Christopher Keith Hall
Senior Legal Adviser, International Justice Project
Amnesty International

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The evolving role of NGOs in international criminal justice

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Non-governmental organizations and the rights of the defendant in the internationalised criminal process

Introduction

I wish to give particular thanks to Morten Bergsmo for inviting meet to participate in this meeting, one day after the 60th anniversary of the Nuremberg Judgment. In addition to his distinguished service as a key member of the Office of the Prosecutor in the International Criminal Tribunal for the former Yugoslavia, where he played a crucial role in the drafting of the Rome Statute of the International Criminal Court, he recently helped to establish the Office of the Prosecutor of the International Criminal Court. I am honoured to join the other speakers, Gilbert Bitti, Richard Dicker, Carla Ferstman and Jeanne Sulzer, all of whom have made an enormous contribution to creating and putting into operation the International Criminal Court.

I have noted that the subject of today's discussion is not the role of non-governmental organizations and the rights of the defendant in international criminal courts, but that role with regard to the internationalised criminal process. I am sure that the title of the seminar was carefully chosen to ensure that we discussed not only the four international criminal courts at Nuremberg, Tokyo, the Hague and Arusha, but internationalized courts, such as the Special Panels for Serious Crimes in Dili, East Timor, the Special Court for Sierra Leone, the Regulation 64 Panels in Kosovo, the Extraordinary Chambers for Cambodia and the Special War Crimes Chamber in Bosnia and Herzegovina, as well as the primary method for enforcing international criminal law, national courts exercising various forms of jurisdiction, including universal jurisdiction. Nevertheless, as I am most familiar with the role of non-governmental organizations regarding the International Criminal Court, that will be the primary focus of my remarks today.

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Senior Legal Adviser, International Justice Project
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Although the title uses the term "defendant", since, as the Human Rights Committee has observed, the rights of persons who have been charged with a crime would be of little value if the rights of those persons when they were suspected of crimes were violated, I will address the role of non-governmental organizations in protecting the rights of persons with respect to all stages of criminal proceedings, from the moment they are suspected of a crime until a final judgment on appeal and any subsequent revision of the judgment or sentence.

An overview of the role played by non-governmental organizations regarding the rights of the accused

Non-governmental organizations played little or no role with regard to the question of the right to fair trial at Nuremberg, Tokyo or the trials in national courts of former Axis nationals for crimes against humanity and war crimes, which have subsequently been criticized as unfair on procedural, as well as substantive, grounds. The absence of such organizations is not entirely surprising. First of all, there were few internationally recognized standards concerning the scope of the right to fair trial. The first steps to develop such standards appear to have been taken by NATO in the early 1950s in the context of drafting Status of Forces Agreements allocating jurisdiction over armed forces stationed abroad who committed crimes in the host country, well before drafting of what is now Article 14 of the International Covenant on Civil and Political Rights (ICCPR) had made much progress. Second, there were few international human rights organizations in existence, apart from the Anti-Slavery Society and the International League for the Rights of Man, founded in the USA in 1942 by members in exile of *La Ligue Française pour la Défense de Droits de l'Homme et du Citoyen*.

However, the situation was entirely different in 1993 when the International Criminal Tribunal for the former Yugoslavia (ICTY) was established. Three non-governmental organizations, including Amnesty International, submitted suggestions for the content of the Statute of the ICTY, and each of them addressed in different ways the question of fair trial. Amnesty International submitted a detailed set of recommendations and urged that "[t]he UN should expressly recognise that this ad hoc Tribunal is only the first step in establishing a permanent, international criminal court competent to try cases involving gross violations of humanitarian and human rights law".[1] Shortly before that submission, it was the only human rights organization to participate in a crucial conference organized by the International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver of government officials and academic experts and its representative was the only participant to urge that the procedure fully satisfy the requirements of international law and standards for a fair trial[2]. The following year, in 1994, the organization submitted a comprehensive memoran-

[1] Amnesty International, *Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia*, AI Index: EUR 48/02/93, April 1993.

[2] International Meeting of Experts on the Establishment of an International Criminal Tribunal, Organized by the International Centre for Criminal Law Reform and Criminal Justice Policy at Vancouver, Canada, March 22-26, 1993 (available at: http://www.icclr.law.ubc.ca/Publications/Reports/1993.pdf)

dum to the International Law Commission, then preparing a draft statute for a permanent international criminal court with recommendations concerning the right to a fair trial[3]. Since then, numerous other members of the Coalition for an International Criminal Court (CICC), as it was then known, joined Amnesty International's calls for the statute and rules of procedure and evidence of the permanent court to include safeguards for the right to fair trial. Moreover, Amnesty International, along with other international human rights organizations, have repeatedly made recommendations with respect to the right to fair trial in internationalized courts and national courts trying cases involving crimes under international law.

