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## INTERNATIONAL CRIMINAL TRIBUNALS: DISPENSING JUSTICE OR INJUSTICE?\*

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After working for some years at the International Criminal Tribunal for Rwanda (ICTR), the authors were disturbed by the lack of attention paid to how justice is dispensed by these so called human rights courts.<sup>1</sup> What follows is our assessment of their current state.

International criminal tribunals<sup>2</sup> to some, may appear to function fairly while applying a combination of civil law and common law principles. By common law we mean those principles that grew out of the Anglo-American legal tradition. Civil law

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<sup>1</sup> Attorney John Floyd spent nearly 5 years at the ICTR trying the *Media* case. Much of this article is based on what he experienced in his never ending struggle to obtain a fair trial for his client *Hassan Ngeze*. When attorney Abbe Jolles began her work in 2007 nothing had changed in fact the situation had significantly worsened. Abbe Jolles represented *Tharcisse Muvunyi* before the ICTR. *Mr. Muvunyi's* convictions for genocide, direct and public incitement to commit genocide and other inhumane acts were overturned by the Appeals Chamber. After quashing Muvunyi's conviction for direct and public incitement to commit genocide based on the speech given at the Gikore Trading Center a retrial limited to this allegation was ordered. Mr. Muvunyi continues to be held at the United Nations Detention Facility in Arusha, Tanzania despite his acquittal. In the retrial, again for the first time in the history of the ICTR, the Trial Chamber certified the question of sufficiency of the evidence offered on the incitement charge to the Appeals Chamber. This allowed the Appeals Chamber to consider whether there had been sufficient evidence offered in the retrial.

<sup>2</sup> When referring to international criminal tribunals we are referring to the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court of Sierra Leone (SCSL.) Specific references can be verified by going to their respective web sites.

refers to those systems that grew out of the Roman-Napoleonic legal tradition.<sup>3</sup> In our view it is not possible for a court to function fairly under these circumstances.<sup>4</sup> The extreme differences in trial practice, procedure and rules of evidence make trials inherently unfair.<sup>5</sup>

This is seen clearly by examining the difference between how the presumption of innocence operates when applied to the prosecution of human rights violations and war crimes in the international tribunals. In common law jurisdictions the defendant/accused is presumed innocent. In civil law jurisdictions the defendant/accused is presumed guilty. This presumption of guilt has been adopted by the international criminal tribunals despite the fact that they pay lip service to the presumption of innocence.<sup>6</sup>

In addition, judges from common law systems are trained to bend toward deductive reasoning while civil law judges apply inductive reasoning. These differences, utilized in one system of justice, make it nearly impossible to obtain a fair trial in an international criminal tribunal.

The common law or adversarial system relies on rules of evidence such as hearsay and other so called exclusionary rules to determine the guilt or innocence of the accused. These rules of evidence assure the admission and consideration, by the fact finder, of only reliable evidence. The fact finder must be truly objective in the common law system. By contrast, in the civil law system, the judges are thought to be able to screen themselves from prejudicial information so exclusionary rules are considered unnecessary. Civil law judges are thought to be able to objectively weigh evidence no matter how irrelevant, suspect or prejudicial. Civil law judges do not consider that they themselves can be prejudiced in the face of overwhelming irrelevant evidence of horrifying acts of war.

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<sup>3</sup> It is important to keep in mind that civil law systems are somewhat varied. The French group represents France and Spain. The German group includes Germany and Austria. The Dutch group is distinct from the aforementioned. Italian law evolved from French based codes to German based codes. Further, there are systems in South Africa, Argentina and Scotland, which combine civil and common law principles. The Canadian province of Quebec could also be included in this group. The system in Quebec is based on the French system, yet incorporates principles of common law.

<sup>4</sup> This is in part because both the civil law and common law systems function well as a whole but when you add and subtract elements due process is put at risk.

