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The Impact of International Law on International Criminal Proceedings – Human Rights Perspective

Wpływ prawa międzynarodowego na międzynarodową procedurę karną – perspektywa praw człowieka

ABSTRACT

A long time ago, the international community has taken some steps to prosecute war criminals and to establish a permanent criminal tribunal. However, a new era in the development of international criminal law and procedure, as well as international human rights and humanitarian law, began in the aftermath of World War II. Unfortunately, the Nuremberg and Tokyo Tribunals focused mainly on the accused and their punishment. They ignored the role of the victim in the criminal proceedings. Thus, it was necessary to create a new international criminal tribunal that would not suffer from the shortcomings and would be in line with the emerging standards for the protection of human rights. Indeed, the Statutes and Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) was an attempt to be more fair and reflect international human rights standards. The milestone, however, was the establishment of the International Criminal Court (ICC), whose Statute mirror not only fundamental human rights standards and jurisprudence of human rights tribunals and organs but also elevates the status of victims. Furthermore, the ICC applies treaties and other sources of international law and it "must be consistent with internationally recognized human rights". The article is a contribution to the discussion of the impact of international law on the development of international criminal proceedings through the lens of human rights standards. It also attempts to show whether the special features of international law have influenced international criminal proceedings and demonstrate the close but complex relationship between sub-branches of international law, such as international criminal law, international criminal procedure, international human rights and humanitarian law, as well as the ways of interferences of international human rights law in international criminal proceedings.

Keywords: accused; human rights; international criminal procedure; victim; witness

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INTRODUCTION

International criminal law, international criminal procedure, international human rights law and humanitarian law are all sub-branches of international law. The same can be said of international criminal procedure. The first one is defined, in a strict sense, as a law which established individual criminal responsibility under international law before international criminal courts.[1] International criminal procedure is a specialized body of international law that governs the conduct of criminal proceedings. Its primary function is the effective and fair enforcement of international criminal law by international courts.[2] International human rights law is described as a set of fundamental freedoms and basic social, economic and cultural rights that are recognized to every individual regardless of nationality.[3] On the other hand, international humanitarian law is aimed at solving the problems arising from international and non-international conflicts. It limits the rights of the parties to the conflict to the use of methods and means of warfare and to the protection of persons or property that may be affected by such conflict.[4]

The primary source for all of them is Article 38 of the Statute of the International Court of Justice (ICJ),[5] i.e. international conventions, international customs, general principles of law and, under certain conditions, unilateral acts and binding decisions of international organizations. Of course, in the case of international criminal courts, they could apply international norms such as customary international law or general principles of law. The only international criminal court that has international personality, or more precisely that is a State Party to the Statute, is the International Criminal Court (ICC), and it can enter into treaties. However, it is not bound by

[1] C. Kreß, *International Criminal Law*, "Max Planck Encyclopedia of Public International Law", March 2009, https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e1423?rskey=qOvCjH&result=1&prd=MPIL (access: 16.12.2024), para. 10.

[2] G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà, *Introduction*, [in:] *International Criminal Procedure: Principles and Rules*, eds. G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappalà, Oxford 2013, p. 14.

[3] R. Kolb, P. Kilibarda, *Human Rights and Humanitarian Law*, "Max Planck Encyclopedia of Public International Law", December 2022, https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e811?rskey=J61tYq&result=1&prd=MPIL (access: 16.12.2024), para. 1.

[4] H.P. Gasser, *Humanitarian Law, International*, "Max Planck Encyclopedia of Public International Law", December 2015, https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e488?rskey=TW4e7p&result=1&prd=MPIL (access: 16.12.2024), para. 3.

[5] G. Boas, J.L. Bischoff, N.L. Reid, B.D. Taylor III, *International Criminal Procedure: International Criminal Law Practitioner Library*, vol. 3, Cambridge 2011, pp. 2–4.

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any treaty that has not been agreed upon.[6] Furthermore, it is indispensable to take into account all the specific features of international law, such as consensual nature of the validity of international legal norms, primary international legal subjectivity of states, voluntary international jurisdiction.[7] In order to determine the influence of international law on the development of criminal proceedings, it is necessary to take it into account. This is because, despite the expansion of the circle of subjects of international law, the law remains clearly state-centered. Thus, the theory of consent plays an essential role, and what states agree to is binding on them,[8] with some exceptions, such as peremptory norm of general international law.[9]

The main purpose of this paper is to determine whether and how international law affects criminal procedure and in particular ways of interferences of international human rights law on criminal proceedings. In order to prove the main thesis, using the method of legal analysis, it is necessary, first, to demonstrate the relationship between the sub-branches of international law, which are complex, but also closely interrelated. Then to examine ways of interference of international human rights law in criminal proceedings, namely those directly involved in criminal proceedings, i.e. the accused, in particular, standards of fair trial, the role of the victim and witnesses in criminal proceedings. This paper has set aside the participation of lawyers, judges, court personnel in the criminal justice process and those not directly participating in criminal proceedings. The article is divided into four main sections: introduction, relationships between sub-branches of international law, ways of interference of international human rights law in criminal proceedings, including the rights of the accused, the position of victims and witnesses, and the last section contains conclusions.

[6] N.A.J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, "Human Rights Law Review" 2011, vol. 11(1), p. 98.

[7] See A. Kozłowski, *Wpływ sądownictwa międzynarodowego na rozwój prawa międzynarodowego*, [in:] *Współczesne sądownictwo międzynarodowe. Wybrane zagadnienia prawne*, ed. J. Kolasa, vol. 2, Wrocław 2010, pp. 50–52.

[8] See L. Antonowicz, *Rzecz o państwach i prawie międzynarodowym*, Lublin 2012, pp. 57–72.

[9] For example, see Fifth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, International Law Commission Seventy-third session Geneva, 18 April – 3 June and 4 July – 5 August 2022, A/CN.4/747, 24 January 2022; A.J. Colangelo, *Procedural Jus Cogens*, "Columbia Journal of Transnational Law" 2021, vol. 60(2), pp. 377–492; D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, Leiden–Boston 2021, p. 792.

