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## INTRODUCTION

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## INTRODUCTION

*Jo Cooper\**

Just over a decade after the establishment of the UN tribunals at the ICTY and ICTR, and the hard-won consensus of the Rome Conference which founded the International Criminal Court, international criminal justice is once again at a crossroads. The *ad hoc* tribunals of ICTR and ICTY are moving towards completion of their mandates, with a complex legacy that deserves critical evaluation. The ICC is still finding its identity, struggling to work out a new way to manage the relationships between prosecutor, defence, victims and court. Elsewhere, in Bosnia, Cambodia and Lebanon, new international and domestic tribunals are taking over the burden of prosecutions. In all these forums, concerns about the fairness of proceedings abound. How is the balance to be struck between the imperative to banish impunity and the obligation to deliver genuinely fair trials that do not bring the international order into disrepute? There is, once again, a need for the impetus of the defence community to nudge the world of international criminal justice forward in the right direction.

This collection of important articles offers critique of international criminal justice institutions, constructive suggestions for improvements in law, procedure, and the provision of properly funded defence institutions, and offers reports from the front line of human rights practice where ICDA members confront the realities of life in the streets and slums of some of the world's most rights-challenged nations. This unique collaboration across continents and across legal cultures is testament to a global vision of world justice shared by members of the International Criminal Defence Attorneys Association – a vision, which truly transcends traditional boundaries.

### **I. Vision and Philosophy**

The collection starts with a series of articles which set the stage for all that follows. The Quebecois lawyer and activist Elise Groulx is the founding President of ICDA, its inspiration and its drive. If any text should be inscribed on the foundation stone of this movement it could come from either of the two articles contained in this collection: “Equality of Arms”: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System” and “The New International Justice System and the Challenges Facing the Legal Profession”. These articles are key texts for the ICDA because they set out some of the philosophical foundations both of this organisation and of the International Criminal Bar. They set out the defining

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vision of the role of the defence function, which has informed much of its activism. Groulx takes a historical perspective that recognises the political and institutional realpolitik of what she has defined as the globalisation of criminal practice. She recognises that establishing tribunals to deliver accountability for grave offences represents a relatively straightforward political and moral impulse. A broad measure of agreement may be found as to many of the core court and prosecution functions. But a well-intentioned desire to investigate, prosecute and hold accountable does not necessarily find a natural counterpart in any impulse to invest individual accused with proper and full representation, still less to empower them in turn to resist, challenge and even defeat the case made against them.

The key insight which these important texts set out is that the defence function is an essential third pillar of the international criminal justice system, a structural necessity for a balanced process together with the other two key components – the court and the prosecution. No doubt this defence function depends centrally on the qualities and experience of individual lawyers engaged for individual defendants, but it also requires defence institutions to support them – a defence bar, self-regulation, an ethics code, collective bargaining over defence resources, proper access to library, training and other research facilities. So the ‘defence’ is not simply about individual criminal defences, but about a defence community with the know-how, the motivation and the resources to vigorously engage the fair trial rights of those engaged in individual cases before the international courts.

Whilst the student of international criminal justice in 2010 will be amazed that it was necessary to make this point at all, it is worth recalling how challenging and how shocking this approach was to an international consensus which had originally looked to *ad hoc* tribunals in the early 90s as a tool in the armoury for fighting impunity rather than as a potential showpiece of the standards of civilised justice. The idea that for these courts to work properly there would need to be a defence function which served as more than a fig-leaf was much more difficult for the originators of these courts to grasp.

Groulx observes that criminal procedure is the barometer of the health of any democracy and the legitimacy of its court system. She maintains that if this is true of national governments, it must also be true of world governmental institutions. It follows that at a time when the international community looks forward towards the creation of institutions and structures which would help to define the way in which the world protects its most powerless people from the gravest crimes, one defining benchmark must be the extent to which individual defendants are permitted to participate effectively in the process. Groulx argues that if the international criminal justice system is to be properly balanced, and not to bring into disrepute the nations who sought to construct it, the architects must not just accommodate, but fully engage with the fair trial agenda – namely, a process which is truly fair by the same standards by which those nations are judged in their domestic and regional human rights instruments. As she points out, if there is no imperative save retribution against the presumptively guilty there is no need to have any sort of trial process at all. As

Groulx observes, one cannot conceive the possibility of a fair conviction unless the trial process contains within it the genuine possibility of a fair acquittal.

Groulx sees the defence function not simply in the form of a master / servant arrangement, in which individual lawyers are permitted privileged but tightly controlled access to the palace of international justice on a case-by-case basis and only in order to carry out highly restricted functions deemed necessary by the powers that be. On the contrary, Groulx envisages wide and transparent access to the same halls of justice by lawyers on behalf of the public in whose name international criminal justice is undertaken. Accordingly the defence function would include acting as fair trial watchdogs in safeguarding the entire system against the arbitrary exercise of judicial and prosecutorial power. She demands a role well away from the individual tribunals, in The Hague or Freetown, and insists on a seat at the tables of power – at the United Nations and at the Assembly of States Parties of the International Criminal Court – where institutions, structures and processes are designed and refined. Only in this way can the global defence movement have its voice heard as an active and constructive partner in the building of the institutions from their earliest conception.