<sup>5</sup> Again both the civil and common law systems function well as a whole. The general tendencies of one or the other system depend upon the way each systems elements work together. This is why such a hybrid procedure puts due process at risk. See Arthur Taylor Von Mehren, *The civil law system: an introduction to the comparative study of law*, 2d ed. (Boston: Little Brown, 1977).

<sup>6</sup> This presumption of guilt is applied practically speaking even though the *European Convention on Human Rights* (ECHR) Article 6 guarantees every person the right to a fair trial and Article 2 states that “[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to law.” Even though the ECHR applies in every European country, in practice, a presumption of innocence is not recognized before the international criminal tribunals. In the common law system the presumption of innocence cannot be ignored. It is an essential element of a fair criminal justice system. The authors take no position on whether the presumption of innocence is ignored in practice before the courts in civil countries. However, it is virtually ignored in the prosecution of war crimes in the international criminal tribunals.

Why then did the drafters of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) charters fail to determine the applicable law and rules? Why did they create hybrid courts dispensing *schizophrenic* uneven justice?

## I. Right to Remain Silent

Pursuant to the rules of both the ICTY and the ICTR an accused has the right to remain silent. This is a uniquely common law concept. In civil law jurisdictions the accused testifies first. In common law jurisdictions when and if the accused testifies is determined in consultation with counsel. The accused is not required to testify and if he chooses not to, that decision cannot be held against him.<sup>7</sup>

While the right to remain silent is codified in the *Rules* of the international criminal tribunals,<sup>8</sup> it is not respected in practice. Often tribunal judicial decisions comment, and assign weight to, both an accused failure to testify or, at what time in the witness line up he/she testifies. Further the testimony of an accused, or lack thereof, often provides the basis for finding him/her guilty. Moreover when there is a lack of evidence, going to an essential element of the crime, the tribunal judges often find against the accused in any case. This is prohibited in a common law jurisdiction because such a finding, where proof is lacking, impermissibly shifts the burden of proof (or presumption of innocence). In short this treatment of presumption of innocence and right to remain silent would cause a conviction to be reversed in common law jurisdictions.

Thus there is a built-in conflict between what the rules require as applied in fair proceedings and as applied in the international tribunals. A legal system cannot operate fairly where convictions can be based on whether or not and when the accused testifies. A fair system requires proof of each and every element of the crime charged. This is an essential requirement of a fair legal system.

As we indicated above, the common law system does not allow for assessment of guilt based on whether or when the accused testifies. In fact it is impermissible to assess credibility/guilt of the accused on this basis.<sup>9</sup>

In French civil courts the accused testifies but is not *sworn* to tell the truth. In France the accused is expected to testify untruthfully.<sup>10</sup>

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<sup>7</sup> This is the rule in the United States and many other common law jurisdictions. In the United Kingdom, comment on the failure of the accused is allowed.

<sup>8</sup> See *Statute of the International Criminal Tribunal for Rwanda*, UN SC, 49th year, 3453rd Sess., Annex UN Doc. S/RES/955 (1995) 3 [ICTR Statute] art. 20. It should also be noted that the ECHR recognizes the right to remain silent but oddly enough does not codify it. The ECHR states that “[t]he right to remain silent under police questioning and the privilege against self incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6”. See *John Murray v. the United Kingdom* (1996), E.C.H.R. (Ser. A) 3, (1996) at para 45, 22 E.H.R.R. 29.

<sup>9</sup> In the United States the accused tends to testify last. Generally it is a matter of custom and strategy not credibility that determines if and when an accused testifies.

This problematic approach to justice is seen clearly by the conflict that arises when a three-judge panel at the ICTR or ICTY happens to consist of all civil law judges and the attorney for the accused is from the common law system. There is also a problem when a civil law avocat argues before a panel of common law judges. The confusion that has developed, results in uneven, unfair trials and inconsistent precedent.

## II. Civil Law vs. Common Law Rules

As indicated, common law rules of evidence create protections so that the fact finder only considers reliable evidence. Under the civil law rules all evidence is admitted and the judge determines its appropriate weight. International jurisprudence is all over the legal map. Rules such as hearsay, best evidence, presumption of innocence, right to remain silent, have been replaced by rumor, suspicion, political correctness, political expediency, presumption of guilt and manipulation. In other words these rules of evidence are applied haphazardly. This is why the resulting trials are unfair.

