strategic Services, Routledge, 2007;

[7] Dragan Jovašević, Nirnberška presuda – Sedam decenija kasnije, Iskustva i pouke iz prošlosti, Vojno delo, 7/2016, pp. 380-392.

[8] Signed in London, on 8th of August 1945, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

[9] R. Calvocaressi, Nuremberg: the facts and the consequneces, London, Maxwell, 1947, pp.78-96., cited by Jovašević, op.cit., p. 385

[10] Benjamin B. Ferencz, International Criminal Courts: The Legacy of Nuremberg, 10 Pace Int'l L. Rev. 203 (1998), p. 212.

[11] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf

law: (a) crimes against peace;[12](b) war crimes;[13] and (c) crimes against humanity.[14] A major legacy of Nürnberg is the codification of the crime of genocide and the expansion in judicial practice of the principle of individual criminal responsibility for violations of international humanitarian law.[15]

It is worth mention that The International Military Tribunal for the Far East (IMTFE)[16] is the lesser-known international Military Tribunal, which was created in Tokyo, pursuant to a 1946 proclamation by U.S. Army General Douglas MacArthur, Supreme Commander for the Allied Powers in occupied Japan. The IMTFE was almost a Nürnberg copy.[17] It was established for trial of the leaders of the Empire of Japan for joint conspiracy to start and wage war, conventional war crimes and crimes against humanity.[18] The IMTFE presided over a series of trials of senior Japanese political and military leaders pursuant to its authority "to try and punish Far Eastern war criminals.[19]

Crimes against civilians in Yugoslavia and Rwanda have led to the revival of the idea of prosecuting international mass crimes and establishment of the two international *ad hoc* criminal tribunals: The International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). However, one has to agree that the political situation under which military tribunals operated was entirely different from the situation in which international criminal tribunals functioned.[20] The jurisdiction of both *ad hoc* tribunals was limited to a specific period and territorial framework when and where the crimes occurred.

Before establishing of the ICTY, by the Resolution 780,[21] Security Council requested the UN Secretary-General to establish a Commission of Experts to provide evidence of "grave breaches of the Geneva Conventions and other violations of the international humanitarian law" committed in the territory of the former Yugoslavia.[22] On 26 October 1992 the UN Secretary-General appointed a five-

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[12] Which encompasses: (i) planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

[13] Which were defined as violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

[14] Encompasses the following crimes: murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

[15] UN Convention on the Prevention and Punishment of Genocide, 1948, Moghalu, op.cit., p. 31.

[16] Known also as the Tokyo Trial or the Tokyo War Crimes Tribunal.

[17] Ehrenfreund, op.cit., p. 113.

[18] Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, London and New York, 2008, p. 52.

[19] https://history.state.gov/; Jovašević, op.cit., p. 386; Ferencz, op.cit., p. 13.

[20] Hanna Kuczyńska, The Accusation Model Before the International Criminal Court, Study of Convergence of Criminal Justice Systems, C.H.Beck 2014, p. 6.

[21] Resolution 780 (1992) of 6 October 1992.

[22] Caianiello & Illuminati, op. cit., p. 424.

member Commission.[23] By UN Council Resolution 808/1993,[24] the Council called upon the Secretary-General to submit statute for an *ad hoc* international criminal tribunal within 60 days. On May 25, 1993, the Security Council, acting under Chapter VII of the UN Charter, as proposed by the UN Secretary-General in Resolution 827,[25] unanimously adopted the Statute of the International Tribunal.[26] The new court, with its seat in the Hague, was the first International Criminal Tribunal since Nürnberg.[27] The ICTY was not a European criminal justice institution, since the UN had created it as a subsidiary instrument for achieving and maintaining peace in the Balkans Region. The decision to establish this tribunal was not made by European states alone, but instead was supported by the international community and by the United States.[28]

One year after the establishment of the ICTY, the Security Council had created the International Criminal Tribunal for Rwanda (ICTR). In 1994, a brutal civil war erupted between rival ethnic tribes in Rwanda and there were reports that perhaps half-a-million Tutsi and their supporters were being savagely massacred by the dominant Hutu government. On 8 November 1994, the UN Security Council adopted Resolution 955 (1994), which established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. The Statute for the International Criminal Tribunal for Rwanda was adopted at the end of 1994.[29] It was more explicit in assuring that even in a civil conflict violations of the rules of war would not be tolerated, so the ICTR was authorized to prosecute for genocide, crimes against humanity and war crimes regardless of whether the strife was called an international conflict or a civil war. Only the specified crimes committed within the defined area during the year 1994 could be dealt with. The Rwanda court was thus a special

[23] The commission was chaired by Prof. Frits Kalshoven and, following the latter's resignation, by Prof. Cherif Bassiouni. The UN Secretary-General Boutros Boutros-Ghali report on the establishment of the Commission of Experts was submitted to the Council on 14 October 1992 (S/24657), https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf; Ferencz, op.cit., p. 221.
[24] Resolution 808 (1993), S/RES/808 (1993), 22.02.1993, https://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf
[25] Resolution 827 (1993) S/RES/827 (1993) 25 May 1993, https://digitallibrary.un.org/record/166567#record-files-collapse-header; Caianiello & Illuminati, op. cit., p. 420.
[26] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), art. 27, U.N. Doc.S/25704/Annexes (1993).
[27] Ferencz, op.cit., p. 19.
[28] Michael P. Scharf, Balkan Justice: The story behind the first international war crimes trial since Nuremberg 51-73 (1997), cited by Caianiello & Illuminati, op. cit., p. 409.
[29] https://legal.un.org/avl/pdf/ha/ictr/ictr_e.pdf.

tribunal of very limited jurisdiction.[30] The ICTR is a sort of "Siamese twin" to the ICTY, because the bodies share both an Office of the Prosecutor and an Appeal Chamber.[31]

