

# The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY

By  
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## INTRODUCTION

The right to a fair trial is an ancient one and is synonymous with the trial process itself. It would be nonsense to speak of the permissibility of an unfair trial. After centuries of implementation in practice, the right to a fair trial, which was finally codified in the international human rights instruments following World War II, is now universally recognized.

In this article, I will endeavour to trace the right to a fair trial from its early roots up to the present day. Understanding its long history and realizing how little it has changed over the centuries clearly demonstrate its fundamental character and its status as a rule of customary international law. I will also consider whether it qualifies as a peremptory norm of general international law or *jus cogens*. Furthermore, a brief survey will be undertaken to show how the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has integrated this right into its legal system.

## EARLY REFERENCES TO THE RIGHT TO A FAIR TRIAL

The roots of the basic principles of the right to a fair trial can be traced all the way back to the *Lex Duodecim Tabularum*—the Law of the Twelve Tables—which was the first written code of laws in the Roman Republic around 455 B.C.<sup>2</sup> Contained within these laws was the right to have all parties present at a hearing,<sup>3</sup> the principle of equality amongst citizens,<sup>4</sup> and the prohibition

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2. The first ten tablets were published around 455 B.C., with the last two around 449 B.C.

3. Table 2, Law 1.

against bribery for judicial officials.<sup>5</sup> These principles can all be found in modern jurisprudence and are essential to the conduct of a fair trial. In modern times, they refer to the right to be heard and to defend oneself, the right to be subject to the rule of law, and the right to have one's case adjudicated by an independent and impartial tribunal.

Another important historical event in the development of the right to a fair trial is the Magna Carta. In forcing King John to sign the *Magna Carta Libertatum* in 1215, the English nobles ratified the principle that even a King's will could be circumscribed by law.<sup>6</sup> In doing so, the Magna Carta paved the way for later developments during the Age of Enlightenment that would seek to subject governments to the will of the people.<sup>7</sup>

The Magna Carta proclaimed that:

No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land.<sup>8</sup>

Thus, the Magna Carta—like the Twelve Tables—recorded in writing a set of clearly formulated rights. Subsequently, courts have looked to the Magna Carta in articulating rights such as trial by jury, habeas corpus, abolition of arbitrary imprisonment, and equality before the law.<sup>9</sup> The right to trial by jury is clearly expressed in the text of the Magna Carta. It arose from the importance of providing the accused with an opportunity to be judged by one's peers, which is a safeguard against “overzealous” prosecutors and “eccentric” judges, a protection against arbitrary government power.<sup>10</sup> These same justifications are used today to defend the right to trial by jury in common law countries.

Another important historical reference to the right to a fair trial is contained in the Treaty of Arbroath of 1320. This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence of a contract between Robert the Bruce and his subjects. This declaration helped to articulate the notion of equality for all,<sup>11</sup> a principle that was later replicated in other developing democracies, such as France and the twelve American colonies of the British Empire. Historians have linked the United States Declaration of Independence to the Treaty of Arbroath.<sup>12</sup> François-Marie Arouet, one of the

4. Table 9, Law 1.

5. Table 9, Law 3.

6. ANN LYON, *CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM* 39 (Cavendish Publishing 2003).

7. SAMUEL WALKER, *CIVIL LIBERTIES IN AMERICA: A REFERENCE HANDBOOK* 147 (ABC-CLIO, Inc. 2004).

8. Magna Carta, ¶ 39, available at <http://www.britannia.com/history/docs/magna2.html>.

9. See generally MCKECHINE, WILLIAM SHARP, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (James Maclehose and Sons 1914).

10. [\*Duncan v. Louisiana\*, 391 U.S. 145, 155-56 \(1968\)](#).