International criminal defence lawyers must consider what it means to be a lawyer. The French existentialist writer Albert Camus wrote that “it is normal to give away a little of one’s life so as not to lose it all.”<sup>11</sup> How much loss of integrity and living with what is an obvious abuse of the rights of the accused in order to bend the system toward justice can we accept? American civil rights advocate H. Rap Brown said that one loses a little bit of integrity with every stale compromise. What are the compromises we international lawyers are making? What are these compromises doing to our collective integrity?

*John Bosco Barayagwiza*,<sup>12</sup> a Rwandan *Hutu* lawyer and former government official, was tried by the ICTR *in absentia* and was without a lawyer for a significant part of his trial. The Appeals Chamber affirmed his conviction nonetheless sentencing him to more than thirty years in prison. To try an accused who is not present and without a lawyer cannot be condoned. This is not real justice. A man tried *in absentia* and without a lawyer has not had a fair trial. We as international criminal defence lawyers should be ashamed. We must speak out against such injustices.

The ICC is considering eliminating cross-examination and not following precedent. They are considering taking *judicial notice* of the existence of a crime. These discussions are proceeding without input of the defence bar. Defence attorneys are in a unique position to understand how eliminating cross-examination, failing to follow precedent and the misapplication of the doctrine of *judicial notice* prevents a fair trial.

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<sup>10</sup> A Paris based criminal avocat once told the authors of this article that the testimony of an accused is expected to be self-serving. While this is admittedly anecdotal it is consistent with many of the opinions rendered by Judges at the ICTR and ICTY who come from civil law jurisdictions.

<sup>11</sup> Albert Camus, *Notebooks 1935- 1942*, (Washington: Marlowe & Co, 1991), entry for 22 Nov. 1937.

<sup>12</sup> See *infra* note 13.

Cross-examination is unique to common law systems and is thought to lengthen trials unnecessarily, confuse the evidence and re-victimize witnesses. However there is no better way to check perjury and memory deficiencies. How will perjury and memory deficiencies be checked if cross-examination is eliminated? Due process requires a sifting of the evidence even of horrific events. People are untruthful. People forget. A witness under stress often fails to observe accurately.

Again, having judges who come from various legal systems and countries has been problematic. A civil law judge may think a lawyer vigorously cross-examining a witness is rude. A common law judge seeing a lawyer politely asking gentle questions of a witness may think that lawyer is incompetent.

The Rwanda government and certain victims' organizations frequently provide the ICTR Prosecutor with the *same* untruthful witnesses at trials. The only way to reasonably challenge such testimony is through cross-examination.

### III. Confusion at the International Criminal Court

The International Criminal Court (ICC) is a creature of the Rome Statute, created by the Assembly of States Parties (ASP). The ASP is made up of all the signatory countries to the Rome Statute. The ICC does not yet have a clear procedure in place to conduct trials. Even though the procedure is unclear, the prosecutor is issuing arrest warrants and holding hearings affecting those who are detained and there are several trials in process. Before arresting and prosecuting, a fair system must be in place. A fair system would include *civilized standards* and clear rules of practice, which are abided by in all cases. The ICC *Rules of Evidence* are particularly unclear. It appears that the first case to be brought before the ICC, that of Thomas Lubanga, was so mishandled and Mr. Lubanga's pretrial rights so violated, that the Trial Chamber made a decision to dismiss his case and release him. At the ICC, this decision is not final, even though prosecution appeals are now exhausted.<sup>13</sup> Thus, despite these grave pretrial rights violations, Mr. Lubanga will never be released.

