

A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial

by **Anne-Marie La Rosa**

The two International Criminal Tribunals set up by the United Nations Security Council in 1993¹ and 1994² are in the process of demonstrating that international repression of serious violations of international humanitarian law is no longer a purely theoretical concept. A total of 21 persons charged with or suspected of committing such breaches have been transferred to the seat of the Arusha Tribunal, and two judgments sentencing the defendants to prison terms have been handed down by the Hague Tribunal. The two Tribunals are competent to hear cases against persons allegedly responsible for serious violations of humanitarian law, but in so doing they are also required, under their respective Statutes, to ensure that the internationally recognized rules relating to the rights of the accused are fully respected at all stages of the proceedings. Article 20 of the Statute of the Tribunal for Rwanda and Article 21 of that of the Tribunal for the former Yugoslavia, modelled on Article 14 of the International Covenant

Anne-Marie La Rosa currently works as a legal officer at the International Labour Office in Geneva. After completing her studies in Canada and in Geneva, the author served as a law clerk in the Chambers of the International Criminal Tribunal for the former Yugoslavia in The Hague. She is a member of the Quebec Bar. The views expressed in this article are strictly personal.

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¹ Resolution 827 (1993), 3217th meeting, 25 May 1993.

² Resolution 955 (1994), 3453rd meeting, 8 November 1994.

on Civil and Political Rights, enumerate in detail the rights that must be accorded to every accused person.³

Reconciliation of the requirements of international humanitarian law with those of fair trial cannot be based on past practice. The procedures adopted by the International Military Tribunals of Nuremberg and Tokyo and by the tribunals set up by the Occupying Powers after the Second World War are not very instructive. At that time, the only recognized principle of international criminal law was the vaguely defined principle of the right to a fair trial. In the German High Command case, the Tribunal in question ruled that:

“In the exercise of its sovereignty the State has a right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him, where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International Law is in no sense done an injustice if he is accorded the same rights and privileges.”⁴

The rules of procedure adopted by the post-war military tribunals proved to be more flexible than those of national criminal courts. It was understood that procedural questions should at no time enable a guilty person to escape justice. In particular, evidence by declaration under oath (affidavit), which does not permit cross-examination and is generally inadmissible under common law, was widely used. In addition, the rules listed in the 1929 Geneva Convention relative to the Treatment of Prisoners of War⁵ were considered to be inapplicable to war criminals, even though they are the minimum generally recognized rules of justice.⁶

³ The text of Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia is reproduced in the Annex hereto.

⁴ 1949 *Law Reports of Trials of War Criminals* (hereinafter *L.R.T.W.C.*), Vol. XII, pp. 62 and 63.

⁵ Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War, in particular Arts 45-67.

⁶ “It is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of War Convention of 1929.” Trial of General Tomoyuki Yamashita, in *Trial of War Criminal Reports*, Vol. III, pp. 105 ff., and 1949 *L.R.T.W.C.*, Vol. IV, pp. 1 ff.; Trial of Robert Wagner, commentary in 1949 *L.R.T.W.C.*, Vol. III, at p. 50; Trial of Hans Albin Rauter, commentary in 1949 *L.R.T.W.C.*, Vol. XIV, pp. 114-118.

Moreover, the trials were held before the adoption of international instruments specifying more detailed rights for every accused person, whether under humanitarian law, with the Geneva Conventions and their Additional Protocols, or human rights law, with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. And finally, at that time the right to a fair trial had not yet been made subject to monitoring by competent international bodies with either regional or universal jurisdiction.

The repression of serious violations of humanitarian law while respecting the basic rules that ensure fair trial, as defined and specified over the past 50 years, presents a considerable challenge for the International Criminal Tribunals. It is indeed essential to bear in mind the extreme gravity of the crimes in question. The rules guaranteeing fair trial were developed with a view to their national application to all kinds of offences, and are not necessarily adapted to repression at the international level. This article considers the possibility of reconciling the repression of serious violations of humanitarian law with full observance of the rights of the accused. Two questions are examined in this connection. The first relates to the evidence and to the scope of admissibility of the consistent pattern of conduct relevant to serious violations of humanitarian law, as provided for in Rule 93 of the Rules of Procedure and Evidence of the Criminal Tribunal for the former Yugoslavia.⁷ The second concerns the right to provisional release until the defendant is acquitted or found guilty. In each case, the article highlights the points of friction that arise between guaranteeing full respect for the rights of the accused and the requirements inherent in the prosecution of crimes under international law.