11. ROSALIND MITCHISON, *A HISTORY OF SCOTLAND* 38-55 (3rd ed. 2002) (1970).

12. See generally LINDA MACDONALD-LEWIS, *WARRIORS AND WORDSMITHS OF FREEDOM: THE BIRTH AND GROWTH OF DEMOCRACY* (Luath Press Limited 2009).

leading civil liberties authors of the Enlightenment period—who is better known by his pseudonym “Voltaire”—said, “We look to Scotland for all our ideas of civilisation.”<sup>13</sup> In modern jurisprudence, the notion of equality for all citizens in terms of fair trial rights has been interpreted to mean both the general prohibition of discrimination and the promise of equality between the parties.<sup>14</sup>

The scope of the right to a fair trial was further developed and codified during the period of the Enlightenment of the 18<sup>th</sup> Century, when the political focus of government began to shift away from an all powerful sovereign and towards the will of the people, and the limits of governmental power began to be restructured accordingly. This restructuring often took the form of written laws, one of which embodied the right to a fair trial.

In 1791, the United States picked up the mantle of the right to a fair trial by adopting the 6<sup>th</sup> Amendment to the United States Constitution. This Amendment provides a criminally accused the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation against one; to be confronted with the witnesses against one; to have compulsory process for obtaining witnesses in one’s favor; and to have the assistance of counsel for one’s defence.<sup>15</sup> In interpreting the 6<sup>th</sup> Amendment, the United States Supreme Court has held that all proceedings before a court must be fair and that fairness is a relative, not absolute, concept.<sup>16</sup> As stated by that Court:

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial.<sup>17</sup>

Another important historical event was the French Revolution. Articles 6 through 9 of the French Declaration of the Rights of Man, adopted in 1789, require a presumption of innocence and prohibit detention unless determined by law. These articles have been construed as the basis for fair trial rights in France’s subsequent Constitutions.<sup>18</sup>

It is against this historical backdrop that I now turn to the right to a fair trial in our own age.

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13. Voltaire, *cited in* Jose Manuel Barroso, *Address at the Enlightenment Lecture Series, Edinburgh University* (Nov. 28, 2006), available at [http://www.eu-un.europa.eu/articles/fr/article\\_6525\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_6525_fr.htm).

14. See STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 94-95 (Oxford University Press 2005).

15. U.S. CONST. amend. VI. Although the right to a fair trial is not explicitly contained within the text, Article 6 allows the accused in criminal prosecutions the right to a speedy trial which in turn has been held by the United States Supreme Court to be a due process right. *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

16. *Snyder v. Massachusetts*, 291 U.S. 97, 116-17 (1934).

17. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

18. RHONA K.M. SMITH, *INTERNATIONAL HUMAN RIGHTS* 6 (Oxford University Press 2007).

## MODERN HUMAN RIGHTS INSTRUMENTS

Article 18 of the American Declaration of the Rights and Duties of Man, adopted in May 1948, entrenches the right to a fair trial.<sup>19</sup> It is not well known that this Declaration predates the Universal Declaration of Human Rights. In fact, this is often overlooked but I would like to emphasize it here.

The Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in December 1948<sup>20</sup>, provides in Article 10 that:

[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, entitles an accused to a fair and public hearing within a reasonable time period, to prompt information on the trial in a language which he understands, to confront witnesses testifying on behalf of the prosecution, to order the appearance of witnesses to testify on his behalf, and to legal assistance.

In 1966, the International Covenant on Civil and Political Rights was adopted. It entered into force in 1976 and thus far has been ratified by 164 States, including most significantly the newly independent states from Africa and the Caribbean, an endorsement that indicates its truly international character. Article 14 of the Covenant affords the full panoply of minimum rights to a criminally accused person. The United Nations Human Rights Committee has been interpreting and clarifying the scope of the Convention for several decades now.<sup>21</sup>

I turn now to the American Convention on Human Rights, adopted in 1969. Article 8 of this Convention provides the full spectrum of rights to a criminally accused person, comparable to the European Convention.

The African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity in 1981, also codifies the right to a fair trial. Article 7 contains many of the rights included in other human rights instruments, such as the right to an appeal, the presumption of innocence, and the right to be tried within a reasonable time period by an impartial court or tribunal. While this Article does not explicitly refer to other relevant components of the right to a fair trial as mentioned in the Covenant on Civil and Political Rights or the

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19. American Declaration of the Rights and Duties of Man, Mar. 30- May 2, 1948, *reprinted in Handbook of Existing Rules Pertaining to Human Rights*, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979).