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RELATIONSHIPS BETWEEN SUB-BRANCHES OF INTERNATIONAL LAW

There are strong links between the above-mentioned sub-branches of international law.[10] First, they emerged at the same time after the atrocities of World War II. The only difference is that international human rights law and international humanitarian law have been in a constant state of development. In the 1950s, however, work on the establishment of a permanent criminal court was abandoned.[11] A revival in the development of international criminal law and criminal procedure has taken place since the 1990s with the establishment of *ad hoc* Tribunals by the United Nations Security Council.[12] Second, they were initially considered to fall under national jurisdictions.[13] Third, all subsets of international law aim to guarantee a minimum standard of human treatment to individuals, but in different legal contexts.[14] Sometimes, international human rights are referred to as a shield and international criminal law and procedure as a sword.[15] Therefore, there is no doubt that international human rights law is necessary to define the procedural rules before the international criminal tribunals.[16] Furthermore, the drafters of the statutes of international criminal courts are strongly influenced by the human rights instruments. International criminal courts also refer to the jurisprudence of the human rights courts or other human rights bodies.[17] As in criminal procedure and international human rights law, in cases of violations of rights and freedoms or war crimes committed, in the absence of adequate remedies in the domestic legal system, or after domestic remedies have been exhausted, there is the possibility of recourse to regional human rights courts and other bodies or international criminal tribunals respectively to whose jurisdiction States have agreed.[18]

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[10] W.A. Schabas, *Relationships between International Criminal Law and Other Branches of International Law*, "Recueil des Cours" 2021, vol. 417, p. 325.

[11] C.M. Bassiouni, *Chronology of Efforts to Establish an International Criminal Court*, "Revue internationale de droit pénal" 2015, vol. 86(3–4), pp. 1164–1165.

[12] Resolution 808 (1993) adopted by the Security Council at its 3175th meeting on 22 February 1993, S/RES/808, para. 1; Resolution 955 (1994) adopted by the Security Council at its 3453rd meeting on 8 November 1994, S/RES/955, para. 1.

[13] W.A. Schabas, *Relationships…*, pp. 325–326.

[14] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge 2010, p. 13.

[15] B. Krzan, *Human Rights and International Criminal Law*, [in:] *Prosecuting International Crimes: A Multidisciplinary Approach*, ed. B. Krzan, Leiden–Boston 2016, p. 153.

[16] *Ibidem*, p. 155.

[17] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *op. cit.*, pp. 13–14.

[18] D. Scalia, *Use of Human Rights in International Criminal Law: Influence or Appearances of Legitimacy?*, [in:] *Convergences and Divergences between International Human Rights, International Humanitarian and International Criminal Law*, eds. P. De Hert, S. Smis, M. Holvoet, Cambridge–Antwerp–Portland 2018, pp. 30–31.

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It is therefore undeniable that international human rights law in particular has an impact on criminal proceedings.[19] This is evidenced also by the content of Article 21 (3) of the Rome Statute,[20] which stipulates that the application and interpretation of the law shall be consistent with internationally recognized human rights.[21] In addition, the ICC, which has an international legal personality, is also bound by Article 38 of the ICJ Statute.[22]

International law scholars distinguished two ways of interference of international human rights law in criminal proceedings. First, concerning those directly involved in criminal proceedings, such as accused, witnesses, victim and even lawyers, judges, or court staff. Second, those who are not directly participating in criminal proceedings.[23]

INTERFERENCE OF INTERNATIONAL HUMAN RIGHTS LAW IN CRIMINAL PROCEEDINGS

1. Accused

1.1. Fair trial

One of the most important rights that primary beneficiaries are accused is the right to a fair trial.[24] This right is connected with the concept of "due process" and can be traced back to the Magna Carta of 1215.[25] This term is derived from the principle of legality according to which all States are obliged to respect the rule of law, including the principle of separation of powers and legal personality of individuals under States jurisdiction.[26] The right to fair trial is envisaged

[19] See A.S. Galand, *The Systemic Effect of International Human Rights Law on International Criminal Law*, [in:] *Human Rights Norms in 'Other' International Courts*, ed. M. Scheinin, Cambridge 2019, p. 87.

[20] See T. Dias, *Beyond Imperfect Justice: Legality and Fair Labelling in International Criminal Law*, Leiden–Boston 2022, pp. 213–240.

[21] Rome Statute of the International Criminal Court, Rome, 17 July 1998, UNTS, vol. 2187, no. 38544, pp. 91–152.

[22] N.A.J. Croquet, *op. cit.*, p. 97.

[23] E. Schmid, H. Drif, *International Criminal Law and Human Rights*, [in:] *Elgar Encyclopedia of Human Rights*, eds. C. Binder, M. Nowak, J.A. Hofbauer, P. Janig, Cheltenham 2022, pp. 224–225.

[24] A. Clooney, P. Webb, *The Right to a Fair Trial in International Law*, Oxford 2021, para. 4.4, p. 33.

[25] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford 2003, p. 3.

[26] L. Doswald-Beck, *Fair Trial, Right to, International Protection*, "Max Planck Encyclopedia of Public International Law", April 2013, https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e798?rskey=rSj6qn&result=1&prd=MPIL (access: 16.12.2024), para. 2.

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in fundamental human rights documents, such as the Universal Declaration of Human Rights (Article 10),[27] the International Covenant on Civil and Political Rights (ICCPR; Article 14),[28] the European Convention on Human Rights (ECHR; Article 6) complemented by Protocol No. 7 of the said Convention, the American Convention on Human Rights (ACHR; Article 8), the African Charter on Human and Peoples' Rights (Article 7)[29] or the Arab Charter on Human Rights (Articles 14 and 15).[30] Furthermore, even in all four Geneva Conventions adopted in 1949.[31] In addition, the right to fair trial was stipulated in Article 20[32] of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) or Article 19[33] of the Statute of the International Criminal Tribunals for Rwanda (ICTR).[34] It is either a conventional or customary rule of international law from which there can be no derogation.[35] In addition, the right to a fair trial is at the heart of both the rights of the defense and the guarantee of the rule of law.[36] This right is treated as a bundle of rights[37] and applies to all proceedings, whether civil or criminal, and at all stages of the proceedings.[38]

Fair trial standards fall into three groups: impartiality, procedure and evidence. The first group includes the presumption of innocence until proven guilty by an impartial tribunal established by law and the right to a public trial. The second group encompasses the right of the accused to be informed promptly of the charges against him, the right to legal assistance of his own choice and to sufficient time to prepare a defense, the right to a speedy trial, the right against self-incrimination, and the right to appeal. The third group contains the right to know the evidence against him, including the right to cross-examine prosecution witnesses, the right

[27] A/RES/217 A (III), 10 December 1948.