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<sup>13</sup> The Trial Chamber found that the Office of the Prosecutor [OTP] withheld exculpatory evidence, such that Mr. Lubanga could not receive a fair trial. The first release decision was made months ago and the Appeals Chamber has already dismissed the OTP appeal, but curiously Mr. Lubanga still sits in jail. This could never happen in a common law system. The delayed trial of Mr. Lubanga will go ahead eventually despite the finding that Mr. Lubanga could not receive a fair trial. The trial was put on indefinite hold days before it was to begin on June 23, 2008 after prosecutors failed to turn over key evidence to the defense or the Chamber. They have now turned over the evidence and the trial will go ahead. Meanwhile, Mr. Lubanga sat in jail while this was all being worked out. In our opinions, this is not the way to conduct criminal trials. See Rachel Irwin, "Experts Believe Lubanga Trial May Go Ahead" Institute for War and Peace Reporting (3 November 2008) online: IWPR <<http://www.iwpr.net/report-news/experts-believe-lubanga-trial-may-go-ahead>>. It is also relevant to note here that the ICTR trial chamber dismissed the case of Jean Bosco Barayagwiza, one of the accused in the *Media* trial, and ordered his immediate release due to pretrial rights violations. They later reversed this decision, on a motion of the Prosecution, and Mr. Barayagwiza died while serving a sentence of 30 years imprisonment, which had been affirmed on appeal. See *Jean Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision Prosecutors Request for Review or Reconsideration

Moreover at the ICC, victims play a pivotal or central role in trials of an individual accused. These are not necessarily victims who have a direct connection to the accused but rather those who have suffered, generally from, been displaced or otherwise adversely affected by, the conflict at hand. This raises serious fair trial issues.

#### **A. Adherence to Consistent Rules of Evidence and Procedures**

There must be a single consistent set of *Rules of Evidence and Procedure* that all international criminal tribunals adhere to. Several non-governmental organizations (NGOs) have evidence of crimes against humanity and war crimes. Yet there is no law enforcement agency or prosecutors office in the world to receive and archive the proof that may be needed in the years to come.<sup>14</sup>

#### **B. Streamlining Procedure and Interpol**

To date there is no clear mandate offering guidance on the proper approach to prosecuting international crime. INTERPOL should be the repository for all evidence of cross-nation and international crimes. INTERPOL has indicated that they are working to modernize the INTERPOL approach to law enforcement to best address the crimes of terrorism, child pornography, drug trafficking, slavery, ethnic cleansing and other crimes against humanity. It appears however that INTERPOL lacks the manpower, technology and government cooperation it and the civilized world need in the 21<sup>st</sup> Century.

Until there is agreement on *Rules of Evidence and Procedure*, sanctioned by the United Nations and recognized by all international tribunals, the ICC and other *ad hoc* international courts will remain weak, partisan, unfair and ineffective.

### **IV. ICTR and ICTY Sentencing Disparity**

Besides criticisms that those charged at the ICTR have often been innocents used as scapegoats, there has also been criticism that even those scapegoats have been sentenced more severely than the ICTY accused. This is so even though the ICTY

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(31 March 2000) (International Criminal Tribunal for Rwanda, Appeals Chamber) online: ICTR <<http://www.ictr.org>>.

<sup>14</sup> Two Seaton Hall Law professors, Raymond Brown and Wanda Aiken, have gathered large numbers of interviews of witnesses and victims of the Darfur abominations. At a New York meeting of the International Criminal Bar in December 2007 they recounted their frustration at offering this evidence of crimes against humanity and war crimes to the prosecutor at the International Criminal Court at The Hague, only to be rebuffed. To their utter astonishment they were told that their evidence of genocide was “not welcomed”. Brigid Inder, Executive Director of Women’s Initiatives for Gender Justice, based in The Hague has expended much time and energy conducting interviews with women throughout conflict areas. In order to accomplish these interviews she and her staff have been put at tremendous risk. They too have been unable to contribute the fruits of their labor. Again there is simply no coherent vehicle/procedure for cataloging these important interviews.

accused are generally convicted of truly reprehensible crimes that include active roles in these crimes.<sup>15</sup> The conduct behind the crimes for which the ICTR accused have been convicted is uniformly and objectively much less egregious than the accused at the ICTY. Yet hefty sentences at the ICTR are frequently imposed and provoke little outcry in the international humanitarian law community.<sup>16</sup>

## V. Politics Vs Justice

### A. Selective Prosecution/Africanization

The International Criminal Tribunals are controlled by politics. For this reason complaints about the incompatibility of the common law and civil law systems and resulting in unjust convictions have been ignored.