The driving force for this vision was Groulx's conception of the defence function as one of the competing powers within a tripartite system alongside the judiciary and prosecutors. As such, she makes an explicit parallel with the doctrine of separation of powers within government, the system of checks and balances that properly reins in excess. This analysis is particularly apt for the international criminal process, whose institutions are so frequently the product of diplomacy between nations rather than settled jurisprudence from within a single legal culture. But the challenge to other participants is stark – the notion that in the absence of a vibrant defence function, the judiciary and the prosecutors, as inherently political organs, have a natural impulse to overreach their powers.

These arguments have been, and remain, highly challenging to the architects of the new world order of criminal justice. Groulx's analysis forces those motivated only by retribution and control to recognise that outcomes from one-sided and potentially abusive processes will lack judicial legitimacy, and are likely to be politically counterproductive as ways of producing sustainable and accountable resolutions in the aftermath of the commission of grave crimes.

One would like to think that these arguments have helped the architects to develop more mature notions of justice, firmly entrenching within them fairness of process and of outcome. Later contributions in this book indicate that this is at best unfinished business. Of course, Elise Groulx was not the first voice to stand up for the defence function in *ad hoc* tribunals and in the development of the International Criminal Court. However the reader sees in her writing, something of the drive and determination which was essential to the early foundation both of ICDA and in turn the International Criminal Bar, and which has led to her reputation as not only one of the great theorists of international criminal legal processes, but also as one of the truly great legal activists of her time. Her tireless and effective advocacy has helped to change the course of legal developments at a crucial time for international justice, and

to embed defence principles into the heart of international tribunals. Her articles are part of a manifesto which has the capacity to change the course of the wide and slow moving river that is the movement for international criminal justice. If there is scope for much greater change, nevertheless the waters are being transformed. It is simply no longer possible for defence rights to be ignored with impunity in any proceeding, at any level, anywhere in the world without the defence community having the language to express opposition and mobilise resistance.

Prof. Kenneth Gallant's contribution in "Criminal Defence and the International Legal Personality of the Individual" also challenges the notion of the defendant as a mere object of international criminal law. He takes a historical look at the interaction between individuals, states, and international criminal tribunals. Drawing on the classical view of the Nuremberg tribunal as a process set up by nation-states trying individual perpetrators for breaches of international law, he analyses that tribunal's dismissive response to defendants seeking to argue jurisdictional challenges to the judicial body seized of their case. He contrasts the more generous hearing given to such claims by later hybrid tribunals, which have been willing to hear challenges from individual defendants as if by one of the state actors to the treaty which gave the court jurisdiction. No longer is the individual constituted as a mere 'object' of international law, but also an active and critical 'subject' able to initiate actions and challenges.

Professor Gallant considers two other aspects of this changing notion of the individual in international law. He notes the increasing independence of the individual not only as defendant but, as in the ICC, also as victim of international crime. Although not technically parties in the ICC, individual victims are empowered with certain opportunities to make claims in the court, and may do so whether their state party is supportive or hostile. Professor Gallant also considers the capacity of individuals to influence, or even create law, in their capacity as combatants in the field. The classical view was that state actors alone were responsible for the development of customary international humanitarian law, but recent trends hint at the possibility that the acts and practices of non-state actors – armed opposition groups, for example – should also be considered.

## **II. Critical Issues in Defence Practice**

The second section of this collection takes us through the early stages of defence representation in practice, and then into the heart of the criminal trial. It introduces some of the critical issues confronting defence practitioners in trying to support the fair trial rights of their clients.

We start with the unique perspective of a practitioner who has worked to develop defence capacity in a variety of tribunals. Rupert Skilbeck has been a member of the defence office in the Special Court for Sierra Leone, was the Director of the Criminal Defence section of the Court of Bosnia and Herzegovina Sarajevo, and is now based in Cambodia. In each forum he was in a position to influence the

development of structures to support effective defence representation, and to see first hand the solutions that work.

In the chapter “Ensuring Effective Defence in Hybrid Tribunals” Rupert Skilbeck writes that often the first challenge is to consider how the ‘prosecution’ – the unified and coherent body of prosecutors – can effectively be opposed despite the fact that the ‘defence’ are often a disparate group of individual defence advocates, perhaps representing individual defendants in conflicting cases, and bound by principles of confidentiality so that even where it may be in their client's interests to do so, they may be unable to discuss matters of common interest, let alone articulate them collectively.

He sets out some of the practical challenges in providing institutional support to defence lawyers assigned to cases. Whether in Sierra Leone, Bosnia, or more recently in Cambodia, his challenge has been to reconcile enduring defence principles, which seem to mandate particular approaches, with the needs of the individual country, defendants and legal actors, which may lead to very different solutions. As he writes, there is no one size which fits all situations, and as the *ad hoc* tribunals mature and begin to move towards completion strategies, important lessons can be learned from the way in which these problems have been addressed in the various local settings.