[28] Adopted by the General Assembly of the United Nations on 19 December 1966, Optional Protocol to the above-mentioned Covenant, adopted by the General Assembly of the United Nations on 19 December 1966, UNTS 1976, vol. 999, no. 14668, pp. 171–301.

[29] Adopted on 1 June 1981, available at https://au.int/en/treaties/african-charter-human-and-peoples-rights (access: 16.12.2024).

[30] Translated from Arabic version provided by the League of Arab States, Tunis, 22 May 2004, [ST/HR/]CHR/NONE/2004/40/Rev.1, available at https://digitallibrary.un.org/record/551368 (access: 16.12.2024).

[31] See L. Doswald-Beck, *op. cit.*, paras 4–5.

[32] Resolution 827 (1993) adopted by the Security Council at its 3217th meeting on 25 May 1993, S/RES/827.

[33] S/RES/955, 8 November 1994.

[34] See B. Krzan, *Human Rights…*, p. 158.

[35] A. Clooney, P. Webb, *op. cit.*, para. 3.2, p. 20.

[36] S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 84.

[37] See A. Clooney, P. Webb, *op. cit.*, para. 2.3, pp. 8–11.

[38] *Ibidem*, para. 4.2, p. 74.

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to present evidence in his own defense, and the right to be informed of any exculpatory evidence in the possession of the prosecution.[39]

1.1.1. Impartiality

The presumption of innocence is called a "golden thread"[40] and requires the prosecution to prove the charges and ensures that the accused is given the benefit of the doubt.[41] It is the privilege against self-incrimination.[42] It is a common view that presumption of innocence means the following: the person charged with crime is treated as innocent until proven guilty, the burden of proof lies on the prosecutor; the defendant may limit himself to rebutting the evidence presented by the prosecutor; the tribunal must be convinced of guilt according to a certain standard of proof, such as the judge's inner conviction in civil law and beyond a reasonable doubt in common law.[43] The presumption of innocence is violated when a judicial decision or a statement by a public official expresses an opinion that someone is guilty before there is evidence of guilt.[44] The right to remain silent and not to be compelled to testify against oneself is a right that is intertwined with the right to be presumed innocent.[45] Furthermore, all human rights documents as well as statutes of international criminal courts guarantee that a fair trial must be conducted before an "independent and impartial tribunal established by law". The ICTY stresses that this is a fundamental human right and an integral part of the right to a fair trial.[46] Without any doubt, judicial independence and impartiality are crucial for the rule of law and indispensable in the protection of individual rights.[47] In addition, it is an absolute right and is not subject to any exceptions.[48] Government and other institutions are obliged to respect and uphold the independence of the judiciary. Furthermore, everyone shall have the right to be tried by ordinary courts or tribunals

[39] F. Harhoff, *One Size Fits All? A Looming Look at Human Rights in International Criminal Legal Proceedings*, [in:] *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi*, eds. P. Acconci, D. Donat Cattin, A. Marchesi, G. Palmisano, V. Santori, Leiden–Boston 2016, p. 416.

[40] Y. McDermott, *Fairness in International Criminal Trials*, Oxford 2016, p. 42.

[41] General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, para. 30.

[42] W.A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford 2015, p. 300.

[43] A. Cassese, *International Criminal Law*, Oxford 2003, p. 390.

[44] W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge 2020, p. 219.

[45] Y. McDermott, *op. cit.*, p. 46.

[46] Judgment of the ICTY of 21 July 2000 in case no. IT-95-17/1-A, *Prosecutor v. Anto Furundžija*, para. 177.

[47] T. Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, "American Journal of International Law" 2005, vol. 99(2), p. 359.

[48] General Comment No. 32, para. 19.

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according to established legal procedures.[49] The "tribunal" is defined not by the name but by the judicial functions.[50] Impartiality is indispensable for the proper performance of the judicial function. The judge should perform his or her function without any bias or prejudice.[51] This is a general rule according to which the judge should be subjectively free from any form of bias and there should be nothing in the surrounding circumstances that would objectively give rise to the appearance of bias.[52] Therefore, there are two types of obstacles to impartiality: subjective and objective. The first concerns any personal relationship between the judge and the parties to the case. The second concerns the appearance of partiality or bias on the part of the judge in a particular case in favor of one of the parties to the case.[53] One of the prominent scholars in the field emphasizes that independence and impartiality of judges can be ensured by proper mechanism of selection of judges, prohibiting judges to seek or receive instructions from outside authorities involved in the proceedings and establishing control mechanism to prevent judges from any form of bias.[54] The right to public hearing in human rights instruments includes the right to be tried in public and the right to have the judgment publicly announced.[55] Sometimes it may extend to the pre-trial stage and appeals as well.[56] The court is required to give notice of the time and place of the hearing and to provide adequate facilities.[57] It provides an important safeguard for the interests of individuals and civil society by ensuring transparency of procedures.[58] It therefore has several functions: to ensure a fair trial for the accused, to help ensure reliable testimony, and it can be referred to as the unknown witness rule, namely the witness who is unknown to all the parties and who has important information about the case can

[49] Basic Principles on the Independence of the Judiciary, adopted on 6 September 1985, the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, paras 1 and 5.

[50] Judgment of the ECtHR of 29 April 1988, *Belilos v. Switzerland*, application no. 10328/83, para. 64.

[51] *Ibidem*, para. 2.1.

[52] Judgment of the ICTY of 21 July 2000 in case no. IT-95-17/1-A, *Prosecutor v. Anto Furundžija*, para. 189.

[53] M.E. Villiger, *Handbook on the European Convention on Human Rights*, Leiden–Boston 2023, pp. 339–340.

[54] A. Cassese, *op. cit.*, p. 393.

[55] European Court of Human Rights, *Guide on Article 6: Right to a fair trial (criminal limb)*, https://rm.coe.int/1680304c4e (access: 16.12.2024). See C. Lysaght, *Publicity of Court Proceedings*, "Irish Jurist" 2003, vol. 38, pp. 34–35.

[56] A. Clooney, P. Webb, *op. cit.*, para. 4, p. 158.

[57] General Comment No. 32, para. 28.

[58] *Ibidem*.