Evidence of a consistent pattern of conduct — Rule 93 of the Rules of Procedure and Evidence

Certain crimes falling within the competence of the International Criminal Tribunal for the former Yugoslavia require proof of a specific means of execution which extends in time and space, or that of a specific intent or design. The grave breach of the Geneva Conventions that consists in the extensive destruction and appropriation of property, not justified by

⁷ Rule 93 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda has the same wording. Unless otherwise indicated, this article refers to the provisions of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and to the decisions handed down by this Tribunal.

military necessity and carried out unlawfully and wantonly, is one such example.⁸ Genocide also requires, in addition to evidence of a moral element inherent in the crimes concerned, proof of intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Finally, some add crimes against humanity, provided that they have been committed on a large scale or in a systematic manner.

There is no denying the complexity of the evidence required to prove the perpetration of serious violations of international humanitarian law beyond all reasonable doubt. This may entail producing evidence of facts which are *a priori* unrelated to the questions at issue or are not directly connected with them. As a general rule, such evidence may be excluded on the grounds that it may unduly prolong the debates in court or may take the accused by surprise and cause him prejudice far in excess of their probative value. Yet Rule 93 of the Rules of Procedure and Evidence seems to sanction the admissibility of such evidence in the following terms:

Evidence of consistent pattern of conduct

- (A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.
- (B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence, pursuant to Rule 66.

This provision calls to mind the concept of “similar facts” under common law, except for the fact that it makes mention of “a consistent pattern of conduct relevant to serious violations of international humanitarian law”. Why should provision be made for the admissibility of such evidence when a Chamber may, under Rule 89 (C) of the Rules of Procedure and Evidence, admit any relevant evidence which it deems to have probative value? It may be presumed that the *raison d’être* of Rule 93 of the Rules of Procedure and Evidence is to forestall any discussion about the relevance and probative value of the evidence required to demonstrate the constituent elements of certain crimes falling within the competence of the Tribunal.⁹ The scope of this provision

⁸ Statute, Art. 2 (d).

⁹ In the first Annual Report of the Tribunal, it is specified with regard to the consistent pattern of conduct inherent to crimes against humanity that: “ the Tribunal will need to look not only at the behaviour of individual defendants but also at the more general

should nevertheless be specified so as to ensure that the rights of the accused are fully respected.

Evidence of similar facts is an exception to the rule of common law providing for the inadmissibility of evidence put forth to prove the guilt of the accused on the sole grounds that he is the kind of person who could have committed the offence.¹⁰ Excluding this evidence of character is particularly warranted in the case of trial by jury, since it is liable to create an *a priori* attitude appreciably unfavourable to the accused. Since its probative value is outweighed by the requirements of fair trial, which presuppose full respect for the presumption of innocence, this type of evidence is generally not admissible. Nevertheless, evidence of similar facts is admissible to the extent that it is relevant to the matter in hand and that its probative value outweighs the prejudice caused to the person who may contest its admissibility. A rapid survey of Canadian jurisprudence, which refers to certain English decisions, shows that the highest judicial authorities of the State admit evidence of similar facts to prove intent to adopt,¹¹ or to determine the existence of, a consistent pattern of conduct¹² or of a plan or system, and to refute defence based on the good character¹³ of the accused or on an alibi. In addition, an action cited as a similar fact need not necessarily constitute an offence,¹³ and the different counts of the same indictment may serve as evidence of similar facts with respect to each of the allegations made.¹⁴

conduct of groups, or military or paramilitary units, and to establish that the mass crimes alleged to have been committed in the former Yugoslavia are not individual events but part of a wider systematic practice; hence the importance of providing for the admissibility of evidence relating to 'patterns of conduct' (Rule 93). Obviously, it will then be for the judges to determine what weight to give to such evidence in establishing the elements of the alleged offence. (...) This evidence may also prove of great significance whenever one has to establish whether one of the basic requirements of genocide, namely 'the intent to destroy, in whole or in part, a group', is present. Plainly, whenever the intent has not been expressly and specifically manifested, one of the means of ascertaining its existence may lie in investigating the consistent behaviour of groups or units, so as to determine whether that intent may be inferred from their 'pattern of conduct'." Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Yearbook of the International Criminal Tribunal for the Former Yugoslavia*, 1994, p. 101.

¹⁰ In this connection, see J. Sopinka, *The law of evidence in Canada*, Markham, Butterworths, 1992, pp. 431-522; J. Bellemare, L. Viau, *Droit de la preuve pénale*, Thémis, Montreal, 1991, pp. 109-151.

¹¹ *R. v. Robertson*, (1987) 1 *Supreme Court Reports* (hereinafter *S.C.R.*), p. 918.