In some hybrid tribunals, but certainly not all, one response has been to set up a defence office. Even before a tribunal is ready to hear its first case, a defence office may have been busy for a year or more helping to establish effective defence teams, providing or facilitating training, and putting lawyers in touch with the resources such as interpreters, investigators, or academics that are needed for effective defence. Standing back from day to day defence practice within the tribunal, a defence office sometimes takes on wider strategic roles, including coordinating specific legal challenges, liaising between local lawyers and the court structures, and engaging with longer term budgetary issues facing the defence bar.

Skilbeck suggests a broader vision, to include outreach work within the tribunal as to the proper role of the defence function, and even to the wider public about the importance of the presumption of innocence and the fairness of the proceedings. Such initiatives suggest an approach to defence practice, which goes beyond competent representation of individual accused. These approaches are designed to articulate and support the underpinning philosophy, as well as the practice, of the third pillar.

Allison Turner is a Canadian lawyer with considerable experience at the ICTR, having represented two defendants charged with international crimes and also having acted as counsel for a defence lawyer, hired by the ICTR as a defence investigator and charged with contempt of the Tribunal. The chapter “Tribunal Ambivalence and Rwanda’s Rejection of Functional Immunity for the ICTR Defence” describes the ICTR’s inconsistent application of a doctrine which is fundamental to effective criminal defence – the doctrine of functional immunity, whereby agents of government or international organisations are afforded privileges

and immunities when they perform their official functions. Functional immunity is central to defence practice, since defence teams should be free to take all proper and lawful steps to investigate, research and present evidence which is relevant to the defence of their client. Where defence teams are forced to make compromises (and where courts turn a blind eye to those shortcomings) there can be no possibility of a genuinely fair trial.

Turner points out that within Tanzania, where the ICTR is based, the doctrine of functional immunity receives proper respect. Ambivalence by the ICTR has however fatally undermined the doctrine in the state where it most matters – in Rwanda itself, where the Rwanda government has little time for what it appears to regard as a legal nicety. Defence investigators working in Rwanda who ought to have the benefit of functional immunity are, Turner explains, at significant risk of arbitrary arrest, detention, and other interference from the Rwanda government. Such maltreatment may also be meted out to lawyers who have taken principled positions on behalf of their clients. Thus the leader of the Defence Bar at Arusha, the US lawyer Professor Peter Erlinder, found himself detained in Kigali in May and June 2010 effectively as a political prisoner of a Rwanda government apparently deaf not only to the doctrine, but also to the international outcry their action had caused. True to form, as Professor Erlinder was being brought to court in Kigali in pyjamas and handcuffs, the immediate response of the ICTR was to charge with contempt those defence lawyers at the Tribunal who insisted on reviewing their own arrangements and protections for staff before continuing with their own trials.

The article discloses a functional problem at the ICTR, which is echoed later in this collection by the observations of Henry<sup>1</sup>, and Jolles and Floyd<sup>2</sup> below, namely that the ICTR has been inadequately assertive in its dealings with the Rwanda government. To the extent that the Tribunal does not assert the functional immunity of its defence investigators, it has failed to demonstrate that it is founded upon judicial as opposed to political and diplomatic principles. The message to all defence teams – even before they have been appointed – is that if they accept an assignment and attempt to carry it out conscientiously, they are acting at their peril.

Turning from issues of principle at the ICTR to the practicalities of the pre-trial phase of formal proceedings, the first case at the International Criminal Court provided the parties with an opportunity to set the culture of criminal practice in a wholly new jurisdiction. Mr. Thomas Lubanga's first defence counsel was Jean Flamme. His article, "L'affaire Lubanga au stade préliminaire devant la Cour pénale internationale : Une primeur historique. Également pour les droits de l'homme et les droits de la défense?" gives a revealing glimpse of the pressures brought to bear on Mr. Lubanga and his defence team during the course of the early proceedings before the ICC. The argument for a defence office with proper funding becomes unassailable when one considers the weight upon the shoulders of a single advocate in relation to this defining prosecution of the modern age of international criminal justice, in which the status of prosecutor and court, indictment and evidence all fell to be litigated in

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<sup>1</sup> "Des acquittés embarrassants".

<sup>2</sup> "International Criminal Tribunals, Dispensing Justice or Injustice?"

the wholly novel context which was the International Criminal Court. It is a tribute to the professionalism, skill and dedication of this legal team that the defendant was represented so effectively. Nevertheless the procedural shortcomings of this process are so stark as to raise very significant questions about the propriety and fairness of the system.