20. The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

21. *Wolf v. Panama*, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 (1992) (the accused refused attendance to relevant proceedings); *Thomas v. Jamaica*, Communication No. 272/1988, U.N. Doc. CCPR/C/44/D/272/1988 (1992) (the accused was not informed of his appeal date until after it had taken place).

Universal Declaration of Human Rights, it is clear that the provisions are to be interpreted broadly to include various components as spelled out in a number of international instruments, including the Universal Declaration of Human Rights.<sup>22</sup>

#### WHAT IS FAIRNESS?

Before examining the status of fair trial rights under customary international law, it is important to define the concept of fairness. To be fair is to be just and equitable.<sup>23</sup> What fairness does *not* require is perfection. Indeed, perfection is something more for the province of gods, than for us human beings. As Lord Diplock said in his celebrated *dictum*, “[t]he fundamental human right is not to a legal system that is infallible, but to one that is fair.”<sup>24</sup>

This principle has been confirmed time and again at the ICTY, for example by the legendary Judge Shahabuddeen, who stated in a separate opinion in the trial of Slobodan Milošević that:

the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him.<sup>25</sup>

#### FAIR TRIAL RIGHTS AS CUSTOMARY INTERNATIONAL LAW AND *JUS COGENS*

That the provision of Article 14 on the right of an accused to a fair trial reflects customary international law is beyond dispute. That is to say, there is widespread state practice supported by *opinio juris* to warrant this conclusion.<sup>26</sup>

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22. Ibrahim Ali Badawi El-Sheikh, *Preliminary Remarks on the Right to a Fair Trial Under the African Charter on Human and People's Rights*, in *THE RIGHT TO A FAIR TRIAL* 328-29 (David Weissbrodt & Rudiger Wolfrum eds., 1997). Moreover, Article 7 should be read in conjunction with Article 60, which clearly indicates that the application of the Charter should be guided by “the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights.” The African Commission, the body tasked with the power to interpret the Charter, adopted a resolution in March 1992 on the “Right to Recourse Procedure and Fair Trial,” which further expanded on this right.

23. *CONCISE OXFORD DICTIONARY* 510 (10th ed.).

24. *Maharaj v. Attorney-General of Trinidad and Tobago*, Privy Council, (1979) AZ 385; (1978) 2 AER 670; (1978) 2 WLR 902.

25. *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 73.4, Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, ¶ 16 (Sept. 30, 2003); *see also* *Prosecutor v. Pauline Nyiramasuhuko and Others*, Decision in the Matter of Proceedings under Rule 15bis (D), Joint Case No. ICTR-98-42-A15bis, Dissenting Opinion of Judge David Hunt, ¶ 16 (Sept. 24, 2003) (“There may be many difficulties placed in the way of an accused in the course of applying an ‘interests of justice’ test in various situations, so that the trial is not a perfect one (such as the need to protect victims and witnesses) but the absence of perfection does not mean that the trial will not be a fair one. However, the interests of justice cannot be served where the accused is denied a fair trial.”).

26. *North Sea Continental Shelf* (Federal Republic of Germany v Denmark; Federal Republic

However, whether that rule has achieved the status of a peremptory norm, *jus cogens*, may be open to question. Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty is void according to the principle of *jus cogens* if it conflicts with a peremptory norm of general international law from which no derogation is permitted. The determination of a norm that constitutes *jus cogens* has always been a matter of controversy. The International Law Commission itself decided against including examples of norms of *jus cogens* in Article 53 because of “the misunderstanding as to the position concerning other cases not mentioned in the article.”<sup>27</sup> However, some members cited as an example of treaties that would be in breach of *jus cogens* treaties which violate human rights.