¹² *R. v. Green*, (1988) 40 *Canadian Criminal Cases* (3d) 333 (Montreal Court of Appeal), confirmed (1988) 1 *S.C.R.*, p. 288.

¹³ *R. v. Robertson*, *op. cit.* (note 11).

¹⁴ *Sweitzer v. R.*, (1982) 1 *S.C.R.*, p. 949.

The admissibility of evidence seeking to determine similar facts nevertheless raises certain problems. If interpreted too liberally, this exception to the exclusion of character evidence runs the risk of introducing evidence which has negligible probative value but is liable to cause serious prejudice to the accused. Moreover, if this exception admits evidence of judicial antecedents, the accused runs the risk of being tried again for the same crime, in contravention of the principle *non bis in idem*. The Chambers of the International Criminal Tribunals, which are called upon to apply the above provision, must specify its scope and limit the admissible evidence to that which shows real similarity to the crime of which the defendant stands accused and is concomitant to it. Under Rule 89 (D) of the Rules of Procedure and Evidence, all evidence having the sole purpose of demonstrating the accused person's natural propensity to committing the crime in question and generally evidence, the probative value of which is substantially outweighed by the need to ensure a fair trial, must be excluded.

To what extent does reference to a consistent pattern of conduct relevant to serious violations of international humanitarian law modify the theory of similar facts? This leads us to question the nature of this consistent pattern of conduct. Is it that of the accused or of other individuals?¹⁵ In cases where evidence of a consistent pattern of conduct which is not that of the accused is admissible, Rule 93 of the Rules of Procedure and Evidence considerably widens the range of evidence admissible as similar facts; these are no longer connected to the conduct of the individual prosecuted, but rather to that of other persons who are not the subject of the indictment. Furthermore, must it be proved that the accused knew or was aware of the fact that the violation of humanitarian law with which he is charged falls within this more general context? If specific knowledge on the part of the accused is not required, proof of a general policy which translates into a consistent pattern of conduct would then be admitted, even if it has no connection with the accused. In such circumstances, it is only reasonable to wonder what kind of defence the accused could present in this regard. How could he refute the manifestations of a policy which is totally foreign to him or detach his crime from that extended context? Such an interpretation is liable to prejudice the rights of the accused, in contravention of the actual provisions of the Statute. An interpretation must therefore be devised whereby Rule 93 of the Rules of Procedure and

¹⁵ Nothing is specified in Rule 93 itself.

Evidence admits evidence of a consistent pattern of conduct which is linked to the accused, either because it is his own conduct that is concerned or because it involves a broader context of which he is aware or which he cannot ignore and which encompasses the crime with which he is charged. In such cases, it is for the Prosecution to establish and demonstrate this link. The necessary evidence must be transmitted to the Defence in advance, in accordance with Rule 93, para. (B), of the Rules of Procedure and Evidence.

Although no written decision has yet been handed down pursuant to Rule 93 of the Rules of Procedure and Evidence, the question of the admissibility of evidence seeking to establish a consistent pattern of conduct was dealt with incidentally in connection with the *Tadic* case,¹⁶ when the Trial Chamber examined the responsibility of the accused with respect to allegations of crimes against humanity. In this case, 10 of the 34 counts of the indictment related to such crimes, which consisted of acts of rape,¹⁷ murder, persecution and other inhumane acts. The Chamber found the accused guilty on all the counts alleging acts of persecution and other inhumane acts, but did not deem that those relating to murder had been proved beyond all reasonable doubt.

For the accused to be declared guilty of crimes against humanity, the Chamber considered that there had to be “some form of a governmental, organizational or group policy” and that “the perpetrator must know of the context within which his actions are taken”.¹⁸ In other words, the act of the charge had to be deliberately directed against any civilian population. The existence of such a policy could nevertheless be presumed by reason of the systematic nature of the violations in question.¹⁹ With regard to the defendant’s criminal intent, the Chamber took as a basis the majority opinion of the Canadian Supreme Court in the *Finta* case, its conclusion

¹⁶ *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT-94-I-T, pp. 17687-17338 (7 May 1997).

¹⁷ This count was dropped.

¹⁸ *Prosecutor v. Tadic*, *op. cit.* (note 16), p. 17439.

¹⁹ The elements of a predetermined plan or of an “administrative practice” have been examined by the judicial bodies of the Council of Europe with regard to Article 3 of the European Convention on Human Rights, which prohibits torture (see in particular *Ireland v. United Kingdom*, 18 January 1978, Series A, No. 25; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Decision of the Commission of 6 December 1983, *Decisions and Reports* 35, p. 143) and by the Inter-American Court of Human Rights (*Velasquez Rodriguez v. Honduras*, 29 July 1988, 1989 *International Legal Materials*, p. 294). Repetition of the acts and the tolerance of the authorities proved to be determining.

being that “the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity”.²⁰ Hence the mere evidence of a policy directed against a civilian population will not suffice; it must be shown that the accused himself is aware that his act was consistent with this policy, and that is indeed the evidence admitted by Rule 93 of the Rules of Procedure and Evidence.