Flamme bemoans the politicisation of every element of the court structure, citing as examples the prosecutor's functions, his strategic objectives within the court system, and his targets for prosecution. Flamme considers the contradiction over the formal role of the United Nations Security Council, as that body includes a number of permanent members who are not themselves signatories to the *Rome Statute*. He notes the failure of will on behalf of the international community to properly fund the International Criminal Court and points to the fact that by contrast, the powerful economic interests which fund and inflame civil wars around the world continue to be beyond the scope of the prosecutor. He considers the differential funding as between prosecution, victims and defence. As between the formal parties, the prosecution and the individual defendant, this is designed into the system at an early stage. As between victims and the defendant, however, the disparity is a result of decisions made by the Registry within the hopelessly conflicted Defence and Victims Section. He regrets the fact that the Assembly of States Parties has maintained its failure to define any crime of aggression, which if applied to States would have the effect of making them think twice before embarking on adventures beyond their borders. Against all of this strategic background, he points out the fair trial rights for the defence continue to be the poor relation compared to the new rights of access and audience afforded to victims.

The foundation of the International Criminal Court is the *Rome Statute* of 1998, as periodically reviewed by the Assembly of States Parties. Although the ICTR and ICTY regularly review their *Rules and Procedures*, the process of review at the ICC is uniquely transparent and accessible. The *Rome Statute* is a living document and the ICC a living court which is visibly growing through a somewhat turbulent adolescence.

With a review conference during the course of 2010, Virginia Lindsay, a US lawyer with unrivalled experience at ICTY and ICC, considers the functioning of the latter court as regards investigation and prosecution procedures. "A Review of International Criminal Court Proceedings Under Part V of the *Rome Statute* (Investigation and Prosecution) and Proposals for Amendments" looks closely at the pre-trial proceedings in the *Lubanga* case and considers how the prosecution and pre-trial chamber have fought for control of the investigation process, whilst the defence team have been struggling to stay afloat in a sea of pleadings. Lindsay cites a Registry report, which suggested that the total number of filings in *Lubanga* was over 1400, at the rate of approximately 2.5 filings per day. Since it appears to have been a condition of appointment of Mr. Lubanga's counsel that he did not require translation services between English and French drafts, the personal demands upon his small team were superhuman.



Lindsay considers the politicised nature of the Prosecutor's role, his overreliance on confidentiality agreements, and his failure to demonstrate confidence and trust in the judges of the court. In contrast, she cites the unexpectedly judicial approach of the court demonstrating that it will invoke judicial standards rather than diplomatic expediency in deciding issues, which are fundamental to a fair trial.

Looking to the future, Lindsay proposes amendments in three areas, namely speedy service of the charging document and supporting evidence, changes to the confirmation of charges hearing to encourage a determination on the basis of a written record, and a lowering of the standard of proof applicable to the confirmation of charges to that of a *prima facie* case rather than the higher standard of 'substantial evidence' which she argues provides no additional protections to the accused and simply results in significantly higher financial costs, delay and fact-finding which is unnecessary to the confirmation process and simply intrudes into the trial process. She argues that the combined effect of her proposals would be to reduce costs arising from the confirmation process while preserving protections for the trial itself.

As the international tribunals have proliferated, so have local approaches to common problems. The participation of victims raises challenges for every tribunal. There is no formal role for victims at ICTR and ICTY save as witnesses, and one of the frequently heard criticisms from victims of the both tribunals is that they are simply not responsive to the real needs of victims. We have seen that as a result of intensive lobbying at the design stage of the *Rome Statute*, victims have a right of audience at ICC albeit without formally becoming parties, but their interventions plainly have the potential to be both onerous and de-stabilising for each of the other participants in the process.

In her article, "Participation des victimes et droits de la défense : Décision de la Chambre préliminaire des CETC du 20 mars 2008 relative à la participation des parties civiles dans l'Appel de Nuon Chea contre sa détention provisoire", Coline Rapneau sets out the approach adopted by the Cambodian special court to the same issue. The starting point for the court was to acknowledge the rights of victims in Cambodian domestic law, and to strive to give effect to such rights in the context of its own procedures. Its solution was to permit participation by representative victims alongside with equal status to the formal parties, the prosecution and defence, so that individual defendants would in practice have to face prosecution from a number of quarters within the same courtroom. Although this decision sets out the principle arrived at by the Preliminary Chamber, it was evident that the precise procedures and mechanisms of representation would need some more detailed work, not least because the Cambodian special court was to be run on adversarial lines.

Whilst being committed to protecting the rights of the accused and making the case for fair trials before international tribunals, members of the ICDA maintain that international criminal justice must remain effective. One area for possible improvement is co-ordinating more closely the approaches of trial chambers and appellate chambers. In a system in which the appellate jurisdiction is only rarely invoked during trial proceedings, and appeals against conviction and sentence are often heard months or years after the original trial, certain cases have revealed

profound differences of approach between the trial chamber charged with the conduct of trial, and the appeal chamber which will have the ultimate say on the outcome of the case. In such cases, the earlier the trial chamber, the parties, and the defendant are appraised of the view of the appeal chamber, the better it is for all since it ensures that trials can proceed with a proper appreciation of the law which will ultimately be applied to the case.