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be summoned for a public hearing.[59] The right to a public hearing is also closely connected to the defendant's right to be present at his trial.[60]

1.1.2. Procedure

The second set of safeguards began with the right of the accused to be informed promptly of the accusation, which is stipulated in Article 14 (3) (a) ICCPR, Article 6 (3) (a) ECHR and Article 8 (2) (b) ACHR. This right constitutes one of the essential elements of the right to prepare a defense, beside the right to adequate time and facilities for the preparation of a defense.[61] The aim of these minimum guarantees concerning notification about nature and cause of charge is rather obvious, namely the right to defend oneself when the accused is aware of the accusation.[62] International documents do not have specific requirements as to the form in which such information should be provided.[63] There are two aspects to the right of the accused to be promptly informed of the charges. The first is the right of the defense to be promptly informed of the charges, which is related to the maxim *nemo iudex sine actore*. The second, known as the principle of immutability, states that the charges, once notified, may not be amended unless new information comes to light.[64] The notice should include a statement of the factual basis of the charge and the legal significance of the charge, which must be determined in order to prepare an effective defense.[65]

The ICCPR, the ECHR and the ACHR guarantee the defendant the right to defend himself or through legal assistant of his own choice.[66] Provisions of all the three human rights instruments are very similar. The only substantive difference we can find is that the ACHR does not limit the right to public defender to cases where the interests of justice so require.[67] The same provision can be found also in Article 21 (4) (d) of the ICTY Statute, Article 20 (4) (d) of the ICTR Statute, Article 67 (1) (d) of the ICC Statute[68] or Article 17 (4) (d) of the Special Tribunal

[59] T.A. Sinars, *The Accused's Right to a Public Trial*, "Notre Dame Law Review" 1967, vol. 42(4), pp. 500–501.

[60] A. Clooney, P. Webb, *op. cit.*, para. 6, pp. 185–186.

[61] *Ibidem*, para. 4, p. 261.

[62] S. Trechsel, *op. cit.*, p. 193.

[63] W.A. Schabas, *The European…*, p. 308.

[64] S. Trechsel, *op. cit.*, p. 195.

[65] I. Perelló Doménech, *The Right to Be Informed of the Charge (Article 6.3 A) ECHR*, [in:] *Europe of Rights: A Compendium on the European Convention of Human Rights*, eds. J.G. Roca, P. Santolaya, Leiden–Boston 2012, p. 304.

[66] See Basic Principles on the Role of Lawyers, adopted on 7 September 1990 by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, para. 1.

[67] S. Trechsel, *op. cit.*, pp. 242–243.

[68] A/CONF.183/9, 17 July 1998.

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for Sierra Leone (STSL) Statute,[69] and has been confirmed by the jurisprudence of the ICTY as well as the ICTR,[70] the STSL[71] likewise the ICC.[72] However, case law also indicates that courts are willing to impose legal representation rather than allow the defendant to defend himself in order to act in the defendant's best interests.[73] This right is the pillar of criminal procedure and is indispensable for the protection of the human rights of the accused.[74] Furthermore, it is recognized under customary international law.[75] In the light of human rights instruments, this right comprises several elements: the right to be informed of the right to legal representation; the right to prompt access to a legal counsel at the expense of the State if the accused can't afford it; the right to choose the legal counsel; the right of the accused to communicate in confidence with the legal representative; the right not to accept a legal counsel and to defend oneself.[76] As to the last one, the right to defend oneself gives the accused an opportunity to personal and direct intervention in the proceeding in order to exercise the right to defend oneself.[77] It is even called a cornerstone of justice, because if a defendant is forced to accept a counsel whom he does not trust, he will be unable to defend himself effectively[78] and, in fact, this

[69] Residual Special Court for Sierra Leone, https://rscsl.org/the-scsl/documents (access: 16.12.2024).

[70] For example, see Decision of the ICTY of 22 September 2004 in case no. IT-02-54 T, *Prosecutor v. Slobodan Milošević*, Reasons for decision on assignment of defence counsel, para. 32; decision of the ICTR of 22 June 2001 in case no. ICTR-97-21-T, *Prosecutor v. Nyiramasuhuko*, Decision on Ntahobali's Motion for Withdrawal of Counsel, para. 20.

[71] Decision of the SCSL of June 2004 in case no. SCSL-04-14-T, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on the Application of Sam Hinga Norman for Self-Representation under Article 17 (4) (d) of the Statute of the Special Court, para. 32; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford 2016, p. 1038.

[72] For example, see ICC of 16 November 2020 in case no. ICC-01/09-01/15, *Case Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, Prosecution's written submissions concerning self-representation, severance of the charges, registration and disclosure of evidence, and other procedural matters pertaining to pre-confirmation proceedings, paras 11–17.

[73] W.A. Schabas, *The International…*, pp. 1038–1041. See also S. Jegede, *The Right to a Fair Trial in International Criminal Law*, [in:] *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, ed. C. Eboe-Osuji, Leiden–Boston 2010, pp. 536–538; V. Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure, Evidence and Human Rights Aspects*, The Hague 2022, p. 425.

[74] K.S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, "International Lawyer (ABA)" 2000, vol. 34(1), p. 22.

[75] J.T. Tuinstra, *Defending the Defenders: The Role of Defence Counsel in International Criminal Trials*, "Journal of International Criminal Justice" 2010, vol. 8(2), p. 463.

[76] A. Clooney, P. Webb, *op. cit.*, para. 5, p. 327. See N. Daminova, *The European Court of Human Rights on the 'Access to a Lawyer' Directive 2013/48/EU: The Quest for a Coherent Application of the Right to a Legal Assistance in Europe?*, "European Criminal Law Review" 2021, vol. 11(2), pp. 220–221.

[77] C.A. Fanego, *Requirements in Relation to the Right to a Defence: The Right to Defend Oneself, to Legal Assistance and Legal Aid (Art. 6.3.C ECHR)*, [in:] *Europe of Rights…*, p. 269.

[78] A. Clooney, P. Webb, *op. cit.*, para. 9, p. 372.