Article 4(1) of the ICCPR provides for derogations from the obligations thereunder in times of public emergency. Article 4(2) prohibits derogation from Articles 6, 7, 8, 11, 15, 16 and 18. It is clear, therefore, that derogation may be made from the fair trial rights set out in Article 14 in periods of public emergency. The question that arises is whether that prohibition means that the right to a fair trial does not have the character of *jus cogens*. Of course, the mere fact that parties to a treaty prohibit derogation from a particular provision does not necessarily mean that that provision has the character of *jus cogens*. However, since those Articles are to be found in a treaty ratified by 164 countries, there must be a strong case for saying that they have the status of *jus cogens*. No one would quarrel with the proposition that Article 6 (the right to life), Article 7 (prohibition against torture), and Article 8 (prohibition against slavery) reflect rules of *jus cogens*.<sup>28</sup> As a matter of fact, the ICTY, in the *Furundžija* case, ruled that torture was in breach of *jus cogens*.<sup>29</sup>

But can it be said that the exclusion of Article 14 from that list challenges the view that the right to a fair trial also has the character of *jus cogens*? Since

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of Germany v Netherlands) 1969 I.C.J. 3, at ¶ 74 (Feb. 20) (“Continental Shelf Case”), stating that an “indispensable requirement” for the formulation of a new rule of customary international law is that “State practice...should have been both extensive and virtually uniform in the sense of the provision invoked.” Moreover, “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation,” ¶ 77; see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 226, ¶ 64, proclaiming that “the substance of that law must be ‘looked for primarily in the actual practice and *opinio juris* of States.’” (citing the Continental Shelf Case).

27. Report of the International Law Commission on the Second Part of its Seventeenth Session, A/CN.4/184 (Jan. 3-28 1966) and on its Eighteenth Session, A/CN.4/191 (May 4-July 19, 1966).

28. The European Convention’s treatment of fair trial rights in periods of public emergency is similar to that of the ICCPR. That is, Article 15 of the European Convention does not list the fair trial rights in Article 6 as a provision from which there can be no derogation. Similarly, Article 27 of the American Convention on Human Rights, devoted to suspension of guarantees, does not list Article 8 – right to a fair trial – as a provision in respect of which derogations are prohibited in times of public emergency.

29. Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 144 (Dec. 10, 1998).

the right to a fair trial is so well established, can it be said that as a matter of practice, the provision in Article 4(2) is to be construed as including Article 14? However, the fact that countries do derogate from fair trial rights in periods of public emergency would seem to weaken the argument that for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, there has developed a subsequent practice in the application of the ICCPR establishing the understanding of the parties thereto that Article 14 is non-derogable. Nonetheless, the right to a fair trial is so well established as a rule from which no derogation is permitted in periods other than a time of public emergency, that it is reasonable to say that, subject to the permissible derogations set out in Article 4(2), it is a peremptory norm of general international law from which no derogation is permitted. Significantly, when countries do derogate from the right in periods of public emergency, they almost invariably represent that the procedures which they adopt are fair in the context of those exceptional circumstances.

The difficulty in concluding that the right to a fair trial does not have the status of *jus cogens* is illustrated by the following question—if a treaty establishing a criminal tribunal provides that in the determination of guilt of an accused the fairness of the trial is irrelevant or immaterial, wouldn't one intuitively conclude that such a treaty is void for breaching *jus cogens*?

I turn now to examine the application of the fair trial right in the work of the ICTY.

#### FAIR TRIAL RIGHTS AND THE ICTY

The United Nations Secretary-General, when he submitted the draft Statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to the Security Council for adoption, accompanied the draft Statute with a report. This report forms the legislative history of the ICTY Statute. In the section devoted to the right of an accused person to a fair trial, the Secretary-General stated:

It is axiomatic that the International Tribunal must fully respect the internationally recognized standards regarding the rights of the accused at all stages of its proceedings.<sup>30</sup>

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30. Report of the Secretary-General pursuant to ¶ 2 of Security Council Resolution 808, ¶ 106, U.N. Doc. S/25704 (1993). The Report also notes at ¶ 34 that “[i]n the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.” This requirement has been consistently applied in the Tribunal’s jurisprudence. *See* Prosecutor v. Milan Milutinović et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction - Joint Criminal Enterprise, ¶ 9 (May 21, 2003) (stating “[t]he scope of the Tribunal’s jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly

The Secretary-General then went on to state that such internationally recognized standards are, in particular, contained in Article 14 of the ICCPR.<sup>31</sup>

Articles 20 and 21 of the Statute contain various guarantees of an accused's right to a fair trial and charge a trial chamber with ensuring that these rights are maintained throughout the proceedings. In particular, Article 21(4) tracks the language of Article 14 of the ICCPR and Article 6 of the European Convention.<sup>32</sup>