In this connection, the Chamber summarized in the preliminary sections of the judgment the historical, geographical, administrative and military context in which the acts of which the defendant was accused were committed. It specified that it had referred solely to the evidence submitted by the parties to that end. It described in detail the pursuit of a policy of Greater Serbia and the consequences which that policy held for non-Serbs, particularly in terms of ethnic cleansing. It subsequently declared itself satisfied with the evidence presented to show that such a policy was prevalent in the region and at the time when the crimes were committed. It made sure that there was a link between that policy and the accused and that the latter was aware of the policy and even supported it. It regarded as probative the fact that the accused defended the cause of a Greater Serbia, had been involved in the nationalist policy and had become a political leader in Kozarac after ethnic cleansing had been completed in that town. The Chamber concluded that the accused had been aware of the broader context in which the crimes with which he was charged had been perpetrated.

Pre-trial detention — Rule 65 of the Rules of Procedure and Evidence

Detention of the accused during the period of investigation and trial is an institution generally recognized in penal systems. All the accused who appeared before the Nuremberg and Tokyo International Military Tribunals were kept in detention until their sentences were pronounced. Nevertheless, international instruments generally ascribe an exceptional character to pre-trial detention and recognize that, in view of the presumption of innocence, liberty should be the rule. With regard to international

²⁰ *R. v. Finta*, (1994) 1 S.C.R., p. 701. In this case, three judges entered a dissenting opinion in which they concluded that only the moral element included in the underlying offence was to be proved, without any need to establish a link between the accused and the pattern of conduct or general context of the offence with which the accused was charged.

humanitarian law, the 1929 Geneva Convention relative to the Treatment of Prisoners of War already stipulated that pre-trial detention of prisoners of war should be as short as possible.²¹ The Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War²² restricts pre-trial detention exclusively to cases where the same measure is applicable to members of the armed forces of the Detaining Power, or if such confinement is essential in the interests of national security.²³

International human rights instruments, whether universal or regional, follow the same trend. The International Covenant on Civil and Political Rights provides that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody”,²⁴ while the European Convention on Human Rights recognizes that everyone has the right to liberty.²⁵ Pre-trial detention is regarded as a measure of last resort.²⁶ It should not be ordered unless it is authorized by law, unless there is reasonable suspicion that the persons concerned are implicated in the offences that have been notified and unless it may be feared that they will take flight, commit other serious offences or seriously obstruct the normal course of justice if they are left at liberty.²⁷

²¹ Art. 47, para. 2: “The judicial proceedings against a prisoner of war shall be conducted as quickly as circumstances will allow. The period during which prisoners shall be detained in custody shall be as short as possible.”

²² Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War, in particular Arts 82-88 and 99-108.

²³ Art. 103, para. 1: “Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that the trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.”

²⁴ International Covenant on Civil and Political Rights, Art. 9, para. 3. See also Principle 36 of the Draft body of principles on the right to fair trial and a remedy, in *The right to a fair trial: Current recognition and measures necessary for its strengthening, Final report prepared by Mr Stanislav Chernichenko and Mr William Treat*, UN document E/CN.4/Sub.2/1994/24 (3 June 1994), publication of which the Commission on Human Rights recommended in its resolution 1995/10.

²⁵ European Convention on Human Rights, Art. 5, para. 1.

²⁶ United Nations Standard Minimum Rules for Non-custodial Measures, UN resolution A/45/110, 14 December 1990, para. 6.1. In this connection, see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN resolution A/43/173 (9 December 1988), Principle 39.

²⁷ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, *Report prepared by the Secretariat*, Chapter I, Section C, resolution 17, para. 2. The European Convention refers to “reasonable suspicion” that the person arrested has committed an offence and to the case where “it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so” (Art. 5, para. 1 (c)).