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can even compromise the integrity of the proceedings.[79] Furthermore, such rights are inherent in the notion of adversarial procedure. The accused is also entitled to be represented by a legal counsel.[80] The right to counsel means that the accused has access to a well-qualified lawyer, taking into account the requirements established by national law.[81] International criminal tribunals require the counsel to meet high standards of competence, such as several years of experience, fluency in the working languages of a particular tribunal and high moral standing.[82]

The right to adequate time and facilities for the preparation of one's defense means that the accused is allowed to prepare his defense in an adequate manner and without restrictions on the ability to present all relevant facts during the proceedings.[83] This guarantee is important both to ensure a fair trial and to apply the principle of equality of arms,[84] which requires that each party be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage compared to its opponent.[85] What constitutes "adequate time" will depend on the circumstances of a particular case.[86] As regards the "adequate facilities", they include access to incriminatory and exculpatory evidence, adequate conditions of detention, which allows for the proper organization of defense and appropriate resources, e.g. access to legal support or experts.[87]

The second category of guarantees includes also the right to a speedy trial (undue delay), which dates back to Henry II and the Assize of Clarendon in 1166. The next step was the Magna Carta of 1215, the Virginia Declaration of Rights of 1776 and the United States Bill of Rights.[88] This right is expressed in the ICCPR, the ECHR, the ACHR, as well as in instruments concerning the rights of the most vulnerable groups,

[79] R. Assy, *Injustice in Person: The Right to Self-Representation*, Oxford 2015, p. 184.

[80] W.A. Schabas, *The European…*, p. 310.

[81] A. Clooney, P. Webb, *op. cit.*, para. 4.1, p. 334. See Basic Principles on the Role of Lawyers, para. 6.

[82] J.T. Tuinstra, *op. cit.*, p. 477.

[83] European Court of Human Rights, *op. cit.*, para. 421.

[84] General Comment No. 32, para. 32. See M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, [in:] *Defense Perspectives on International Criminal Justice*, eds. C. Rohan, G. Zyberi, Cambridge 2017, p. 204.

[85] Judgment of the ECtHR of 27 October 1993, *Dombo Beheer BV v. the Netherlands*, application no. 14448/88, para. 33.

[86] General Comment No. 32, para. 32; European Court of Human Rights, *op. cit.*, para. 422.

[87] A. Clooney, P. Webb, *op. cit.*, para. 6.2, p. 284.

[88] C. Cline, *Trial Without Undue Delay: A Promise Unfulfilled in International Criminal Courts*, "Revista Brasileira de Políticas Públicas" 2018, vol. 8(1), pp. 57–58.

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such as children,[89] migrants[90] or persons deprived of their liberty,[91] among others. The right to a speedy trial has several functions, including limiting violations of personal liberty caused by detention, preventing unreasonable detention and preventing the loss of evidence.[92] Furthermore, it also helps to ensure public confidence in the administration of justice.[93] This right applies to all stages of proceedings from pre-trial to appeals.[94] The jurisprudence of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights indicates that all of these bodies consider several elements in assessing whether the trial has been undue, namely the complexity of the case, the conduct of the defendant and the authorities, and the extent of the prejudice caused to the accused by the delay. With regard to the latter, the Human Rights Committee and the African Court on Human and People's Rights do not always take them into account.[95]

The right against self-incrimination can be defined as the individual's right to remain silent and not be forced to cooperate with law enforcement in order to incriminate himself.[96] This right is explicitly recognized in the ICCPR, the ACHR and EU Directive 2016/343,[97] but not in the ECHR.[98] Nevertheless, the case law of the ECtHR has confirmed the right of the accused not to incriminate himself.[99] It should

[89] For example, see Article 40 (2) (b) (iii) of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, UNTS 1990, vol. 1577, no. 27531, pp. 3–177.

[90] Article 18 (3) (c) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990, UNTS vol. 2220, no. 39481, pp. 3–257.

[91] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted on 9 December 1988 by General Assembly resolution 43/173, Principle 32.

[92] B. Farell, *The Right to a Speedy Trial before International Criminal Tribunals*, "South African Journal on Human Rights" 2003, vol. 19(1), p. 99.

[93] M. Henzelin, H. Rordorf, *When Does the Length of Criminal Proceedings Become Unreasonable According to the European Court of Human Rights*, "New Journal of European Criminal Law" 2014, vol. 5(1), pp. 81–82.

[94] S. Jegede, *op. cit.*, p. 542.

[95] A. Clooney, P. Webb, *op. cit.*, paras 5.1.1 and 10, pp. 402–403, 445.

[96] J.E. Veas, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Right against Self-Incrimination*, "Revista Brasileira de Direito Processual Penal" 2022, vol. 8(2), p. 870.

[97] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ EU L 65/1, 11.3.2016).

[98] A. Sakowicz, *Standard of the Protection of the Right to Silence Applicable to Persons Examined as Witnesses in the Light of the European Court of Human Rights Case Law*, "Ius Novum" 2018, vol. 12(2), p. 120.

[99] V. Dimitrijević, *The Human Right to Remain Silent*, [in:] *International Law: New Actors, New Concepts – Continuing Dilemmas: Liber Amicorum Božidar Bakotić*, eds. B. Vukas, T. Šošić, Leiden–Boston 2010, p. 393.

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be noted that, in the light of human rights instruments, the right to silence and the right against self-incrimination are an integral part of the right not to be compelled to testify against oneself or to plead guilty. However, these rights are not identical. The latter is narrow because it protects only the form of answers to questions that might be incriminating. On the other hand, the right to remain silent is broader and includes also the production of documents and other materials against the accused.[100]

The last element of the second set of norms is the right of appeal. Initially, it was not an autonomous right, but rather a part of the reconsideration of the judgment or sentence by the supreme authority. The right to appeal arose from international human rights law and was not provided for at the Nuremberg and Tokyo Tribunals.[101] However, this right is enshrined in the Statutes of the ICTY (Article 25), the ICTR (Article 24), the ICC (Articles 81–83),[102] the STSL (Article 20) or the Special Tribunal for Lebanon (STL; Article 26).[103] It is a fundamental element of civil and political rights and an ordinary measure against a decision.[104] It allows parties to challenge judgments for alleged errors of law or fact that result in miscarriages of justice.[105] The right to appeal also allows the accused to obtain a more favorable decision. Furthermore, it is a remedy for violations of other fair trial rights.[106]

1.1.3. Evidence

The third set of standards contains the issue concerning the evidence. Evidence is defined as a means of reestablishing a disputed past event in the context of a legal proceeding.[107] Criminal evidence strikes a balance between the accused's right to a defense and society's legal interest in the suppression of crime.[108] In accordance with international human rights law, the accused has the right to have access to the witnesses against him or her. This means that witnesses testify in open court and are

[100] A. Clooney, P. Webb, *op. cit.*, para. 4.2, p. 615.