The judgments and decisions of the ICTY are replete with affirmations of the fundamental nature of the right to a fair trial. I will only mention one example here. In 2001, the Appeals Chamber, in a contempt judgment arising from the *Tadić* proceedings, was faced with the issue of whether a person convicted for contempt of the ICTY had a right of appeal. In finding that such a right existed, the Appeals Chamber commented that Article 14 of the ICCPR reflected "an imperative norm of international law to which the Tribunal must adhere."<sup>33</sup> This dictum and others of the same kind<sup>34</sup> ought to be understood in

committed"); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment, ¶ 197 (Nov. 29, 2002) (stating, "[t]he scope of the Tribunal's jurisdiction *ratione materiae* is determined by customary international law as it existed at the time when the acts charged in the indictment were allegedly committed. This limitation placed upon the Tribunal is justified by concerns for the principle of legality"). *See also* *Prosecutor v. Dragoljub Kunarac et al.*, Case No. It-96-23 & IT-96-23/1-A, Judgment, ¶ 124 and ¶¶ 146-148 (June 12, 2002); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment, ¶ 111 (Dec. 10, 1998).

31. Report of the Secretary-General pursuant to ¶ 2 of Security Council Resolution 808, ¶ 106.

32. For a discussion of the relationship between fairness and expeditiousness, see Patrick Robinson, *Ensuring Fair and Expeditious Trials at ICTY*, 11 (3) E.J.I.L. 569, 582-83 (2000).

33. *See e.g.* *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, p. 3 (Feb. 27, 2001); *see also* *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶¶ 104, 113 (Mar. 24, 2000) (stating, in the context of whether the right of appeal is a component of the fair trial requirement contained in Article 14 of the ICCPR and Article 21(4) of the ICTY Statute, that the right to a fair trial was "of course, a requirement of customary international law"); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, ¶ 164 (Jul. 21, 2000) (commenting, in the context of a ground of appeal based upon the alleged bias of a judge, that the right to be tried before an independent and impartial tribunal was "generally recognized as being an integral component of the requirement that an accused should have a fair trial," citing Article 21(2) of the ICTY Statute and Article 14 of the ICCPR).

34. *See* *Prosecutor v. Norman, Kallon, and Gbao*, Case No. SCSL-2003-09-PT, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal (Nov. 4, 2003), in which the Special Court of Sierra Leone found that Article 14 of the ICCPR had the status of *jus cogens*. In that case, the accused had made applications concerning issues such as the lawfulness of the establishment of the Special Court and the validity of amnesties they had been granted. The Trial Chamber referred these applications to the Appeals Chamber for expeditious determination, rather than deciding them in the first instance—the so-called "fast track" process for preliminary motions relating to jurisdiction. The accused argued that they had a right under international law to a two-tier determination of pre-trial preliminary motions. In refusing the arguments of the accused, the Appeals Chamber held that the right to an expeditious trial is "firmly entrenched" in international law, as reflected by Article 14(3)(c) of the ICCPR and the decisions of courts such as the European Court of Human Rights. The Chamber further noted that the right to an expeditious trial was not just a right of an accused, but also belonged to victims and the international community. In upholding the legality of the "fast track" process, the Appeals Chamber analyzed Article 14(5) of the ICCPR and noted that "the very agreement by the UN to the terms of Article 20 of the Special Court Statute

the context of the earlier analysis which effectively separates periods of public emergency from other periods for the purposes of determining the *jus cogens* character of fair trial rights.

Many have argued that the trials at the ICTY have posed serious challenges to the principle of the right of an accused to a fair trial. They make this argument by citing the many procedures that the ICTY has adopted to expedite trial proceedings. However, the ICTY has always been careful to ensure that the rights of the accused are not compromised. The need for fair but expeditious trials is nowhere more urgent than in the trial of persons charged with mass atrocities involving hundreds if not thousands of witnesses.

I would now like to consider some conceptual and doctrinal issues. For example, how is fairness determined? Is the standard for fairness in an international tribunal different from that in domestic courts? Is fairness a relative or absolute standard?