The years since the international criminal tribunals came into being have bred cynicism and contempt by the International Criminal Defence Bar. It is widely recognized that the civil law or inquisitorial system is less immune from politics than the adversarial or common law system. The common law system is deeply rooted in precedent with precise rules that must be applied to everyone similarly. In this way it protects against uneven justice.

Too often political expediency, not real justice, results from these tribunals in their current state. There exist fundamental flaws in all of the current international criminal tribunals. The flaws are illustrated by inconsistency of their decisions and what we call their *Africanization*. This is best illustrated by the situation at the International Criminal Court (ICC). It is thought to be the permanent international court. To date the ICC has only issued warrants for Black Africans. Furthermore the civil law or inquisitorial system predominates.

### B. The Prosecution Of Black Africa-SCSL

The Special Court of Sierra Leone (SCSL) has only prosecuted accused from Black Africa even though there is evidence that weapons used in the slaughter in Sierra Leone and Liberia were supplied by Asia and the West. It is well known that

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<sup>15</sup> A good example of this is seen by the sentence received by General Krstić, head of the Drina Corps, without whom Srebrenica would not have happened. General Krstić received a sentence of 45 years and on appeal it was reduced to 35 years. At the ICTR those who were convicted in the *Media* trial (Incitement to Genocide) received that much time and more. General Krstić is responsible for the largest single war crime in Europe since the Second World War. Between 6 and 16 July 1995 the *Serbs* seized the Srebrenica safe area, expelled 23,000 *Bosnian* Muslim women and children and captured and executed thousands of Muslim men. See Norbert Both and Jan Willem Honig, *Srebrenica, Record of a War Crime*, (Harmondsworth: Penguin, 1996). If General Krstić did not deserve a life sentence than certainly those who have been convicted and have received life at the ICTR do not.

<sup>16</sup> One of the justifications for this disparate sentencing is the differences which exist between the applicable national jurisdictions laws in effect. In our view this does not justify disparate sentencing. We must seek uniformity of applicable laws and rules at all international tribunals so that the process treats all human beings the same. That requires the same level of proof if you are *Hutu* from Rwanda as if you are a *Serb* from the former Yugoslavia.



the desire for diamonds, oil and other precious minerals is at the core of the misery in Africa. Additionally, the West is always seeking geo-political advantage. These issues trigger crimes against humanity. Who but Africans have been indicted? There is a lot of evidence that the Chinese and certain Western entities are supplying weapons to the sub-Saharan killers of the Janjaweed militia. Even in the face of overwhelming evidence, not one Chinese or western arms supplier has been indicted by the ICC.

It is now clear that no matter how serious their offenses and no matter how much evidence, no war criminal, who is a national of the major powers, will be tried at any international tribunal. The tribunals will continue to spend millions to prosecute relatively minor dictators, warlords and illiterate thugs. The weapons and other support in these conflicts continue to be provided by those who will never be prosecuted. Credibility and equality are lacking at the international tribunals.

### C. Prosecution of all Criminals Regardless of Ethnicity

The International Criminal Bar must not be a guilty bystander to what has and is occurring. That is we should not stand by and watch, for example, the selective prosecution of only *Hutus*<sup>17</sup> for the Rwandan genocide. This is true even though there has been confirmation, by ICTR Chief Prosecutor Hassan Jallow, of *Tutsi* dominated Rwanda Patriotic Front (RPF) responsibility in the genocide.<sup>18</sup> This is just one example of the evolution of partisan and unfair processes at least at the ICTR.