[101] S. Zappalà, *op. cit.*, pp. 153–154.

[102] A. Mosna, *Some Thoughts on the Nature and Limits of the Right to Appeal in Front of the ICC*, "Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft" 2017, vol. 100(3), p. 267.

[103] Statute of the Special Tribunal for Lebanon, attachment to UNSC Res. 1757 (2007), S/RES/1757 (2007), 30 May 2007.

[104] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 116.

[105] G. Boas, J.L. Bischoff, N.L. Reid, B.D. Taylor III, *op. cit.*, p. 424.

[106] A. Clooney, P. Webb, *op. cit.*, p. 658.

[107] B. Krzan, *Admissibility of Evidence and International Criminal Justice*, "Revista Brasileira de Direito Processual Penal" 2021, vol. 7(1), p. 162.

[108] G.J. Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study*, Leiden–Boston 2014, p. 223.

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subject to cross-examination.[109] This accused's prerogative is guaranteed in statutes of international criminal courts, such as Article 21 (4) (e) of the ICTY Statute, Article 20 (4) (e) of the ICTR Statute, Article 67 (1) (e) of the ICC Statute, Article 17 (4) (e) of the STSL Statute or Article 16 (4) (e) to (f) of the STL Statute. In addition, is similar drafted in human rights instruments.[110] Some differences are contained in Article 8 (2) (f) ACHR, which concerns "witnesses present in the court".[111] The purpose of the right to cross-examine witnesses is to give the accused the same legal power as the prosecutor in this respect.[112] However, all of the provisions are intended to ensure equality of arms.[113] Furthermore, it has a twofold function: first, it gives the accused the right to cross-examine witnesses and even challenge their testimony; second, it requires the court to assist in obtaining the presence of defense witnesses who may throw light on the facts.[114] The right to cross-examine prosecution witnesses is not unlimited, but concerns only those who are critical to the defense and provide a fair opportunity to question and challenge the witnesses against the accused.[115] In addition, the accused has the right to present evidence in his favor, which is counterpart of the prosecutor's obligation to prove the guilt of the accused. The latter has also the right to access to exculpatory evidence.[116] The practice of disclosing both incriminating and exculpatory material differs between the ICC[117] and other international tribunals. It is up to the prosecutor to decide whether evidence is incriminating or exculpatory. These rights are an integral element of the principle of the equality of arms.[118]

2. Victim and witnesses

The Nuremberg and the Tokyo Tribunals overlooked the protection of the victims and witnesses in their Statutes. On the other hand, the Statutes of the ICTY and the ICTR deal extensively with the protection of victims and witnesses.[119] Fur-

[109] A. Clooney, P. Webb, *op. cit.*, p. 493.

[110] K. Vanderpuye, *Traditions in Conflict: The Internationalization of Confrontation*, "Cornell International Law Journal" 2010, vol. 43(3), pp. 538–564.

[111] L. Hennebel, H. Tigroudja, *The American Convention on Human Rights: A Commentary*, Oxford 2022, p. 350.

[112] General Comment No. 32, para. 39.

[113] See L. Hennebel, H. Tigroudja, *op. cit.*, p. 350.

[114] S. Trechsel, *op. cit.*, pp. 129–139.

[115] General Comment No. 32, para. 39.

[116] F. Harhoff, *op. cit.*, pp. 433–435.

[117] For example, see X.J. Keïta, *Disclosure of Evidence in the Law and Practice of the ICC*, "International Criminal Law Review" 2016, vol. 16(6), pp. 1018–1047.

[118] Y. McDermott, *op. cit.*, pp. 81–83.

[119] M. Bachrach, *The Protection and Rights of Victims under International Criminal Law*, "International Lawyer" 2000, vol. 34(1), pp. 7–20.

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thermore, the United Nations and regional organizations have adopted a number of non-binding instruments in this regard. The most important of these is the charter of victim rights, namely the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power according to which "victim" is a person who has suffered harm, such as physical or mental injury, emotional suffering, economic loss, or significant impairment of his or her fundamental rights, by acts or omissions that violate criminal laws in force in the Member States. The term "victim" also includes the immediate family or dependents of the direct victim.[120] Victims should be guaranteed access to justice, fair treatment and redress.[121] On 16 December 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the so-called "Van Boven/Bassiouni Principles".[122] These principles include, i.a., the obligation to respect, ensure respect for and implementation international human rights law and international humanitarian law, the obligation in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, definition of victim, the principles governing the treatment of victims, access to justice and the question of redress for victims. The most important thing is that they have adopted a "victim-oriented perspective".[123] Furthermore, one of the sixth main organs of the United Nations – the Economic and Social Council issued the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.[124] According to this instrument, "child victims and witnesses" means "children, adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders".[125] The Guidelines provide for best practices based on consensus, international and regional principles and standards to assist States, Governments, organizations, civil society or other interested parties in protecting and ensuring the full enjoyment of the rights of children who are victims and witnesses of crime.[126] It also sets out the principles of dignity, non-discrimination, best interests of the child, protection, harmonious development and the right to participation, which

[120] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985 by General Assembly resolution 40/34, A/RES/40/34, paras 1 and 2.

[121] *Ibidem*.

[122] Adopted by General Assembly resolution 60/147, A/RES/60/147, 21 March 2006. For example, see M. Zwanenburg, *The Van Boven/Bassiouni Principles: An Appraisal*, "Netherlands Quarterly of Human Rights" 2006, vol. 24(4), pp. 641–668.

[123] M. Zwanenburg, *op. cit*., p. 645.

[124] ECOSOC Resolution 2005/20, E/RES/2005/20, 16 December 2005.

[125] *Ibidem*, para. 9 (a).

[126] *Ibidem*, para. 1.