What are the main problems or patterns of problems regarding the investigation and prosecution of crimes under international law?

At the international and internationalized court level, there have been major advances in the written guarantees in statutes and rules of procedure over those governing trials in the international criminal tribunals at Nuremberg and Tokyo. Indeed, in certain respects, particularly with regard to the rights of persons during investigations, they are an important advance over human rights law and standards in effect in 1993. Many of the protections in these instruments reflect the recommendations made by Amnesty International and other non-governmental organizations. However, a number of weaknesses remain in these written protections and the implementation of these safeguards in practice leaves much to be desired. Even more disturbing is that national criminal justice systems are not being reformed, even under the pressure of the complementarity principle, when states implement the Rome Statute, to reflect the same stringent protections found in the international and internationalized courts. We could spend several weeks discussing the scope of fair trial guarantees applicable in investigations and prosecutions of crimes under international law, but today I will have time to mention just a few challenges.

Before discussing a few particular problems, it must be borne in mind that international and internationalized criminal courts, like national courts, were set up to investigate and prosecute crimes. Indeed, the Charter of the Nuremberg Tribunal stated that the International Military Tribunal was established for the just and prompt trial and punishment of the major war criminals of the European Axis. The starting point for establishing such courts has been prosecution focused and the rights of suspects and the accused – like the rights of victims – have usually come second. Even the Preamble of the Rome Statute, which has extensive guarantees of the right to fair trial, expressly mentions only victims and the duty to end impunity. Similarly, Article 17 of the Rome Statute permits the Court to exercise its jurisdiction when national proceedings are not independent or impartial, but only if they are inconsistent with an intention to bring a person to justice. In addition, a cursory review of reporting of crimes under international law reveals, apart from nationalist press in certain countries,

[3] Amnesty International, *Memorandum to the International Law Commission: Establishing a just, fair and effective permanent international criminal tribunal*, IOR 40/007/1994, 12 June 1994 (available at: http://web.amnesty.org/library/pdfIOR400071994ENGLISH/$file/IOR4000794pdf-W).

a widespread public presumption that suspects and accused are guilty of the crimes being investigated or prosecuted. Indeed, even some human rights organizations in the past decade have repeatedly referred to "indicted war criminals".

The following list briefly notes some of the problems with protection of the rights of the defence under the Rome Statute:

Inequality of arms at the investigation stage. The resources available in international criminal courts to the defence, particularly with regard to investigation, are limited. There are no independent defence investigation services. Duty counsel can be, and have been, appointed, but there usually is not a fully-fledged public defender office. To some extent, these problems are addressed in the Rome Statute by the ability of the Pre-Trial Chamber under Article 56, on the request of the Prosecutor or on its own initiative, when there is a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available at trial to take any necessary measures to protect the rights of the defence. In addition, Article 57 (3) (b) authorizes the Pre-Trial Chamber, upon request of a person who has been arrested or appeared pursuant to a summons, to issue orders, including measures similar to those authorized under Article 56, or to seek cooperation from states "as may be necessary to assist the person in the preparation of his or her defence". To what extent these measures will effectively address the imbalance in resources remains to be seen, but counsel in the first case before the International Criminal Court has repeatedly asserted that the resources of the defence are inadequate.

Right to counsel at pre-trial stage. Article 55 of the Rome Statute is a mini-human rights convention for suspects and other persons involved in investigations by the Prosecutor. However, a number of the international courts, including those in Kosovo and East Timor, have not adequately addressed the problems of poor qualifications and lack of training of defence counsel. The Cambodian Extraordinary Chambers initially limited the ability of foreign counsel to appear. Fees for counsel in some international courts, such as the Special Court for Sierra Leone, have not always been sufficient to attract the most qualified and experienced lawyers in the world to appear as defence counsel.

Limits on translation and poor quality of translation and interpretation. Although the two working languages of the International Criminal Court are English and French, many of the documents filed in the cases so far are available only in one language. Those that are translated are often translated so late that the translations cannot be used before deadlines for filing papers. These failures to translate and late translations undermine the ability of all parties, but particularly the small defence teams, in the majority of cases where not all members of the staff are bilingual.