We must answer the question of why certain Africans are most often charged by international courts. Even though there is substantial evidence that prominent *Tutsi* were intricately involved in mass killings in Rwanda and Congo, not one *Tutsi* has been indicted or prosecuted. Only the *Hutu*, the poorest and historically most abused Rwandans, have been subjected to arbitrary political prosecution for the benefit of those who stood by and allowed more than a million people in Rwanda and Congo to be slaughtered. Furthermore there is evidence that European soldiers were involved in war crimes in Rwanda yet none have been prosecuted.

## VI. Registrar's Quasi Judicial Role

One of the major problems, ongoing since the inception of the modern international tribunals, is the power invested in the registrar. The registrar is often intricately involved in the charging and prosecuting decisions and in the allocation of precious legal defence resources. As the registrar is akin to a clerk of the court in a common law system it is difficult to understand why he has the power to adversely impact the trial of the accused. The registrar has administrative, prosecutorial and

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<sup>17</sup> There is ample evidence that *Tutsis* slaughtered *Hutus* in Rwanda in 1994. However despite overwhelming evidence not one *Tutsi* has ever been prosecuted at the ICTR.

<sup>18</sup> See ICTR Chief Prosecutor Jallow's presentation to the United Nations Security Council confirming *Tutsi* dominated Rwanda Patriotic Front responsibility for crimes committed in Rwanda in 1994, June 2008.

judicial duties and there is no requirement that he exercise these duties impartially. Even more troubling is that there is no procedure to review registrar decisions that effectively deny essential fair trial rights to the accused.<sup>19</sup>

The registrar makes serious legal aid decisions. He decides whether and when a lawyer will be appointed to the accused. In common law systems this legal decision is made by a judge, who must be impartial. The decision about when in the process the accused is entitled to legal counsel, as seasoned defense lawyers are acutely aware, is paramount. It is a crucial legal decision that can adversely impact the rights of the accused. The registrar is not always legally trained. Even with legal training because he should not be empowered to make decisions affecting essential fair trial rights of the accused. These should be made by judges. It is inappropriate for a registrar to make these decisions. Allowing the registrar to make such a decision results in a denial of fundamental fair trial rights.

Recently the ICTR registrar, Adama Dieng, actually took a position on whether and under what circumstances a lawyer should be appointed for a defence investigator arrested while performing his duties in Rwanda and sent to the ICTR for trial.<sup>20</sup> He also took a position on what resources would be available for his defence. Adama Dieng has never been a prosecutor or a defence attorney. He is simply not qualified to make such decisions.<sup>21</sup> These are decisions the judges presiding over the case should make without input from the registrar. Judges are in a unique position to evaluate legal requests whether they are related to resources to be expended or substantive motions. Judges must protect the rights of the accused at every stage. Their decisions, should they be erroneous, are subject to immediate review on appeal. In this way a check on abuse of power and or discretion operates to insure a fair process.

When the ICTR registrar took a position on a Motion filed asking that the Trial Chamber appoint counsel immediately to the incarcerated investigator Leonidas Nshogoza, defence lawyers were shocked. A system that allows a clerk to impact when and under what circumstances counsel should be appointed is by definition an unfair system. The appointment of counsel, for an accused person, should not be decided by the court clerk. Until international criminal tribunals make appointment of counsel the sole responsibility of judges, who are in a position to make sure that the rights of the accused are protected, the system cannot be fair. Convictions resulting from systems where the registrar decides whether and when counsel is appointed are fundamentally flawed. These convictions lack credibility and are more often than not political. They should be reversed.<sup>22</sup>

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<sup>19</sup> When a judge makes a decision that adversely impacts the rights of the accused that decision can be appealed. Both sides must brief and argue the issue and the Appeals Chamber ultimately settles the issue. In the case of the registrar, decisions are in practice final and unreviewable.

<sup>20</sup> *The Prosecutor v. Leonidas Nshogoza*, ICTR-2007-91-PT, Order for Immediate Assignment of Counsel (18 August 2008) (International Criminal Tribunal for Rwanda: Trial Chamber III).