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should be followed by all professionals and those responsible for the welfare of children.[127] In addition, the Guidelines guarantee some rights for children who are victims and witnesses of crime including: the right to be treated with dignity and compassion, the right to be protected from discrimination, the right to be informed, the right to be heard and to express views and concerns, the right to safety, the right to reparation, among others.[128]

It should also be noted that regional organizations have also adopted an instrument on victims and witnesses. The Council of Europe adopted the European Convention on the Compensation of Victims of Violent Crimes on 24 November 1983.[129] The objectives of this Convention are harmonization at the European level of guidelines on compensation to victims of violent crimes and close cooperation between the States-Parties to the Convention in this respect.[130] As a non-binding document, the Council of Europe Committee of Ministers for the first time adopted Recommendation No. R(85) 11 to the Member States on the position of the victim in the framework of criminal law and procedure.[131] On 15 March 2023, the Committee of Ministers of the Council of Europe adopted the Recommendation on Rights, Services and Support for Victims of Crime,[132] which updates and replaces the Recommendation Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims.[133] This last Recommendation was drafted by the European Committee on Crime Problems. In particular, it introduced the right to be heard with regard to any decision that significantly affects their interests (Article 10) and the right to a remedy (Article 16).[134] Regarding the protection of witnesses, the Council of Europe adopted in 2022 a new Recommendation,[135] replacing Recommendation Rec(2005)9 of the Committee of Ministers to Member

[127] *Ibidem*, para. 8.

[128] *Ibidem*, paras V–XIV.

[129] ETS no. 116.

[130] Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, 24 November 1983, ETS no. 116, para. 11.

[131] Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies.

[132] Recommendation CM/Rec(2023)2 of the Committee of Ministers to Member States on rights, services and support for victims of crime, adopted by the Committee of Ministers on 15 March 2023 at the 1460th meeting of the Ministers' Deputies.

[133] Recommendation Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies.

[134] See European Committee on Crime Problems, *New Recommendation on Rights, Services and Support for Victims of Crime*, 16.3.2023, https://www.coe.int/en/web/cdpc/-/new-recommendation-on-rights-services-and-support-for-victims-of-crime (access: 16.12.2024).

[135] Recommendation CM/Rec(2022)9 of the Committee of Ministers to Member States on the protection of witnesses and collaborators of justice, adopted by the Committee of Ministers on 30 March 2022 at the 1430th meeting of the Ministers' Deputies.

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States on the protection of witnesses and collaborators in justice.[136] The Recommendation includes definition of a witness, i.e. "any person who possesses information relevant to criminal proceedings about which he or she has given and/or is able to give testimony (irrespective of his or her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law) and who is not included in the definition of 'collaborator of justice'," and sets out, i.a., general principles, protection measures and a program.

Another regional organization, the European Union, adopted Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims[137] in order to ensure enjoyment of fair and appropriate compensation for the injuries suffered by victims or Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.[138] The main objective of this Directive is to ensure that victims of crime receive adequate information, support, protection and participation in criminal proceedings.

If we look back at the Nuremberg or Tokyo Tribunals, it is impossible to find the words "victim" or "survivor". The Statutes of both Tribunals did not provide for the participation of victims or survivors in the proceedings.[139] The Rules of Procedure and Evidence of the ICTY (Rule 2A)[140] and the ICTR (Rule 2A)[141] or STSL (Rule 2A)[142] contain the concept of victim, which is limited to the person who is a direct victim of a war crime. Furthermore, the role of the victim is very limited to that of the witness, although all tribunals have a victims and witnesses unit.[143] It should be noted that during the drafting process of the Statute of the ICTY, there was a proposal to appoint a separate counsel for victims. However, this proposal was

[136] Adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies.

[137] OJ EU L 261/15, 6.8.2004.

[138] OJ EU L 315/57, 14.11.2012.

[139] S. Garkawe, *The Role and Rights of Victims at the Nuremberg International Military Tribunal*, [in:] *The Nuremberg Trials: International Criminal Law Since 1945. 60th Anniversary International Conference*, eds. H.R. Reginbogin, C. Safferling, München 2006, p. 86. See N. Boister, R. Cryer, *The Tokyo International Military Tribunal – A Reappraisal*, Oxford 2008, p. 358.

[140] IT/32/Rev.50, 8 July 2015.

[141] Adopted on 29 June 1995, as amended on 13 May 2015, available at https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf (access: 16.12.2024).

[142] Adopted on 16 January 2002 (ICTR Rules, applicable *mutatis mutandis*), as amended on 31 May 2012, available at https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf (access: 16.12.2024).

[143] For example, see G. Boas, J.L. Bischoff, N.L. Reid, B.D. Taylor III, *op. cit.*, p. 309.

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rejected.[144] On the other hand, the ICC is a victim-centered tribunal. It is likely that this change is the result of the abandonment of the criticism of the *ad hoc* Tribunals. Likewise, the STL (Rules 86 and 87),[145] which ceases operation on 31 December 2023[146] or Extraordinary Chambers in the Courts of Cambodia (ECCC; Rule 23)[147] have adopted a victim-oriented approach.[148] Under the ICC's Rules of Procedure and Evidence, a "victim" is an individual who has suffered harm resulting from the commission of a crime within the Court's jurisdiction (Rule 85). Furthermore, the term "victim" may also include organizations or institutions.[149] The latter should demonstrate the direct harm and the former only the harm.[150] In the ICC Statute, there are also several references to the victim role such as in the Preamble of the ICC Statute, the right to participate in the proceeding, establishment of a Victims and Witnesses Unit and Trust Fund for Victims[151] or entitlement of victims to reparations (Article 75), among others.[152] The victim shall have the right to participate in the proceedings referred to in Article 68 (3) or to claim compensation.[153] With respect to the former, victims may express their views and concerns at any stage of the trial, including through legal counsel. This is without prejudice to the rights of the accused and to a fair trial.[154] Furthermore, the ICC Statute also provides for protective and supportive measures for victim and witness.[155]

[144] B. McGonigle Leyh, *Understanding Limitations: Victim Participation and the International Criminal Court*, [in:] *Victimological Approaches to International Crimes: Africa*, eds. R. Letschert, R. Haveman, A.M. de Brouwer, A. Pemberton, Cambridge–Antwerp–Portland 2011, pp. 493–494.

[145] STL, Rules of Procedure and Evidence, amended on 10 April 2019, STL-BD-2009-01-Rev.10.

[146] See United Nations, *Justice Served: Lebanon's Special Tribunal Closes*, 31.12.2023, https://news.un.org/en/story/2023/12/1145217 (access: 16.12.2024); A. Dutton, F. Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate*, "Chicago Journal of International Law" 2019, vol. 19(2), pp. 490–547.