Stéphane Bourgon is a versatile and talented lawyer, with a unique background that gives him considerable insight into the challenges of international criminal justice. Having started his career as a military lawyer, he has practised at the ICTY on a full time basis for the past 12 years. He first started within the Office of the Prosecutor and then moved to the Chambers where he acted as *Chef de Cabinet* of the President. Working closely with the then President of the ICTY, Justice Claude Jorda, and the other senior members of the Tribunal, Mr. Bourgon was close to the key policy issues regarding the development of the new international justice system, and in particular, the International Criminal Court (ICC). He later made the bold move into defence practice and represented a series of defendants in major cases before the ICTY. His article, entitled “Le caractère arbitraire de la procédure de certification des appels interlocutoires devant le Tribunal pénal international pour l’ex-Yougoslavie”, is a vivid illustration both of this wide experience and his unique perspective. Bourgon’s co-author is Marie-Claude Fournier, a Quebec lawyer who came to prominence in her work during the Srebrenica genocide case at ICTY, and who now works at the Inter-American Commission on Human Rights.

Bourgon and Fournier address what they regard as a systematic failing within the international justice system – namely the apparent inability and unwillingness of appellate chambers to deal in a timely fashion with interlocutory appeal points arising from the conduct of ongoing criminal trials. The authors point out that the sheer scale of the international criminal trial, its size, its duration and the gravity of the subject material, impose unique demands on each of the participants – including trial judges. In such a system the checks and balances of a sensitive and principled appeal process are all the more important. They argue that time spent by the Appellate Chamber addressing interlocutory appeals, properly authorized pursuant to an objective test based on appropriate rules, is time well spent. This is the only course that ensures that the tribunal can properly address fair trial issues and possible violations of the rights of the accused as they occur *during* trial proceedings rather than when it is too late at the appellate stage.

The authors go on to observe, with regret, that both the ICC and ICTY *Rules of Procedure and Evidence* appear to be evolving in the wrong direction, making it more and more difficult for parties, as time has gone on, to be granted leave to file interlocutory appeals. They conclude, however, that it is not too late to redress the situation and establish a more responsive appeal mechanism which would protect the ongoing trial rights of the accused by correcting errors of law or procedure before they are allowed to do damage to the integrity of the trial.

The lawyer Natacha Fauveau Ivanovic raises a discrete question about the relationship between international criminal trials and the fair trial norms which are

available at the domestic level pursuant to instruments such as the *European Convention on Human Rights*. Under the broad heading of “fair trial rights” are notions such as equality of arms, the right to counsel of choice, the right to hear and confront prosecution witnesses, the right to time and facilities to conduct the defence and the right to trial within a reasonable time before an independent tribunal. There are two respects in particular in which proceedings at the ICTY may be said to fall short. The reality of the prosecution of grave crimes is that they are frequently not prosecuted for many years after the events that are being described. When trials do start, their complicated nature means that the trial process itself may impose very considerable demands on defendants and last for several years. How does the ICTY balance the obligation imposed by its statute to try such offences against the fair trial rights for the accused?

In “La durée des procès internationaux et le droit au procès équitable” Fauveau Ivanovic explores the limits, at the international level, of the pure notion that justice delayed is justice denied. Tribunal judgements have repeatedly stressed the fact that speedy trial is only one of a number of fundamental rights afforded to defendants, and that there will sometimes be a trade off between respecting this right against other undoubted rights, such as participating fully at trial. She cites Lord Hunt's dissenting decision in *Milosevic* to the effect that the legacy of the tribunal will be measured by the fairness of its proceedings rather than the number of convictions. She notes that one of the stated reasons for the completion strategy is to ensure trial without excessive delay.

As the ICTR and ICTY come to the conclusion of their lives, the issue of transferring their remaining work back to domestic courts in Bosnia and Rwanda gives rise to some serious issues. Both tribunals are required to consider the quality of justice in the receiving state. When it comes to the case of Rwanda, in particular, many lawyers perceive a conflict between the judicial imperative to ensure fair trial standards, on the one hand, and the political and diplomatic impulse to avoid any confrontation with the Rwanda government.

Alexandra Marcil is a versatile lawyer who is deeply committed to the development of international criminal law and has worked to strengthen the position of the defence since 1998. She has many years of experience in the field, having represented defendants in two major joint trials before the ICTR. She was also involved in proceedings before the Sierra Leone Special Court (SLSC). The article by Marcil, “La stratégie d'achèvement des travaux du TPIR par le transfert des accusés devant les tribunaux rwandais : Peut-on garantir le droit à un procès équitable?” (“The Closing Strategy of the ICTR: Transferring Accused Persons Before Rwandan Justice. Can Fair Trial Rights be Guaranteed?”), recounts the story of the intervention by ICDAAs as *Amicus Curiae* in the attempt by the ICTR Prosecutor to transfer five cases to Rwanda under Rule 11 *bis*. The question was whether the domestic court in Rwanda was yet able to try these genocide cases according to fair trial standards.