There were several special courts established with the support of the UN but there are not subject of elaboration in the paper because they are different regarding many aspects: the purpose for their existence, way of establishing or assisting as well as their specific domestic-international mixture of jurisdiction– Special court for Sierra Leone (SCSL) in 2002,[32] The Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003,[33] and The Special Tribunal for Lebanon (STL) in 2009.[34]

The efforts to establish a permanent ICC started with the initiative within the League of Nations,[35] and were continued by the UN. Since World War II, only two international conventions have referred to an international criminal jurisdiction:[36] Article 6 of the 1948 Genocide Convention[37] and Article 5 of the 1973 Apartheid Convention.[38] The question of an international criminal court returned to the UN in 1989 after General Assembly held a special session on the problem of drug trafficking, at which Trinidad and Tobago proposed the establishment of a specialized international criminal court. The Rome Statute of the International Criminal Court (ICC) was adopted on 17 July 1998, and it entered into force on 1 July 2002.[39]

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[30] Ferencz, op.cit., p. 21.
[31] Caianiello & Illuminati, op. cit., p. 422.
[32] The Special Court for Sierra Leone was set up in 2002 as the result of a request to the UN in 2000 by the Government of Sierra Leone for "a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war. This was the first international court to be funded by voluntary contributions and, in 2013, became the first court to complete its mandate in 2013 and transition to a residual mechanism - The Residual Special Court for Sierra Leone to oversee the continuing legal obligations of the Special Court after its closure, http://www.rscsl.org/.
[33] The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a special Cambodian court which receives international assistance through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). The court can only prosecute two categories of alleged perpetrators for alleged crimes committed between 17 April 1975 and 6 January 1979, https://www.eccc.gov.kh/en.
[34] The Special Tribunal for Lebanon (STL) is a tribunal of international character, inaugurated on 1 March 2009, with a primary mandate to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 22 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others, https://www.stl-tsl.org/en.
[35] The efforts of the League of Nations were linked to a permanent international criminal court whose jurisdiction was limited only to enforcement of the 1937 Terrorism Convention, The Legislative History of the International Criminal Court, Second Revised and Expanded Edition, Volume 1, M. Cherif Bassiouni & William A. Schabas (Eds.), Leiden-Boston: Brill, Nijhoff, 2016, p. 60.
[36] Bassiouni & Schabas (Eds.), op.cit., p. 68.
[37] The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.
[38] Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, https://treaties.un.org/doc/Publication/UNTS/Volume%201015/volume-1015-I-14861-English.pdf;
[39] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en

ICC is a permanent international criminal court to "bring to justice the perpetrators of the worst crimes known to humankind – war crimes, crimes against humanity, and genocide", when national courts are unable or unwilling to do so.[40]

USA is not a State Party to the Rome Statute.[41] The trial of leading Nazis comes from the US and the chief American prosecutor in IMT in Nürnberg and the principal architect of the London Charter was Robert H. Jackson.[42] The United States Congress passed a law that regulated prohibition on cooperation with the ICC. Namely, the American Service-Members' Protection Act (ASPA) enacted August 2, 2002 is a US federal law that aims to protect US military personnel and other elected and appointed officials of the US government against criminal prosecution by ICC.[43] The prohibition is applying only on cooperation with ICC, but is not applying to cooperation with an ad hoc international criminal tribunal established by the UN Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict.

The ICC is the product of a major ideological or conceptual battle in international relations between visions of cosmopolitan world society and those of international society that favor interstate cooperation, but one predicated on sovereignty.[44] This is in the line with the consideration that within international criminal law the forms of criminal procedure shall be adapted in such a way to emphasized didactic function of the international criminal justice system and the need to reconcile that didactic function with the fact that international criminal proceedings are conducted primarily against nationals of small and weak states.[45]

2. Specific guarantees regarding rights of defence from Nürnberg to ICC

The Principle V of Nürnberg principles, is significant legacy for the defence rights within international criminal justice, since it regulates that any person charged with a crime under international

[40] Otto Triffterer & Kai Ambos, The Rome Statute of the International Criminal Court, A Commentary, Beck Hart, 2016.
[41] More details: David J. Scheffer, Twelfth Annual U.S. Pacific Command, International Military Operations and Law Conference, Honolulu, Hawaii, 23 February 1999; David J. Scheffer, 'The United States and the International Criminal Court, The American Journal of International Law, Vol. 93, No. 1 (Jan., 1999), pp. 12–22; Jason Ralph, Defending the Society of States - Why America Opposes the International Criminal Court and its Vision of World Society, Oxford University Press Inc., New York, 2007;
[42] Ferencz, op.cit., p. 9.
[43] https://legcounsel.house.gov/Comps/American%20Servicemembers'%20Protection%20Act%20Of%202002.pdf.
[44] Moghalu, op.cit., p. 129.
[45] Mirjan Damaška, Pravi ciljevi međunarodnog kaznenog pravosuđa, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15, no. 1/2008, pp. 13-33.

law has the right to a fair trial on the facts and law.[46] The criminal tribunals must respect the international human rights standards, both in order to spread human rights, and to guarantee their legitimacy.[47]

The "*equality of arms*" shall be used as a term that involves the balance between the rights of parties during proceedings, equal opportunities, means and resources, as well as budgetary issues for indigent defendants. However, equality before the law (stipulated both by the statutes of the ICTY[48] and ICTR[49]) should not be confused with 'equality of arms', which is a principle of procedural fairness.[50]

> *According the ICTY Appeals Chamber the principle of equality of arms is only one feature of the wider concept of a fair trial.* – (Kordić et al. (IT-95-14/2-A), Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, para. 5).