In my view, the standard for fairness in an international tribunal is the same as for a domestic court. The ICCPR should not be interpreted as providing one set of rules for domestic courts and another for international tribunals. However, there is no gainsaying that context is significant in construing provisions of the ICTY's Statute and Rules. I consider it important to stress the sameness of the character of fairness in both international and domestic tribunals because the applicable law in a trial for a person charged with war crimes, crimes against humanity and genocide is the same whether the tribunal or court operates in an international or domestic setting—it is international humanitarian law. For example, the Court of Bosnia and Herzegovina, the Belgrade District Court in Serbia and courts in Croatia are applying international humanitarian law in trials of persons similarly charged with war crimes, crimes against humanity and genocide.

Now I turn to the issue of whether the principle of fairness is relative or absolute. As previously mentioned in *Snyder*, the Supreme Court of the United States ruled that “[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results.”<sup>35</sup> In my view, however, at the ICTY, fairness must have the same face as fairness in a domestic court, subject only to differences yielded by contextual and teleological interpretation of the basis of the Vienna Convention on the Law of Treaties.<sup>36</sup> This approach provides greater protection for the rights of the accused than that which simply states that

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affords some evidence that it has indeed reached the status termed by international lawyers ‘*jus cogens*’ i.e. a rule binding on all states through their acknowledgement of its imperative force.”

35. *Snyder*, 291 U.S. at 116-17.

36. Article 1(5) of the Vienna Declaration and Programme of Action provides: “all human rights are universal, indivisible and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

fairness is relative.

In order for a measure adopted by the ICTY expediting the trial process to be legitimate, that measure must pass the fairness test. Fairness has become one of the principal, if not the principal tool in construing the Statute and its Rules. In that respect, the significance that the principle of fairness has in the work of the ICTY is no different from its importance in domestic criminal proceedings.

At the ICTY, we have hundreds of witnesses to the mass crimes committed. Most of them would not attend court in the absence of protective measures. These measures include pseudonyms, closed or private sessions, voice distortion, and image distortion. The drafters of the Statute were keenly sensitive to the possibility that such measures would compromise the rights of the accused. In treating of the relationship between the accused on the one hand, and victims and witnesses on the other, they established a hierarchical system requiring, pursuant to Article 20(1), that trials be conducted “with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses” (emphasis added). Nonetheless, the Statute makes it clear that the protection of victims and witnesses is of critical importance in the ICTY’s proceedings. And in Article 21(2), the right of the accused to a fair and public hearing is made subject to Article 22, which requires the ICTY to provide for the protection of victims and witnesses in its Rules. We have Rules which call for a balancing or weighing of the rights of the accused with the protection of victims and witnesses.<sup>37</sup> A substantial body of case law has developed around these Rules regarding how to perform this balancing exercise. If at the end of the balancing exercise the conclusion is that a protective measure is fair, then it is legitimate. This is the way Lord Bingham put it: “If, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised.”<sup>38</sup>

#### CONCLUSION

In conclusion, we have seen that the right to a fair trial is something to which every person is entitled. The history of this right and the practice of courts show that the right to a fair trial has acquired universal recognition and

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37. Rule 69 provides that “[i]n exception circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal” and that “[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.” Rule 75 provides that “[a] Judge or a Chamber may, *proprio motu* or at the request of either party...order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.” Rule 79 provides that “[t]he Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of ... (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75.”

38. *R v. Davis*, [2008] UKHL 36 (HL) [26(2)] (addressing “the question whether it was permissible for a defendant to be convicted where the conviction was based solely or to a decisive extent upon the testimony of one or more anonymous witnesses”).

acceptance. Not only has it been integrated into the legal systems of most countries, but it has been codified in treaties and conventions. It is today a well-established rule of customary international law, and in the view of many, has the status of a peremptory norm of general international law.

Judges must remain vigilant in the pursuit of justice and fairness. Our reach for perfect trials must always exceed our grasp, so that the men and women accused before us at all times are afforded the full extent of the protection of the law. As the poet Robert Browning once wrote, “Ah, but a man’s reach should exceed his grasp, Or what’s a heaven for?”<sup>39</sup>

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39. Robert Browning, *Andrea del Sarto* (1855).