Marcil led a team which applied for and was granted *Amicus Curiae* status in each of the cases. She was in charge of the conception and preparation of all ICDAAs' briefs on this matter and she led ICDAAs' international team of advocates

in oral submissions to the ICTR. The thrust of the ICDAAs submissions was that the Trial Chamber could not be satisfied that the ICTR accused would receive a fair trial if transferred to Rwanda and specific concerns were expressed regarding the accused's right to obtain the attendance and examination of defence witnesses. The intervention spearheaded by Marcil was strikingly successful and the five motions for transfer to Rwanda were denied.

In her article, Marcil goes on to raise the question of how to design a blueprint for judicial and other structures within the country of an armed conflict which can provide fair trial guarantees for persons accused of genocide and other international crimes who might be tried there. The institutional realities within Rwanda could be compared against domestic criminal standards elsewhere in the world and with the approach taken by *ad hoc* tribunals, hybrid tribunals and other tribunals, such as the war crimes tribunal in Bosnia. Marcil observes that the introduction of international components within a domestic judicial system offers some protection of fair trial guarantees in the context of trials for international crimes. As things stand, however, she concludes that it was difficult to imagine any place in the world where Rwandan accused were less likely to have a fair trial than in their home country.

Marcil highlights the fact that the international community provided no suitable alternative venues for the trial of the many ICTR defendants who have been held in custody for very significant periods. As she points out, there is no requirement under Rule 11 *bis* that defendants who could not be tried within the lifetime of the ICTR should only be repatriated to Rwanda. The fact that the ICTR has only been given very few candidate countries for receiving defendants is a matter of great regret.

As a result of the decisions to refuse transfers, the ICTR was given a further year's reprieve by the United Nations Security Council. This time may be used to try cases at ICTR, to further litigate future transfers, and for the Rwanda government to take steps towards establishing a genuinely fair judicial system with fair trial guarantees for all accused. Marcil argues that the period of grace should also be used to put forward a genuine, viable and fair alternative venue for the trial of these important charges.

It has been said earlier that fair convictions must imply the genuine possibility of fair acquittals. The problem of what to do with acquitted defendants may be a very real problem for any tribunal but the problems at the ICTR are particularly acute given what many regard as the antagonistic approach adopted by the Rwandan authorities. For a start, many Rwandan accused before the tribunal who are lucky enough to be acquitted may find themselves as effectively stateless persons, entitled to claim political asylum from a very real risk of oppression within Rwanda if they were ever required to return. In the chapter, “Des acquittés embarrassants” (“Embarrassing Acquittals”), Benoît Henry, a highly experienced lawyer who devoted his whole career defence practice, cites a number of such experiences by acquitted defendants who were subject to further interventions by a government determined to exact revenge on those it considered to be guilty – whatever the findings of the ICTR. Henry, a dedicated and highly committed lawyer,

is one of the very few who have secured an acquittal for his client before an international tribunal.

The case of Bagambiki involved a defendant formally acquitted by the ICTR and then subsequently prosecuted within Rwanda for a number of crimes. In due course he was not only found guilty (in his absence) but also sentenced to life imprisonment. Little wonder that certain acquitted defendants have sought the protection of the Registrar of the ICTR in a safe house in Arusha.

The case of Jean Bosco Barayagwiza is illuminating. Following his release by the Appeal Chamber, the Rwanda government announced that it would cease all cooperation with the tribunal. Given the number of witnesses who come from Rwanda it was easy to imagine the extent of disruption to the work of the tribunal that this would cause. Despite intense negotiations between the ICTR and the Rwanda government it was not until the Appeal Chamber reversed its original decision that matters were brought back on track. In this instance the pressure by the Rwandan authorities was not brought to bear on a single defendant or collection of defendants but on the Tribunal itself.

Henry refers to the enforcement agreements entered into between the international tribunals and supporting states whereby sentences imposed by tribunals are served in host countries. If this can be done to house convicted criminals, he asks, why cannot similar measures be put in place for the host countries to receive acquitted defendants for whom life in Rwanda would be impossible?

### **III. Critique and Reflections**

The third section widens the scope of this collection by bringing together a number of broader personal observations on the nature of international practice – whether concerned directly with international criminal proceedings or with applying effective defence practice in other supra-national court structures. Whether in Guantanamo, in Peru, in Tanzania or Jerusalem, our members are confronting difficult challenges on behalf of the clients they represent.

The section starts with a return to first principles of due process. In most parts of the world the legal representation of defendants is considered a fundamental right. A trial in the absence of legal representation would be considered wholly incompatible with fairness. But there remains a dark corner of the US jurisdiction in which these fair trial norms appear to be turned on their head. Despite worldwide condemnation, it appears that military prosecutors still persist in seeking some form of trial procedure – sometimes in capital cases – against unrepresented Guantanamo detainees. John Wesley Hall's chapter, "Shining the Light in the Darkness of Guantanamo" describes the cascade of successful legal challenges to this abuse of power by a coalition of lawyers known as "the John Adams project", a joint initiative of the National Association of Criminal Defence Lawyers and the American Civil Liberties Union. Despite these successes, the obstacles to effective defence representation continue to be stacked high.