The integrity, legitimacy and acceptability of international criminal proceedings can be tested by compliance with human rights guarantees before ICTY[51] and ICTR[52] as *ad* hoc tribunals with limited geographical and temporal competences, and ICC[53] as permanent court with ratified competence by states parties of the Rome Statute.[54]

There are many guarantees within the right to a fair trial connected with the *equality of arms* of the accused person which are well established in the jurisprudence of the European court on human rights (ECtHR). However, there are some guarantees through the international criminal justice that are inevitable to be mentioned, but are unknown for the ECtHR. When comparing the guarantees of fair trial within the Article 6 of the European convention of human rights and fundamental freedoms (ECHR) which concerns the domestic legislation and guarantees within the international criminal tribunals and

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[46] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf

[47] Charles C. Jalloh & Amy DiBella, Equality of Arms in International Criminal Law: Continuing Challenges, University of Pittsburgh School of Law, Legal Studies Research Paper Series, Working Paper No. 2013-28, September 2013, pp. 251-287.

[48] ICTY Statute, Article 21(1).

[49] ICTR Statute, Article 20(1).

[50] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge University Press, 2006, p. 511.

[51] ICTY Statute, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; ICTY Rules of procedure and evidence (ICTY RPE), https://www.icty.org/x/file/Legal%20Library/Rulesprocedureevidence/IT032Rev50_en.pdf.

[52] ICTR Statute, http://www.icls.de/dokumente/ictr_statute.pdf; ICTR Rules of procedure and evidence (ICTR RPE), https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf

[53] ICC Rome Statute, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf; Rules of procedure and evidence ICC, https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf (ICC RPE); ICC Regulation of the Court, https://www.icc-cpi.int/Publications/Regulations-of-the-Court.pdf

[54] From the viewpoint of treaty law, the Rome Statute should be considered, qua a multilateral international treaty, Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, European Journal of International Law, 10 (1999), pp. 144–171, p. 145.

ICC, there are mainly two types: *traditional guarantees* –part of the Art. 6 of ECHR as well as of statutes and rules of procedure and evidence of *ad hoc* tribunals and ICC (promptly informed; effective participation; access to lawyer; defend oneself in person or through legal counsel; receive free legal assistance; right to remain silent; adequate time and facilities for preparing the defence; to call, examine and cross-examine witnesses etc.);[55] and *specific guarantees* – well known in the statutes and rules of procedure and evidence of the *ad hoc* tribunals and ICC (financial resources; evidentiary rules; defence investigation; defence disclosure; exclusion of evidence; state cooperation etc.).

This approach of dividing the guarantees is only with the purpose to emphasize the significance of the specific guarantees, since they can undermine the whole case regarding the possibility of the accused to undertake his own investigation and present his defence within international criminal proceedings.

> *The principle of equality of arms must be given a broader interpretation due to following issues: i) unlike domestic courts that had a capacity to control matters that could materially affect the fairness of the trial, the Tribunal is totally dependent upon the co-operation of states to hold its trials as it was states that were often in possession of evidence relevant to the trial and states could impede the efforts of counsel to secure that evidence; and ii) if the assistance of the Tribunal proved ineffectual, in that the party despite that assistance was still unable to obtain the evidence sought, that was a matter outside of the scope of the principle of equality of arms as a principle of procedural equality, although it was a factor that could go to the fairness of the trial.* - (ICTY Case (IT-94-1-A), Prosecutor v. Tadić, Appeal Judgment, 15 July 1999, pars 48-52).

It is quite strange to refer to the principle with the respect to the acts of the Prosecution, but there are such cases in ICTY case law.[56]

> *The application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community.* – (ICTY Case IT-95-14/1-T, Prosecutor v. Zlatko Aleksovski, Appeals Chamber Decision On Prosecutor's Appeal on Admissibility Of Evidence, 16 February 1999, Para. 25).

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[55] Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb), Updated on 31 December 2019, Council of Europe/European Court of Human Rights, 2020; Pieter Van Dijk et. al., Theory & Practice of the European Convention on Human Rights, 3rd Edn., Kluwer Law International, 1998; Javier García Roca & Pablo Santolaya, Europe of Rights: A Compendium on the European Convention of Human Rights, Martinus Nijhoff Publishers, 2012; William A. Schabas, The European Convention on Human Rights – A Commentary, Oxford University Press, 2015.

[56] William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge University Press, 2006, p. 514.

2.1. Proper investigation by the defence

The opportunity for proper investigation taken by the defence counsel is one of the prerequisites for fair trial. For effective investigative resources, the defence needs assets which improve the functioning capacity to search for, find and procure information and sources relating to the criminal charges against the accused.[57] Given that all accused are presumed innocent unless and until the prosecution meets its burden to prove guilt beyond a reasonable doubt, the accused's right to "adequate" time and facilities to prepare a defence refers not just to the preparation of an affirmative defence case but also to adequate time and facilities with which to investigate the credibility of and to prepare to meet the prosecution's evidence at trial.[58]

It is well known that the prosecution usually takes several years to collected sufficient evidence prior issuing an arrest warrant or deciding to indict a person. It is also axiom that after this measures taken by the prosecution, the defence begins its investigations. The person who is arrested or interrogated by the prosecution or police authorities has a right to a defence counsel.

> *It is argued that there is no equality of arms between the defence and the prosecution, because the defence lacks sufficient resources to conduct separate and proper investigations, whereas the prosecution has extensive resources*. – (Prosecution v. Tadić, Case No. IT-94-1-A, Judgement 15 July 1999, para. 30; Prosecution v. Milutinović et al., Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, Milutinović, Ojdanić and Šainovic, 13 November 2003, para. 11; Kayishema and Ruzindana, Case No. ICTR-95-1- T, Judgement, 21 May 1999, para. 56).