[147] ECCC, Internal Rules (Rev.10) as revised on 27 October 2022, available at https://www.eccc.gov.kh/en/document/legal/internal-rules (access: 16.12.2024).

[148] A.M. de Brouwer, M. Heikkilä, *Victim Issues: Participation, Protection, Reparation, and Assistance*, [in:] *International Criminal Procedure: Principles…*, pp. 1300–1301.

[149] Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A, with amendments.

[150] W.A. Schabas, *The International…*, p. 1065.

[151] See The Trust Fund for Victims, https://www.trustfundforvictims.org (access: 16.12.2024).

[152] W.A. Schabas, *An Introduction…*, p. 353.

[153] Idem, *The International…*, p. 1063.

[154] Idem, *An Introduction….*, p. 359.

[155] S. Mouthaan, *The Modalities of Victim Participation*, [in:] *Victim Advocacy before the International Criminal Court*, eds. E. King, R. Letschert, S. Garkawe, E. Pobjie, Cham 2022, p. 3.

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CONCLUSIONS

The relationship between international criminal law and procedure, human rights and humanitarian law is complex and interdependent.[156] In particular, the development of international criminal law and procedure has been significantly influenced by international human rights law and international humanitarian law. According to some academics, it can even be said that international human rights law is the "backbone and general framework of the current law of international criminal procedure".[157] International criminal courts are not human rights tribunals. However, their law and jurisdiction are related to international law in general and its sub-branches, i.e. international human rights law and international humanitarian law. Unlike the ICC Statute, the ICTY and the ICTR do not have applicable law provisions. However, they were established by an organ of an international organization – subject of international law – and as part of general international law they are not exempted from Article 38 of the ICJ Statute.[158] Furthermore, according to the principle of consent, the statutes of criminal tribunals and their other internal documents are binding on states that have consented to their jurisdiction. In a similar vein, we can say about human rights instruments. Thus, most human rights standards have been implemented in the statutes and internal documents of international criminal tribunals.

It is undisputable that human rights are the foundation of the right of the accused.[159] The Secretary General of the United Nations clearly stated that it was undeniable that international tribunals should respect rights of accused at all stages of proceedings, which are envisaged in Article 14 ICCPR.[160] Thus, there is no doubt that "the credibility of international justice is dependent on rigorous respect for the rights of the accused to a fair trial".[161] Fairness does not require perfection in every detail. But the essence of the concept is whether the accused has had a fair opportunity to respond to the charges against him or her.[162]

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[156] See H.P. Gasser, *The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law*, [in:] *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, eds. J. Doria, H.P. Gasser, M.C. Bassiouni, Leiden–Boston 2009, p. 1111.

[157] G. Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, "International Criminal Law Review" 2006, vol. 6(4), p. 610.

[158] A.S. Galand, *op. cit.*, pp. 87–92.

[159] See D. Scalia, *Human Rights in the Context of International Criminal Law: Respecting Them and Ensuring Respect for Them*, [in:] *Research Handbook on Human Rights and Humanitarian Law*, eds. R. Kolb, G. Gaggioli, Cheltenham–Northampton 2013, pp. 577–582.

[160] S/25704, 3 May 1993, para. 106.

[161] W.A. Schabas, *The International…*, p. 1017.

[162] Decision of the ICTY of 30 September 2003 in case no. IT-02-54-AR 73.4, *Prosecutor v. Slobodan Milošević*, Separate Opinion of Judge Mohammed Shahabuddeen appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements, para. 16.

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The cornerstone of international human rights law is also the redress and justice for human rights violations.[163] Therefore, victim's participation is also crucial in criminal proceedings. For many years, their presence in criminal proceedings was neglected.[164] Over time, however, the status of victims has evolved from that of witnesses to that of participants.[165] The adoption of the ICC Statute, which strengthens the position of victims in criminal proceedings, was a milestone in this regard.

In sum, international criminal procedure and all sub-branches of international law seek to strike a balance between the right of the accused to a fair trial and the interests of the international community, in particular the right of the victim to reparation for all atrocities suffered.[166]

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ABSTRAKT

W przeszłości społeczność międzynarodowa podjęła wysiłek celu ścigania i ukarania zbrodniarzy wojennych oraz ustanowienia stałego trybunału karnego. Nowa era w rozwoju międzynarodowego prawa i procedury karnej, a także międzynarodowego prawa praw człowieka i prawa humanitarnego rozpoczęła się po II wojnie światowej. Niestety, Trybunały w Norymberdze i Tokio skupiały się głównie na oskarżonych i ich ukaraniu, ignorując rolę ofiary w procesie karnym. Dlatego konieczne było stworzenie nowego międzynarodowego trybunału karnego, który uzupełniłby istniejącą lukę i byłby zgodny z tworzącymi się standardami z zakresu ochrony praw człowieka. Dlatego Statuty i Reguły Procesowe i Dowodowe Międzynarodowego Trybunału Karnego dla byłej Jugosławii (MTKJ) i Rwandy (MTKR) starały się bardziej odzwierciedlać zasadę sprawiedliwości i międzynarodowe standardy z zakresu ochrony praw człowieka, ale kamieniem milowym było ustanowienie Międzynarodowego Trybunału Karnego (MTK), którego Statut nie tylko odwzorowuje podstawowe standardy z zakresu ochrony praw człowieka oraz orzecznictwo trybunałów i organów praw człowieka, lecz także wzmacnia pozycję ofiary w toczącym się postępowaniu. Trybunał stosuje traktaty i inne źródła prawa międzynarodowego, które „muszą być zgodne z międzynarodowo uznanymi prawami człowieka". Artykuł stanowi wkład w dyskusję na temat wpływu prawa międzynarodowego na rozwój międzynarodowej procedury karnej z perspektywy praw człowieka. Podjęto również próbę wykazania, czy szczególne cechy prawa międzynarodowego wpłynęły na rozwój międzynarodowej procedury karnej oraz na relacje pomiędzy poszczególnymi podgałęziami prawa międzynarodowego, takimi jak: międzynarodowe prawo karne, międzynarodowa procedura karna, międzynarodowe prawo praw człowieka oraz międzynarodowe prawo humanitarne, a także sposoby oddziaływania międzynarodowego prawa praw człowieka na międzynarodową procedurę karną.

Słowa kluczowe: oskarżony; prawa człowieka; międzynarodowa procedura karna; ofiara; świadek