In “International Criminal Tribunals, Dispensing Justice or Injustice?” two lawyers from the United States adversarial tradition, Abbe Jolles and John C. Floyd, who have both tried hundreds of criminal cases, present an experienced based analysis which illustrates the essential contradiction between the two components of the modern international tribunal's approach to the trial process. On the one hand, there are the common law principles that grow out of the Anglo-American legal tradition. These involve competing parties presenting alternative cases, which are judged against the background of a burden of proof upon the prosecution and a standard of proof requiring certainty before conviction. On the other hand, there are the civil law principles which stem from a continental impulse for a judicial enquiry into truth, wherever it leads. While both systems function well on their own, any tribunal that attempts to draw its judicial personnel, its procedures, and its rules from both sides of this massive judicial fault line risks losing its footing. Jolles and Floyd conclude that there are fundamental and systemic shortfalls in the quality of justice available in all courts built across the same fault line.

The writers list a catalogue of areas in which defence rights are, in practice, marginalised or ignored, or where they are swept away as a by-product of political imperatives and realities. Some of these defects are systemic, arising from inequities within the court system, especially in terms of resources as between prosecution and defence. Some derive directly from the systemic failure to implement fair trial guarantees, such as evidential rules of exclusion, which operate to safeguard the quality of evidence. Many of the shortcomings are practical in origin, deriving not necessarily from defective systems but from working practices which court personnel have been permitted to develop themselves. Thus, they argue, the accused is unable to obtain a fair trial and the legitimacy of both the trial process and the outcome is questionable.

In “La Práctica Legal ante el Sistema Interamericano de Derechos Humanos”, the Peruvian lawyer and professor, Carolina Loayza Tamayo, sets out the way in which victims can be represented in the Inter-American human rights system, both before the commission and before the full Court. The principle which is adopted is that access to the Commission should be made available to the widest group possible including to anonymous victims, victims represented jointly by NGOs, and even by victims who have not granted permission to third persons to present briefs on their behalf. Recent changes to the procedure in the full Court allow victims full audience rights in all proceedings if the Commission has certified the case is of sufficient merit. Whilst the system permits representation, it does not in practice require any party to be represented by lawyers. This less formal approach is designed to facilitate open access, albeit that it may change the character of the proceedings and may increase demands on other participants. Loayza reports that certain NGOs such as the Centre for International Justice and Law provide free legal assistance.

Rosette Bar Haim is a law graduate from the Universities of Paris and Jerusalem where she received a Master in Criminal Law – specialising in the fundamental individual rights in the *Rome Statute*. She has practised criminal law since 1997 in Jerusalem. She has campaigned for Israel to become part of the ICC

process. She was recently admitted on the ICC list of Counsels as the first Israeli women representative and is involved in the representation of a group of victims in the DRC (Democratic Republic of Congo) case. Her work as an independent researcher led her to develop the legal doctrine of *Judicial Humanism*.

In the article entitled “Une vision du droit pénal international : ‘L’Humanisme judiciaire’. Régulation du droit pénal international par la codification des garanties internationales d’équité du procès pénal”, she presents an innovative vision of international humanitarian law, introducing the concept of ‘Judicial Humanism’, which echoes a fundamental principle of international criminal law. It reflects an assumption that the internationally recognized human rights that are provided for in Article 21.3 of the *Rome Statute* amount to a new supranational standard. A broad interpretation of this article, she argues, allows us to achieve a fresh holistic approach to the sources of the *sui generis* international criminal systems and specifically a sound platform for a defence perspective.

This text serves as an opportunity the reader to reflect on the status of fundamental individual rights in the international judicial context, arguing for their effective implementation for each participant at each stage in the process – victims of crimes, suspects and formally accused. The new embryonic international judicial order that Ms. Bar Haim argues for has some support at the ECJ which observed recently in the case of *Kaddi v. Council of the EU*: “The Community judicature must fully review the lawfulness of all Community acts in the light of the fundamental rights which form an integral part of the general principles of Community law.”

#### **IV. Judicial Reconstruction and the Rule of Law**

The final three chapters of the book open a window on the varied project work which has been carried out around the world by committed members of ICDA. Their interventions have been aimed at ensuring effective access to justice for some of the most powerless people in the most neglected and conflict-prone states.

An overview of this activity is provided by a collaborative article led by Elise Groulx entitled “Reconstruction judiciaire et projet d’aide juridique en Afghanistan.” It explains how the ICDA has adapted its commitment to promote due process and a strong defence for all citizens to help people in war-torn countries. These are countries where the rule of law can mean the difference between life and death, and most often between freedom and imprisonment without a trial. The ICDA undertakes projects to help build institutions that ensure – as a long-term goal – universal access to justice for all citizens.

The article describes the notion of judicial reconstruction – a relatively new concept which emerged in the 1990s and which generally refers to the restoration and establishment of legitimate judicial institutions in countries emerging from armed conflict or devastating events. Over the years, judicial reform has acquired a more important role in national reconstruction programs which have traditionally been focused on rebuilding physical infrastructure, educational and health systems. It is

increasingly recognized that establishment of the rule of law is essential to ensuring the return of political stability, investor confidence and economic growth.