<sup>21</sup> Even Mr. Dieng himself recognized, in response to the questions posed by the Coalition for the International Criminal Court to Candidates for ICC Registrar, that the registrar should be responsible for “*NON JUDICIAL*” aspects of court administration, a “*NEUTRAL SERVICE PROVIDER*”.

<sup>22</sup> The ICTR judges do not have the power to appoint counsel to indigent accused.

The registrar also makes decisions regarding when counsel should be removed. To remove a defence lawyer from an ongoing case without any basis fatally flaws any proceeding associated with such removal. The registrar decides when to appoint an attorney and in many cases what work is necessary for the attorney to complete prior to termination of appointment.<sup>23</sup> This is a judicial function in a democratic system.

The registrar also makes decisions regarding whether certain documents will be translated into the language spoken by the accused and counsel.<sup>24</sup> These decisions are made by judges in common law jurisdictions. By permitting the registrar to make these decisions the registrar has usurped the power of the judiciary. Thus the judges, no matter how well intentioned, are powerless to insure a fair trial. The judges cannot overrule the registrar.

While the authors understand the importance of safeguarding the public treasury, this is a judicial not a clerical function. A clerk has not been trained nor properly vetted (as judges are) to exercise such a function.

Furthermore and equally troubling is that the ICTR registrar, takes public positions on who should be prosecuted for the Rwandan genocide. This is absolutely inappropriate. One example of inappropriate remarks by the ICTR registrar, was the condemnation of the arrest, in France, of Rose Kabuye, senior aid to President Kagame.<sup>25</sup> Court officials must always remain impartial. As this illustrates ICTR representatives do not attempt to appear impartial. They take a position on the culpability of the accused at the time of arrest.

Generally ICTR officials operate on the assumption that certain individuals (*Hutus*) charged with war crimes in the international tribunals are guilty. Quite contrary to the presumption of innocence, this is a powerful indication that there is a *presumption of guilt* in effect.

## VII. Allocation of Resources

Lawyers who have defended accused persons at the various international tribunals uniformly believe that the trials are unfair although they may disagree about why.

Many trials are too political or can be termed ethnically condescending. They all lack equality of resources between the prosecution and defence. Equality of arms

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<sup>23</sup> See the *International Criminal Tribunal Rules and Practice Directive for Assignment of Counsel*.

<sup>24</sup> Author, John C. Floyd III, represented Hassan Ngeze in the *Media* trial over a period of five years. Mr. Ngeze was ultimately convicted of the crime of incitement to genocide based on the newspaper he published in Kinyarwanda. The registrar did not permit translation of any of the so called criminal speech yet the ICTR Judges (none of them Kinyarwanda speaking) were able to find Mr. Ngeze guilty of incitement to genocide. Mr. Ngeze was sentenced to more than 30 years in prison. That sentence was affirmed on appeal.

<sup>25</sup> Berna Namata, "Rwanda: ICTR Registrar Condemns Rose Kabuye's Arrest" (13 November 2008), *The New Times*, online: All Africa <<http://www.allafrica.com>>.

for the defence, lack of judicial independence,<sup>26</sup> prosecutorial incompetence and misconduct adversely impact on the fairness and credibility of all international criminal trials.

## VIII. Defence Counsel Compensation

Defence lawyers are underpaid at all the international tribunals and the defence generally is grossly underfunded. Defence counsel compensation has not increased at the ICTR since its inception. Americans are among the most experienced trial lawyers in the world, yet precious few handle cases before international criminal tribunals. One of the reasons that very few American lawyers work as defence attorneys at the tribunals is that the pay is particularly low for them. Americans are fully taxed on their earnings. Lawyers from many other nations work tax free due to special exemptions in place to encourage lawyers to do international legal work.

As indicated the ICTR is still paying defence counsel the same low rates in US dollars. While the ICTR Office of the Prosecution (OTP) has had upward adjustments throughout the years, the pay of defence counsel and defence team members has actually decreased. It should also be noted that the ICTY has been paying defence lawyers in Euros for some years now.