Presumption against release. Article 9 (3) of the ICCPR provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear". Regrettably, Article 59 (4) of the Rome Statute presumes in favour of custody. It states that when a national court holding a person pursuant to an International Criminal Court arrest warrant "shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional cir-

cumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court". In contrast, the ICTY, which initially used this presumption against release, shifted its approach and began to release many pre-trial detainees, even permitting them to return to their own countries, provided sufficient assurances were provided that they would appear for trial and not intimidate or harm victims or witnesses.

Disclosure. The Rome Statute contains strong guarantees of the presumption of innocence in Article 66. However, there is some ambiguity about the power of the Pre-Trial Chamber in Article 61 (3) to "issue orders regarding the disclosure of information for the purposes of the hearing" and whether it could require the defence at this stage of proceedings to disclose evidence or defence strategy before the Prosecutor has presented the case. Rules 78 and 79, which require the defence to permit the Prosecutor to inspect its files and to disclose certain aspects of defence strategy, appear to be inconsistent with the statutory presumption of innocence, to the extent that these obligations apply before the Prosecutor has presented the case.

Limitations of the exclusionary rule. Article 69 (7) of the Rome Statute is an important safeguard of the integrity of proceedings. However, it remains to be seen how it will be applied in practice. The first prong of this exclusionary rule would not bar the introduction of evidence obtained by torture or other improper means, if it could be demonstrated that it was reliable. The second prong would exclude evidence that "would be antithetical to and would seriously damage the integrity of the proceedings". It is to be hoped that the Court will give this exclusionary rule a broad reading.

Poor quality of jurisprudence. Sadly, quality of jurisprudence of international criminal courts has been uneven and, despite some excellent exceptions, often poor and inconsistent. For example, the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) remains after a decade hopelessly inconsistent on fundamental matters such as the appropriate mental element of the crime against humanity of murder. Similarly, many of the decisions by the Kosovo international panels and the Special Panels for Serious Crimes in Dili, East Timor are extremely poor. This inconsistency and poor quality of jurisprudence can only harm the rights of suspects and accused to a fair trial.

Limits on interlocutory appeals. The scope of interlocutory appeals is limited under Article 82 and the Pre-Trial Chamber has an unreviewable ability pursuant to Article 82 (1) (d) to prevent interlocutory appeals of its own decisions when it determines that they do not involve "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial".

Prosecution appeals of acquittals. Article 20 of the Rome Statute contains extensive guarantees of the principle of *ne bis in idem.* Paragraph 1 provides that, "[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court". However, Article 81 provides that acquittals may be appealed by the Prosecutor. It would be more consistent with the principle if

Prosecution appeals of acquittals were able to obtain only a decision that identified legal errors that would apply only to future cases but that could not lead to a retrial for the same conduct. However, the problems with this provision are compounded since the Appeals Chamber is not limited to ordering a retrial, but it may, pursuant to Article 83 (2) (a), simply reverse or amend the decision. According to the leading commentary, this means that the Appeals Chamber could simply substitute a guilty verdict, thus also denying the person originally found not guilty the right to appeal to a higher court, recognized in Article 14 (5) of the ICCPR[4].

Restrictions on revision. Article 84 (Revision of conviction or sentence) is an important safeguard against legal and factual errors in judgments. However, it requires, without exception, that new evidence not have been available at trial and that "such unavailability was not wholly or partially attributable to the party making the application". This requirement is too inflexible and overlooks a range compelling reasons for failing to present all relevant evidence, including failures by incompetent counsel or duress of the convicted person.

Limits on compensation. Article 85 (Compensation to an arrested or convicted person) is an important protection of accused persons against abuse of process. However, paragraph 2 bars compensation when "it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to him or her".

Have non-governmental organizations done enough to address these problems with respect to the right to fair trial?

Of course, if the problems continue to exist, we have not done enough.

As I have indicated, since 1993, non-governmental organizations have produced extensive commentaries on draft statutes and rules and analyzes concerning actual proceedings in international, internationalized and national courts in cases involving crimes under international law and lobbied the drafters and the courts once they were established to improve the protection of suspects and accused, with due regard for the rights of victims.

Why have non-governmental organizations not had greater success with regard to drafting statutes and rules and influencing practice? With respect to the first problem, governments may have been reluctant to incorporate the most effective protections because of the precedent it would set with respect to investigations and prosecutions of ordinary and political crimes at the national level. With respect to practice of courts, one reason for not having greater impact has been the limited resources of non-governmental organizations and their largely independent monitoring of proceedings. Often they will have resources only to send observers to the opening days of a case, often one that already has high visibility, or to monitor developments concerning a single issue.

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[4] Christopher Staker, *Article 83*, in Otto Triffterer, *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 1034 (1999).