Due to material differences between the parties, the defence counsel has much limited possibilities to undertake investigations, so the defence should be allowed assistance: regarding its own investigator at the *locus delicti*;[59] for visiting a crime scene; for obtaining witnesses and other evidence.[60]

Proper investigation is closely linked with the financial resources of the defence. This issue reflect the effectiveness of the equality of arms principle since the prosecution *de facto* benefits more than the

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[57] Jalloh & DiBella, op.cit., p. 263.
[58] Colleen Rohan, The Defence in international criminal trials: important actor or necessary evil?, in Mayeul Hiéramente & Patricia Schneider (Eds.), The Defence in International Criminal Trials, Observations on the Role of the Defence at the ICTY, ICTR and ICC, Nomos Verlagsgesellschaft, Baden-Baden, Germany 2016, pp. 17-28, more details p. 19, note 16.
[59] The ICTR Appeals Chamber considered that the mere fact of not being able to travel to Rwanda is not sufficient to establish inequality of arms between the Prosecution and the Defence. The defence had failed to demonstrate that this deprived the accused of a reasonable opportunity to plead his case, Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 72.
[60] Jalloh & DiBella, op.cit., p. 268.

defence as a result of the imbalance of financial resources and political powers.[61] There are cases where defence was allocated far fewer investigators and their efforts to secure witnesses remained not enough effective. It is even impossible, for defence counsel to fulfill his duty to act diligently and promptly in order to protect the client's best interests without additional funds.[62] The tribunals have not accepted that equality of arms should also extend to financial resources.[63]

> *Equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resource*. – (Prosecutor v. Kayishema Case No. ICTR 95-1-A, Appeals Chamber Judgment, June 1, 2001, para. 69).

The defence filed a motion seeking an order that the Registrar allocates additional funds in respect of pre-trial preparation in relation to one of the accused persons since there was an extension of the duration of the pre-trial stage.

> *The Trial Chamber in denying the application for additional funds has held that the defence should demonstrate exceptional circumstances or events beyond its influence if such requests are to be granted. According to the Trial Chamber an extension of the duration of the pre-trial stage is not a sufficient reason for paying out additional legal aid funds unless justified by work which was not estimated when the original grant was made*. – (Prosecutor v. Milutinović et al., Case No. IT-99-37, Decision on Motion for Additional Funds of Jul 8, 2003).

> *The Trial Chamber has held that the rights of the accused and equality between the parties should not be confused with the equality of means and resources and that the rights of the accused shall in no way be interpreted to mean that the defence is entitled to the same means and resources as those available to the Prosecution.* – (Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4) (b) of the Statute of the International Criminal Tribunal for Rwanda, 5 May 1997 and Judgment of May 21, 1999, para. 60).

2.2. Number of witnesses or the amount of time for interrogation

[61] Geert-Jan Alexander Knoops & Robert R. Amsterdam, The duality of State cooperation within international and national criminal cases, Fordham International Law Journal, Volume 30, Issue 2, 2006, p.294.
[62] The duty to act diligently is among basic principles of codes of professional conduct of the Tribunals and ICC: Articles 3 and 11, The Code of Professional Conduct ICTY; Article 6, The Code of Professional Conduct ICTR; Article 5, The Code of Professional Conduct ICC.
[63] Geert-Jan Alexander Knoops, Redressing Miscarriages of Justice, Practice and Procedure in National and International Criminal Law Cases, Transnational Publishiers, Inc., 2006, p. 151.

Each party is entitled to call witnesses and present other evidence as well as to comment on the evidence of the contrary party, and has the right to secure the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[64] The principle of equality of arms may be at stake where the defence is required to limit the number of witnesses or the amount of time for their interrogation.[65]

> *The Trial Chamber has the authority to limit the length of time and number of witnesses allocated to the defense and must consider the time given to the accused to be reasonably proportional and objectively adequate to permit the accused to set forth his case in a manner consistent with his rights.* - (ICTY Appeals Chamber decision of *Prosecutor v. Orić*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, July 20, 2005, para. 8).

Important regarding the defence rights are: status conferences and pre-defence conferences. The purpose of the Status conference[66] is to organize exchange between parties and to ensure expeditious trial proceedings and trial, to review the status of the case and to allow the accused to raise issues including those regarding his mental and physical health. Pre-defence conferences could be held only upon discretion of the Trial Chambers in ICTY and ICTR before the commencement of the defence's case in order to streamline it. There are competences of the Chamber to order the defence to: i) shorten the estimated length of the examination-in-chief for some witnesses;[67] and ii) to reduce the number of witnesses.[68] ICC Chamber may call a Status conference and may order the defence the same issues covered by Regulation 54.

> *The Trial Chamber determined that the same appropriate method for limiting the length of the Prosecution case pursuant to Rule 73 bis by fixing the number of sitting days available to the Prosecution to lead its evidence would be appropriate for determining the length of the defence case.* - (Prosecutor v. Milošević, ICTY Case No. IT-02-54, Order rescheduling and setting the time available to present the defence case, 25 February 2004).

> *The Appeals Chamber cautions the defence that it should not abuse the right for re-examination of witnesses, but should focus on the relevant issues of its case*. - (ICTY Appeals Chamber decision of Prosecutor v. Orić, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, July 20, 2005, para. 10).

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[64] ICTY Statute - Article 21(4)(e); ICTR Statute - Article 20(4)(e); ICC Statute - Article 67(1)(e).
[65] J.P.W. Temminck Tuinstra, Defence counsel in international criminal law, Ph.D thesis, Faculty FdR: Amsterdam Center for International Law (ACIL), 2009, p. 160-161.
[66] ICTY RPE - Rule 65 *bis*; ICTR RPE - Rule 65 *bis*; ICC RPE – Rule 132.
[67] ICTR RPE - Rule 73 *ter* (C) and (D), ICTY RPE - Rule 73 *ter* (C).
[68] ICTR RPE - Rule 73 *ter* (C) and (D).

2.3. State cooperation

The effectiveness of the international criminal proceedings depends largely of inter-relation between state cooperation and equality of arms. In accordance with tribunal's Statutes, states have to cooperate in regard of investigation and prosecution of persons accused of committing serious violations of international humanitarian law. The cooperation includes, but is not limit to the following issues: identification and location of persons; taking of testimony and the production of evidence; service of documents; arrest or detention of persons; and/or surrender or the transfer of the accused to the tribunal. [69] Regarding the cooperation with *ad hoc* tribunals, the affected states had no choice but to cooperate due to the fact that the tribunals were established by the Security Council resolutions under Chapter VII of the Charter of the United Nations.