It is important to address and resolve the problem of inadequate defence counsel pay in order for the tribunals to be in a position to dispense fair and impartial justice. To its credit the ICC has taken the position that defence counsel should be paid at the same rate as the prosecutors. This is particularly important because it is a permanent court and thus when the OTP gets an increase so will defence counsel. In this way the *inequality of arms* between the prosecution and the defence, which exists in a big way at the ICTR, may be avoided. However, unless the international community continues to apply direct pressure on the ICC in this area defence counsel will not remain appropriately compensated. It cannot be over stated that one of the essential elements of a fair criminal justice system is competent defence counsel adequately and timely paid.

## IX. Conviction of Innocents: Whose Interest Is Served?

So much money has been spent on trying people at the ICTR, ICTY and SCSL. The purpose of the international criminal tribunals is to bring justice to victims of conflict. In the blind quest to bring justice to conflict victims we have lost sight of the importance of doing all we can to assure that we convict the guilty. It is not sufficient just to have convictions. We must assure as best we can, through a fair and rigorous process, that those who are convicted are actually guilty.

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<sup>26</sup> As illustrated by routine deference to the registrar, considered a mere clerk or administrator by common law standards, on important questions concerning the rights of the accused.

The systematic protections that we all value have been slowly eroded. The best example of this is the way the *Hutu* intelligentsia has been kept on the defensive since the 1994 genocide. Despite the constant calls to prosecute all criminals involved in the conflict it is only the *Hutus* that have been prosecuted. Furthermore those *Hutus* prosecuted are generally convicted based on their mere presence in Rwanda during the conflict. Even the ICTY has done better as they tried Milosevic although they did not manage to finish the trial before his untimely death.

What currently passes for international law is often irrational. In 2007 at a New York international law conference, an African international legal scholar was characterizing former President George Bush as a war criminal for having invaded Iraq. When we tried to have a rational conversation with this legal scholar, a judge in his country, he further postulated that not only President George Bush but every United States Member of Congress who voted for the resolution supporting the invasion of Iraq was a war criminal. He refused to understand that legislatures in all democratic countries are immune from prosecution by performing legitimate official acts. Voting is a legitimate act. No amount of reasoning could convince him that he was wrong. The core of the argument was about who, at the ICC, should be authorized to return an indictment.

It is our view that only the United Nations Security Council should be authorized to return an indictment. Currently the ICC Chief Prosecutor has sole authority to return an indictment. There must be some check, akin to the Grand Jury used in the United States, on the prosecutor's discretion. Furthermore, it appears that only the weak are subject to international criminal tribunals in their present state.

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Mao Tse Tung said that "all political power comes from a barrel of a gun."<sup>27</sup> Does all international law also come ultimately from the barrel of a gun?

Dr. Martin Luther King said that "all history bends ultimately towards justice."<sup>28</sup> Is the history of the international courts bending toward justice or toward political expediency?

We are both pessimistic and optimistic about the future of the tribunals. In a fair world they are necessary. In a real world their future is uncertain.

We understand that the international tribunals, operating in an international political context, will not simply adopt the common law system or the civil law system but will continue to utilize certain parts of both systems. However as

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<sup>27</sup> Mao Tse-Tung, *Little Red Book-Quotations from Mao Tse-Tung*, [1964], (Menlo Park: Oak Grove, 2008).

<sup>28</sup> Dr. Martin Luther King Jr., "Where do we go from here?", Southern Christian Leadership Conference, Atlanta Georgia, 16 August 1967, online: <<http://www.famous-speeches-and-speech-topics.info/martin-luther-king-speeches/martin-luther-king-speech-where-do-we-go-from-here.htm>>.

international trial lawyers, hoping for justice and mindful of the current reality, we know that mandatory rules must be codified that apply in all international tribunals. The United Nations Security Council, or its designee, appears to be the only vehicle to adopt uniform rules of evidence and procedure. Thus it should develop and codify uniform rules guided by civilized principles and standards, not by a desire to convict the accused regardless of culpability.