A pillar of the rule of law, in turn, is ensuring the presumption of innocence, fair trial rights, impartial tribunals and independent legal representation. In terms of building the ICC system, national judicial reconstruction is also essential to the effective implementation of complementarity – the principle that assigns to nation states primary responsibility for enforcing the Rome Statute and fighting impunity.

To date, the ICDA main project, undertaken with an American partner, the International Legal Foundation (ILF), has been the development of a national legal aid system in Afghanistan as one building block of the rule of law in that country. As is illustrated dramatically by the Afghan situation, judicial reconstruction often takes place under challenging circumstances in societies plagued with a significant level of corruption, black market transactions, poverty, a high level of criminality and the traumatic aftermath of violence and destruction. Many of these countries are characterized by legal systems that incorporate elements of customary law and unwritten legal traditions based on ethnic and cultural affiliations. It is therefore essential to reinforce the population's capacity by offering continued support to local actors. This increases their active participation in public life, beyond international intervention.

Grassroots participation and local outreach are guiding principles of the approach taken by ICDA and ILF to improving access to justice in Afghanistan. The project was initiated through a grant from the Open Society Institute in August 2003 to the ILF. This enabled the organization to open its first public defender's office in Kabul with two Afghan lawyers, which subsequently became the International Legal Foundation-Afghanistan (ILF-A). Through a contribution of the Canadian International Development Agency (CIDA), the ICDA joined ILF in 2005 to expand ILF-A offices under a project entitled "Nationalizing Legal Aid in Afghanistan". Today, the ILF-A comprises a main office in Kabul and thirteen provincial offices with a total of fifty-five qualified lawyers, of whom six are female lawyers. It provides legal representation to more than two thirds of the total incarcerated population in Afghanistan. The project seeks to entrench a culture of legal defence and advocacy, increasing the capacity of Afghan lawyers to ensure access to justice and legal representation of accused persons and detainees, among others.

Benoit Turcotte is a Montreal-based lawyer who was engaged on assistance missions to Afghanistan on three occasions and spent almost a year in the country. "La défense criminelle au soutien de l'émergence d'un État de droit en Afghanistan" sets out the challenge of importing fair trial norms into an emergency system which is reeling from years of conflict, in a society which is deeply divided, and in which discrimination is rife. There are positives. He reports that at last there is an independent bar in Afghanistan, one which offers the possibility of access to justice for individuals regardless of their ethnic origin or their economic or social conditions. But unless there is continuing investment in the state organs – police, prosecutors and, particularly, judges – progress against corruption will be difficult to sustain.



In “Portraits de missions”, Marie-Pierre Poulain describes two particular interventions which are testament to the extraordinary commitment and qualities of this remarkable campaigner and lawyer. I leave the reader to discover the outcome of her attempt to save the life of a young woman in Nigeria at risk of judicial execution. Her fieldwork initiative to help foster the rule of law in Congo likewise called for a deep understanding of legal principle, quiet diplomacy and an open mind. These interventions are at the very heart of the global ICDAА project. They feed on the natural hunger for justice and just processes which we find in communities everywhere in the world. Poulain concludes her chapter with the words: “our mission as defence advocates and as citizens of the world is to encourage this fervour (for justice) and to give people the means of expressing it and to strengthen it, all the while leaving our preconceptions at the door.”

This is a fitting conclusion to a book which is itself the product of a unique collaboration. Unique because it draws upon contributions from practitioners operating at all levels of different legal systems, steeped in different legal cultures and traditions, spread across different continents, and divided by language. Yet the unifying theme of this work is what unites the ICDAА membership – the overriding concern for the dignity of humans, the fairness of individual trials, the need for court processes to be conducted with appropriate respect for all participants, and for systems which value fair and accountable approaches to investigation, prosecution and trial. In all the corners of the world our members are fighting these battles.

## V. Finally

Before leaving this overview, a mention should be made of the distinguished contribution of Daniel Soulez Larivière whose own tribute to the work of ICDAА and its President stands as a fitting preface to this work. A member of the Paris Bar since 1965 Mr. Soulez Larivière has been a driving force in advocacy and the advancement of the legal profession in France and in Europe for decades, providing key support for the creation of the International Criminal Defence Attorneys Association in 1997 and then to the movement to create the ICB in 1999. Readers may know of his work as a member of the advisory committee for the revision of the French Constitution (1992-1993) and of the Commission for the review of the criminal immunity of the President of the French Republic (2002-2003). He is the author of numerous books on the theme of justice, including *L'Avocature* (1982), *Les juges dans la balance* (1987), *Notre justice* (2002, co-written with Hubert Dalle), *La Justice à l'épreuve* (2002, co-written with Jean-Marie Coulon, then Chief Justice of the Paris Court of Appeal), and *Le Temps des victimes* (2007, co-written with Caroline Eliacheff). Mr Soulez Larivière is a recipient of the French National Order of Merit, a Knight of the Legion of Honour and a tireless ambassador for ICDAА in Europe and the francophone nations.