The situation is quite different with the ICC. Namely, the states voluntarily decide upon becoming a party to ICC Statute by its ratification and afterwards shall fully cooperate with the ICC in investigations and prosecutions of crimes within the ICC jurisdiction.[70] State cooperation can take several 'dimensions': (1) political in the sense of recognition, moral, financial and material support; and (2) legal in the sense of 'cooperation in criminal matters'.[71]

A meaningful example concerns the problem of cooperation of each State with the International Criminal Court. The ICC has the authority to request that a State execute certain acts or take particular measures. Namely, every State Party to Rome Statute must establish internal law relating the forms of cooperation with the ICC.[72]

However, states might be reluctant to provide sensitive information or material to the defence by explanation for protection national security interests. Hence, the inability of the defence to conduct meaningful on-site investigations is due to obstructive behavior by the state authorities as well as due to the lack of an institutional position of the defence within the framework of the international tribunals, which has resulted in difficulties in requesting state cooperation.[73] There is Tribunal's case law where the State authorities gave it neither an effective opportunity to gain access to defence witnesses, nor to the key sites in the region where the alleged crimes were committed. The judges recognized that states can impede counsel's efforts to obtain the evidence in their custody.

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[69] ICTY Statute Article 29; ICTR Statute Article 28.
[70] ICC Rome Statute Part IX.
[71] Maria Igorevna Fedorova, The Principle of Equality of Arms in International Criminal Proceedings, School of Human Rights Research Series, Volume 55, 2012, p.190; Sluiter, Göran, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Doctoral dissertation defended at Utrecht University on 25 September 2002, School of Human Rights Research, v. 16, Antwerpen; New York: Intersentia, 2002, p.6.
[72] Caianiello & Illuminati, op. cit., p. 436.
[73] Fedorova, The Principle of Equality of Arms, op.cit., p.6.

It contends that the uncooperative stance of the authorities in the Republika Srpska had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial…. The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. – (Prosecutor v. Tadić, IT-94-1-A, Judgement, 15 July 1999, paras. 31 and 50).

There is a possibility for each party to seek for assistance in accessing materials or documents so that the tribunal is issuing orders directed to states.[74] However, the assistance has subsidiary effect, since there are three preconditions: specificity, relevance and necessity.

Regarding the specificity the defence shall describe the requested documents or information in as much detail as possible.

There is a firm obligation placed upon those representing an accused person to make proper enquiries as to what evidence is available in that person's defence. – (Prosecutor v. Aleksovski**,** IT-95-14/1, Decision on prosecutor's appeal on admissibility of evidence, 16 February 1999, para. 18; Prosecutor v. Milutinović et al., IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, 17 November 2005; Prosecutor v. Hadžihasanvić et al., IT-01-47-PT, Decision on Defence Access to EUMM Archives, 12 September 2003).

Relevance means that the party must demonstrate direct and important value of the evidence, since the parties are not permit to conduct „*fishing expeditions*"[75] as an inquiry carried on without any clearly defined plan or purpose in the hope of discovering or gain useful information.

The requesting party must demonstrate that the evidence sought is of direct and important value in determining a core matter in the case and that the evidence is necessary for a fair determination of the matter. – (Prosecutor v. Kordić and Čerkez, IT-95-14/2-AR108bis, Decision on the Request of the Republic of Croatia for a Review of a Binding Order, 9 September 1999, para. 41).

The defence request of the materials to be produced by the States does not identify specific documents concerning the type of category; that the recordings requested are television recordings, video recordings or radio recordings; that it is broad in category thus lacks

[74] ICTR RPE - Rule 54; ICTY RPE Rule 54 and 54*bis.*
[75] Temminck Tuinstra, op.cit., p. 170; Fedorova, The Principle of Equality of Arms, op.cit., p. 198.

> *particularity and is indeterminate in number. The defence appears to be engaged in a fishing expedition.* – (ICTR, Prosecutor v. Nzirorera et al., Decision on the Request to the Governments of United States of America, Belgium, France and Germany for Cooperation, ICTR-98-44-I, 4 September 2003).

Necessity is fulfilled after the party prove due diligence in undertaken all necessary measures, activities or efforts to provide evidence but they remained unsuccessful and demonstrate a legitimate forensic purpose - that it has done all that it could to access the material without any assistance.

> *While interpreting the scope of due diligence, it is not required to exhaust all possible mechanisms before seeking intervention by the Tribunal*. - (*Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Proseper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi, 30 October 2008, para. 14).

The requesting party must explain the steps that have been taken by the applicant to secure the State's assistance and demonstrates that the evidence sought cannot reasonably be obtained elsewhere.

> *The Applicant cannot be said to have failed to take reasonable steps to secure voluntary cooperation by his refusal to accept the States' conditional offers.* – (Prosecutor v. Brđanin & Talić, Decision on Interlocutory Appeal, 11 December 2002, para. 50; Prosecutor v. Milutinović et al., IT-05-87-PT, T. Ch., Decision on Second Application of Dragoljub Ojdanić for Binding orders pursuant to Rule 54bis, 17 November 2005, para. 24).

In regard of equality of arms requirements, the defence can request ICC Chamber assistance in accordance with ICC Statute Article 57(3)(b). ICC Statute Article 57(3)(a)&(b) authorizes the Chamber, at the request of the Prosecutor, to issue orders and warrants necessary for investigation purposes, while all measures have to be authorized and supervised by national authorities. Unfortunately, this provision can be on detriment of defence since there is no state duty to cooperate with the defence.