How then could non-governmental organizations improve their effectiveness? I won't venture a suggestion with regard to the first problem and would welcome ideas. However, with respect to the second, Amnesty International has proposed the establishment of an informal international network within the CICC and serviced by its Secretariat, to monitor proceedings in international, internationalized and national courts trying crimes under international law. That network would be composed of international and national non-governmental organizations with expertise in trial monitoring or procedural law and be able to monitor proceedings in both working languages as well as to disseminate the information in other languages. They would endeavour to ensure that every hearing in every case is monitored from the moment a suspect is identified through any revision after an appeal judgment is final by using interns, as well as more experienced trial lawyers and experts in international criminal law on a voluntary basis. A key component of this trial monitoring network would be existing and newly established international criminal law clinics based in universities and other educational institutions around the world. Such a sharing of monitoring responsibilities would necessarily increase the effectiveness of monitoring and lay the foundation for comprehensive recommendations and lobbying for changes in the practice of investigations and prosecutions.

How do non-governmental organizations balance their concerns about impunity, the role of victims and the rights of suspects and accused?

Non-governmental organizations, even those that are members of the CICC, have a wide variety of perspectives and represent many constituencies. Some, particularly at the national level, such as the American Civil Liberties Union (ACLU) in the USA and Liberty (formerly the National Council on Civil Liberties) in the United Kingdom, are particularly concerned with the rights of suspects and accused. Others, such as Redress and the Women's Caucus for Gender Justice, the predecessor of Women's Initiatives for Gender Justice, have a particular concern with the rights of victims. The International Criminal Bar includes both defence lawyers and lawyers representing victims. Others have a particular focus on impunity and some of them assist prosecutors in the investigation and prosecution of crimes under international law.

A number of international non-governmental organizations, such as Amnesty International, strongly support investigation and, where there is sufficient admissible evidence, prosecution of crimes under international law; with regard to victims, call for effective protection, support, provision of information about proceedings, participation in those proceedings and full reparations; and press criminal justice systems to respect fully the rights of suspects and accused.

Do these different perspectives and constituencies cause tensions, either within non-governmental organizations or between them? Occasionally, some difficulties do arise. For example, the Women's Caucus strongly supported the use of anonymous witnesses in cases involving crimes of sexual violence and barring the use under any circumstances whatsoever of evidence of the prior sexual history of victims. In contrast, most international non-governmental organizations, citing the fundamental principle of the right to a fair trial that a person on trial has the right to confront the evi-

dence, including testimony of witnesses, an issue that has recently re-arisen in the context of the new rules for military commissions adopted by the US Congress, opposed the use of anonymous witnesses in any circumstance whatsoever. This led to considerable internal discussion within such organizations, but, partly because of the fiasco of Witness L, in the *Tadić* case, whose perjury in pre-trial statements was exposed only when his identity was disclosed to the accused shortly before he was to testify, anonymity was excluded by the Rome Statute and the Rules of Procedure and Evidence. Similar problems occurred with respect to the proposal to exclude in all circumstances evidence of prior sexual history, but, although Rule 71 states that such evidence shall not be admitted, the rule makes clear that it could be admitted pursuant to Article 69 (4) if its probative value outweighs its prejudicial effect, for example, when it would be essential to establish that the witness had committed perjury.

I cannot speak for other organizations, but Amnesty International believes, based on more than a decade of work on international justice that it has not run into any conflict of interest in its work to end impunity, support victims and defend the rights of suspects and accused. In developing its position on particular issues, it has attempted to reach a sensitive balance between competing interests, although the choices that it has made may well be different from those of other organizations. It has also avoided problems so far by maintaining an arms length distance from national and international prosecutors during the investigation and prosecution of cases so that it can monitor impartially and independently criminal proceedings to ensure that the rights of victims and of suspects and accused are fully respected. Some other organizations do not perform this independent monitoring function and, instead, are free to act as private investigators for prosecutors.

Of course, not all involved in the struggle for international justice see things the same way and some accused asked the Special Court for Sierra Leone in the *Brima* case to compel a human rights monitor to reveal his confidential sources. Interestingly, the Prosecutor, the United Nations Office of the High Commissioner for Human Rights, Human Rights Watch and Amnesty International all objected and the Appeals Chamber reversed a Trial Chamber order to disclose the sources, but on narrow procedural grounds[5]. I would anticipate that we will have many more such issues being litigated in the future concerning the role of non-governmental organizations and international justice.

[5] *Prosecutor v. Brima*, Case No. SCSL-2004-16-AR73, Appeals Chamber, 26 May 2006.