2.4. Disclosure of evidence

International criminal Tribunals rules on pre-trial disclosure steer a middle course between civil law legal system (where judges has primary control over the evidence) and common law jurisdictions (the parties are required to disclose).[76] The legal framework of the tribunals presents two types of disclosure

[76] Combs, Nancy Amoury, "Evidence", College of William & Mary Law School, Faculty Publications, Paper 1178, 2011, p. 324.

obligations: (1) a positive obligation to disclose certain materials; and (2) an obligation to facilitate the inspection of certain materials by the other party.[77] The ICC rules regarding disclosure cover the pre-trial procedure and the trial procedure relating to prosecution witnesses and inspection of material in possession or control of the Prosecutor.[78]

Since the Prosecution is obliged for collecting both incriminating and exculpatory evidence, the disclosure regime of the Tribunals does not permit an accused blanket access to materials in the possession of the prosecution.[79] Prosecution before the ICC is based on the principle of opportunity, so the Prosecutor's discretion is extremely broad and may prove difficult to control.[80]

> *Tribunal has characterized the prosecution as a "minister of justice" with an overriding obligation of ensuring fairness in its proceedings*. – (Prosecutor v. Brđanin & Talić, Decision on Interlocutory Appeal, 11 December 2002)

Prosecutor has more extensive obligations regarding disclosure of evidence than the defence and there are specific rules regarding obligation of the Prosecution to disclose exculpatory materials in its possession to the defence.[81]

> *The disclosure to the Defence of evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused is one of the most onerous responsibilities of the Prosecution*. – (Prosecutor v. Brđanin, IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can be Resolved, 30 October 2002, para. 23).
>
> *The Prosecution's obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute itself*. – (Prosecutor v. Kordić and Čerkez, IT-95-14/2-A, Decision on Motions to Extend Time For Filing Appellant's Briefs, para. 14).
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> *The responsibility for disclosing exculpatory evidence rests solely on the Prosecution and that the determination as to what material meets Rule's 68 disclosure requirements falls within the Prosecution's discretion*. – (Prosecutor v. Blaškić, IT-95-14, Decision on Production of Discovery

[77] Masha Fedorova, Disclosure of Information as an Instrument Ensuring Equality of Arms in International Criminal Proceedings, in Mayeul Hiéramente/Patricia Schneider (Eds.), The Defence in International Criminal Trials, Observations on the Role of the Defence at the ICTY, ICTR and ICC, Nomos Verlagsgesellschaft, Baden-Baden, Germany 2016, pp. 115-148, p.119
[78] Rules 76-84, RPE ICC.
[79] ICTY/ICTR RPE Rule 66(A), ICC RPE Rule 76 .
[80] Caianiello & Illuminati, op. cit., p. 439
[81] ICTY/ICTR RPE Rule 68

> Materials, 27 Jan. 1997, para. 50.1; ICTY, Prosecutor v. Krstić, Appeals Chamber, Decision on Prosecution's Motion to Be Relieved of Obligation to Disclose Sensitive Information Pursuant to Rule 66 (C), IT-98- 33-A, 27 March 2003, par. 4.)

Rule 68(v) ICTY RPE and Rule 68(E) imposes a continuing obligation upon the prosecution to disclose all exculpatory material known to the prosecution notwithstanding the completion of the trial and any subsequent appeal. When applying to the Trial Chamber to evaluate prosecution's disclosure practice the defence needs to meet a certain threshold: of (1) defining or identifying with reasonable specificity the material sought; (2) that the material is in the possession or control of the prosecutor; and (3) that the material is of potentially exculpatory nature.[82]

> *The duty of the Prosecution to disclose exculpatory material arising from related cases and that this duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned* – (Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 267).

> *During Appeal proceedings it came to light that particular documents were in fact in the possession of the Prosecution, but the Prosecution did not revealed this to the defence. The Prosecution has been unable to give the Appeals Chamber a reasonable explanation of its failure to disclose the material during trial*. (Prosecutor v. Kordić and Čerkez, Judgement, 17 December 2004).

The ICC Appeal Chamber held that the Pre-Trial Chamber shall make an assessment of the potential relevance of the information to the Defence on a case by case basis.[83]

> *If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care… and each individual document purporting to contain potentially exculpatory material must be individually examined by the Chamber in order to enable to it assess whether the trial will be "conducted with full respect for the rights of the accused" in accordance with Article 64(2) of the Statute*. – (Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Tnal Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC01/04-01/07-476, paragraph 57).

[82] Fedorova, Disclosure, op.cit., p.126

[83] ICC, Prosecutor v. Lubanga Dyilo, Decision on the Consequences of non-disclosure of Exculpatory Materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 89.

There were complains of the defence counsels that the Prosecution's failure to comply with disclosure obligations should be considered as a violation of fair trial and prejudices the rights of an accused or defendant so egregiously that it impacts on a court's adverse decisions and judgments of conviction against a defendant.[84]

> *There is an Appeals Chamber's consideration that the Prosecution's obligation to disclose exculpatory material is unequivocally essential to a fair trial.* - (Karemera et al., ICTR-98-44-AR73.7, Appeals Chamber, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9; Ndindiliyimana et al., ICTR-00-56-T, Trial Chamber, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12).

> *Disclosure at the time of cross examination is insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.The Appeals Chamber founds that the Trial Chamber erred by narrowly construing the Prosecution's disclosure obligations under Rule 66(B).* – (ICTR, Prosecutor v. Bagasora, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, IT-98-41-AR73, 25 September 2006, paras. 12 and 13).

There was a possibility for "electronic disclosure" of materials by the prosecution of ICTY and ICTR to the defence by establishing Electronic Disclosure System (EDS).[85] Although the idea was to simplify the disclosure process, this purpose was not met and the utility of the EDS for the defence in some cases was almost impossible.[86]

> *The EDS contains 34 collections of documents comprising around 4 million pages, the documents placed in the EDS are separately 'indexed', but only by the name of the collection in which they are placed; and that "no index presently exists of individual documents within the 34 collections,*

[84] More details: Gabrielle McIntyre, Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY, The International Society for the Reform of the Criminal Law, 17th Annual Conference, Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps, Workshop 303 – Ethics, The Hague, Netherlands, 24-28 August, 2003; Beth S. Lyons, Prosecutorial Failure to Disclose Exculpatory Material: A Death Knell to Fairness in International (and all) Justice, 3rd International Criminal Defence Conference, "International Criminal Justice: Justice for Whom?" held in Montreal, Quebec, Canada, 29 September 2012.

[85] ICTY Practice Direction on 'Establishing Restrictions on Dissemination of Material Disclosure to the Defence by the Prosecutor on the 'Electronic Disclosure System', IC/219/Rev/1, 6 November 2003.

[86] Kate Gibson & Cainnech Lussiaà – Berdou, Disclosure of evidence, in Principles of evidence in international criminal justice, (K.A.A.Khan & C.Buiman & C.Gosnell Eds.), Oxford University Press, 2010, pp. 306-374, p. 314.

but work is underway to provide an index of about half of the individual documents in these collections", which will not be completed until September 2005 at the earliest. - (Prosecution v. Halilović (IT-01-48-T), Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 July 2005)

Upon defence request, the Prosecutor shall permit the defence to inspect books, documents, photographs and tangible objects in the Prosecutor's custody or control.[87] The prosecution, on request, must permit the defence to inspect the documents in its possession or under its control that (1) "are material to the preparation of the defence," and those that (2) "are intended for use by the Prosecutor as evidence at trial.[88]

*The Trial Chamber could not place a deadline on the disclosure of material falling under Rule 66(B) because the defence can make requests for such material at any stage. – (*Prosecutor v. Karadžić, IT-95-5/18-T, Decision on Accused's Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para.9, Prosecutor v. Ngirabatware, ICTR-99-54-T, Decision on Trial Date, 12 June 2009, para. 43; Prosecutor v. Lubanga Dyilo, ICC- 01/04-01/06-718, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, PTC I, para. 4).

There is a defence obligation to provide the Prosecutor with copies (ICTY) of statements of the witnesses it intends to call to testify and other written statements (ICTY RPE - Rule 67(A)(ii)). In accordance with ICC RPE - Rule 78, the defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial. Only the communications between the lawyer and the client cannot be subject of defence disclosure.

2.5. Exclusion of evidence

The Nürnberg Tribunal was not bound by technical rules of evidence and could admit any evidence that it deemed to have probative value.[89]

The correct balance must be maintained between the fundamental rights of the persons accused for serious violations of international humanitarian law and the essential interests of the international community. There might be decision for exclusion of evidence for two main reasons: for ensuring fair trial; or due to improperly obtained evidence.

[87] ICTY/ICTR RPE - Rule 66(B) and ICC RPE - Rule 77;
[88] Fedorova, Disclosure, op.cit., p. 120.
[89] Caianiello & Illuminati, op. cit., p. 414.

A Chamber shall exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

> *It is part of the duties of the Trial Chamber, according to Article 20 of the Statute, to ensure that a trial is fair and expeditious. It is, therefore, within the competence of the Trial Chamber to exclude any piece of evidence sought to be introduced by the Prosecution, if indeed it seeks to do so, without having given the Defence the opportunity to examine that piece of evidence beforehand and thereby enable it to prepare a proper defence.* – (Prosecutor v. Mucić et al., ICTY Case No.: IT-96-21-T, Decision on motion by the defendant on the production of evidence by the prosecution, 8 September 1997, para. 9).

The Chamber shall exclude an evidence if the defence was not been provided with the procedural opportunity to challenge that evidence.

> *The Trial Chamber held that the probative value of the evidence is so reduced that it is "substantially outweighed by the need to ensure a fair trial"... since the defence would have no opportunity of cross-examining any witness about the reports, which are based on a variety of sources.* – (Prosecutor v. Kordić and Čerkez, ICTY, Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts, 1 December 2000, para. 40).

According the Article 69 - ICC RPE, the violation of a legal prescription does not suffice to exclude evidence, because it is necessary to verify that the violation has actually caused harm.[90]

Exclusion of improperly obtained evidence[91] is reflecting the principle that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission would seriously damage the integrity of the proceedings.

> *The Trial Chamber is of the opinion that Rule 95 is a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision. The Prosecution has not proved beyond reasonable doubt that the interview was free and fair, and if that is right the only proper course is to exclude the evidence because it is in breach of Rules 89(D) and 95.* – (ICTY Prosecutor v. Mucić et al., Decision on Zdravko Mucic's motion for the exclusion of evidence, IT-96-21-T (RP D5082-D5105), 2 September 1997).

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[90] Caianiello & Illuminati, op. cit., p. 439.

[91] ICTY and ICTR RPE – Rule 89(D) regulates exclusionary discretion; ICTY and ICTR RPE - Rule 95 regulates mandatory exclusion.

> *The Trial Chamber held that statements which are not voluntary, but rather are obtained by means including oppressive conduct, cannot be admitted pursuant to Rule 95.* – (Prosecutor v. Martić, ICTY, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para. 9).

More comprehensive seems to be ICC Statute provision of Article 69(7), according which evidence obtained by means of a violation of ICC Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. The Article 69(7) does not imposes the automatic exclusion of obtained evidence so it should be interpreted within the meaning of ICC RPE Rule 63(3) - a Chamber shall rule on an application of a party or on its own motion concerning admissibility when it is based on the grounds set out in Article 69(7).

3. Concluding remarks

There is a significant evolution of procedural rules relating to the international criminal procedure from Nűrnberg to ICC. It is so obvious having in mind that the military tribunals (IMT and IMTFE) had only basic and general rules (IMT total of 11 rules, IMTFE total of 9 rules) so that all procedural problems were left to be resolved by the decisions and ruling of the judges. Unlike this, there are detailed rules and articles in ICTY and ICTR statutes and rules of procedure and evidence, as well as in ICC, where the procedure is based upon Rome Statute, Rules of procedure and evidence and Regulations of the Court.

There are many discussion regarding the model of the procedure before ad hoc tribunals and ICC, which are quite different from the procedure before IMT and IMTFE. The “model of the procedure” shall be understood as set of basic components of a system that allows differentiating it from other systems, with a structure that is coherent and complete,[92] although often is referred to as “cultural and legal hybrid”,[93] or the procedural model that can be characterized as an "intermediate solution" between the continental and the Anglo-American systems.[94] The characteristics of the procedure before the *ad hoc* tribunals led to the conclusion that it is a model of procedure with adversarial inclination.[95] When

[92] Kuczyńska, op.cit., p. 4.
[93] Cryer R & Friman H & Robinson D & Wilmshurst E, An introduction to international criminal law and procedure, 2nd Edn., Cambridge University Press, 2010, p. 427.
[94] Caianiello & Illuminati, op. cit., p. 432.
[95] Bassiouni M.C. & Manikas P., The law of the International Criminal Tribunal for the former Yugoslavia, Transnational Publishers, New York, 1996, p. 863.

analyzing the ICC procedural features, the inevitable conclusion is that two legal traditions, which had previously been considered irreconcilable, were reconciled in the proceedings before the ICC.[96]

When analyzing the fair trial guarantees within international criminal justice system, one must not underestimated the fact that the Defence is not even an organ of the *ad hoc* tribunals and ICC, while there are special Prosecution offices in all of them. The organs of the ICTY and ICTR were the Chambers, comprising three Trial Chambers and an Appeals Chamber; the Prosecutor; and a Registry, servicing both the Chambers and the Prosecutor. The ICC has the same organs as *ad hoc* tribunals and The Presidency. In 2002, in accordance with decisions taken by the Plenary of judges, the ICTY established an Association of Defence Counsel practicing before the ICTY (ADC-ICTY), which in 2017 had officially renamed itself to Association of Defence Counsel practicing before the International Courts and Tribunals (ADC-ICT).[97]

Equality of arms is an essential element of the fair trial that encompasses a number of component rights. In international criminal justice there is a great and actual inequality of the parties in their ability for identifying, locating and accessing evidence relevant to the case. However, principle of equality of arms has been given a more liberal interpretation within international criminal justice and it is subjected to teleological interpretation depending on the nature of the criminal proceedings.

Although the equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case, in terms of procedural equity, the ICTY case-law shows that this does not mean that the defence shall be necessarily entitled to precisely the same amount of time or the same number of witnesses as the prosecution.

The guarantees of a fair trial have the same name but different content in the system of international criminal justice. In this sense, the term "adequate facilities" for the preparation of the defence in international tribunals and ICC has a completely different meaning because the financial resources are of outmost importance. A common criticism of *ad hoc* tribunals has been the disparity in the allocation of resources and insufficiency of funds allocated to the defence as well as other very important issues: inadequate or no access to important witnesses; limitations on cross-examination due to increasing use of written statements; undermining of the right to a public trial by the overuse of closed, private sessions; lack of cooperation from relevant government and police agencies, late disclosure from prosecutors or the failure to disclose exculpatory evidence.[98] There are proposals that judges could compensate the inequality between the prosecution and defence by excluding prosecution evidence that was gained through the cooperation of a state authority, if these authorities consistently refused to cooperate with the

[96] Kuczyńska, op.cit., p. 12.
[97] https://www.adc-ict.org/; http://www.haguejusticeportal.net/index.php?id=2166.
[98] Principles of Evidence in International Criminal Justice, K. Kahn & C Buisman & C Gosnell, eds (Oxford Press, 2010); Fedorova, Disclosure, op.cit., p. 115-148.

defence.[99] Although quite acceptable, we have to admit that there are no grounds to believe that something like this can be operational in the practice due to the findings that the court has a limited role to ensure equality between the defence and the prosecution if the disparity results from external factors such as a lack of state cooperation.

The establishment of the ICC is a logical consequence of decades of efforts for existence of a permanent international criminal court with defined competence and rules of procedure and evidence regardless of the affected state. This is the only approach that enables legal certainty and respect for the principles of *nullum crimen nulla poena sine lege* and avoid the danger of applying *ex post festum law*.

Prof. Gordana Lažetić, Ph.D

EVOLUTION OF INTERNATIONAL FAIR TRIAL STANDARDS FROM NÜRNBERG TO INTERNATIONAL CRIMINAL COURT

(Summary)

The paper deals with the aspects relating to the evolution of the international fair trial standards. The roots of modern international criminal law are to be found after World War II. The Principle V of Nürnberg principles, is significant legacy for the defence rights. The major legacy of Nürnberg was the codification of the crime of genocide and the expansion in judicial practice of the principle of individual criminal responsibility for violations of international humanitarian law. The jurisdiction of both ad hoc tribunals was limited to a specific period and territorial framework when and where the crimes occurred.

Equality before the law should not be confused with 'equality of arms'. The guarantees of a fair trial have the same name but different content in the system of international criminal justice. The paper is dealing with the so called specific guarantees – well known in the statutes and rules of procedure and evidence of the tribunals and ICC related with the financial resources; evidentiary rules; defence investigation; defence disclosure; exclusion of evidence and state cooperation. The opportunity for proper investigation taken by the defence counsel is one of the prerequisites for fair trial. The effectiveness of the international criminal proceedings depends largely of inter-relation between state cooperation and equality of arms since the states might be reluctant to provide sensitive information or material to the defence by explanation for protection national security interests. Disclosure regime is of outmost importance for the defence and complains of the defence counsels that the Prosecution's failure to

[99] Temminck Tuinstra, op.cit., p. 168.

comply with disclosure obligations should be considered as a violation of fair trial. Due to the correct balance between the fundamental rights of the persons accused for serious violations of international humanitarian law and the essential interests of the international community, the evidence might be excluded for two main reasons: for ensuring fair trial; or due to improperly obtained evidence

There is a significant evolution of procedural rules relating to the international criminal procedure from Nűrnberg to ICC. Establishment of ICC as a permanent international criminal court enables legal certainty and respect for the principles of nullum crimen nulla poena sine lege and avoid the danger of applying ex post festum law.

Key words: equality of arms, investigation, state cooperation, evidence, disclosure, exclusion of evidence, international criminal law

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