Despite this convergence of rules relating to pre-trial detention, the letter and spirit of the Statute and the Rules of Procedure and Evidence make detention the rule of law and liberty the rule of exception. The Rules of Procedure and Evidence expressly provide that the accused shall be detained,²⁸ and he may not be released except by order of a Trial Chamber.²⁹ This seeming contradiction between the international texts and the Rules of Procedure and Evidence is only apparent, since under the provisions of the Statute a person cannot be the subject of an official indictment unless such an indictment is confirmed by a judge of the Tribunal.³⁰ Now, such confirmation cannot take place unless there is sufficient evidence reasonably to maintain that a suspect has committed a crime. In other words, this relates to evidence which for the Prosecutor raises “a clear suspicion of the suspect being guilty of the crime”.³¹ This test is analogous to that of “reasonable suspicion that the accused has committed a crime” in respect of which the international instruments authorize pre-trial detention. In addition, the extreme gravity of the crimes of which the persons brought before the Tribunal are accused and the unique circumstances in which the Tribunal has to operate — absence of a police force and of territorial control — are such that the other conditions warranting pre-trial detention are fulfilled.³² It is nonetheless interesting to note that the International Law Commission, in its draft statute for an international criminal court, did not see fit to depart from the principle that liberty should be the rule, despite the gravity of the crimes falling within the competence of the future court.³³ The International Law Commission was nevertheless aware that “charges under the Statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a State”.³⁴

²⁸ Rule 64 of the Rules of Procedure and Evidence.

²⁹ Rule 65 (A) of the Rules of Procedure and Evidence.

³⁰ Statute, Art. 19.

³¹ *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnil Delalic, pp. 1523-1504 (1 October 1996), at p. 1510.

³² In particular, risk of flight or destruction of evidence.

³³ Draft statute of an international criminal court, *Report of the International Law Commission on the work of its forty-sixth session* (1994), General Assembly Official Records, Suppl. No. 10 (A/49/10), paras 23-209.

³⁴ *Ibid.*, comments on Art. 29.

With regard to the Rules of Procedure and Evidence, provisional release may be ordered only in “exceptional circumstances” and only if the Trial Chamber is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.³⁵ In addition, the host country must be heard.³⁶ These criteria constitute a whole in that they are cumulative and their proof is incumbent on the Defence. The Chambers of the Tribunal have interpreted these conditions strictly and, except for one case in which the accused, suffering from an incurable disease in its terminal stages, was provisionally released,³⁷ all requests filed in this connection have been rejected.³⁸

What are the “exceptional circumstances” mentioned here? Neither the Statute nor the Rules of Procedure and Evidence provide any indications in this regard, but it would be reasonable to assume that these are extremely rare cases in which, apart from proof that the accused will appear and does not constitute a danger to public safety, an additional element is to be taken into consideration. The inability of the Detention Unit to provide the necessary facilities for an accused person suffering from a specific form of physical disability might be a case in point.

The practice of the Chambers shows a different approach, however, as they have not identified situations which might present exceptional features, but have rather specified the criteria that must be taken into account to determine such situations. They have settled on three criteria, namely reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged, his presumed role in the perpetration of the crimes and the length of time

³⁵ The Rules further provide that the Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond (Rule 65 (C)) and, if necessary, may issue an international warrant of arrest to secure the presence of an accused who has been provisionally released (Rule 65 (D)).

³⁶ Rule 65 (B) of the Rules of Procedure and Evidence.

³⁷ *Prosecutor v. Djukic*, Case No. IT-96-20-T, Decision rejecting the application to withdraw the indictment and order for provisional release, pp. 5/220bis-1/220bis (24 April 1996).

³⁸ *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision rejecting a request for provisional release (25 April 1996); *Blaskic*, Case No. IT-95-14-T, Order denying a motion for provisional release, pp. 8/3047bis-1/3047bis (24 December 1996); *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnil Delalic, *loc. cit.* (note 31); *Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Hazim Delic, pp. 1689-1676 (28 October 1996); *Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Landzo (16 January 1997).

spent in detention. They are greatly influenced by the decisions handed down by the judicial bodies of the Council of Europe, which, it will be recalled, work on the basis of a treaty under which liberty is the rule. The reasoning followed by the Chambers calls for several observations.

As explained earlier, the reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged are analogous to those justifying confirmation of the indictment. If these are lacking or are insufficient, the accused may request not only his provisional release, but also rejection of the indictment on the grounds of procedural defect or manifest lack of foundation. It is not unreasonable to believe, however, that circumstances may allow for provisional release, especially when the duration of pre-trial detention is no longer reasonable, without the validity of the indictment itself being called into question. Nonetheless, reference to "reasonable suspicion" at the stage of an application for provisional release excludes any such possibility.

A similar problem arises with regard to the presumed role of the accused in the alleged crime or crimes. The Chambers consider that the difficulties of determining the right to provisional release are directly connected with the significance of the role played by the accused.³⁹ Now, the Tribunal's jurisdiction covers only serious violations of international humanitarian law involving the criminal responsibility of the authors, by reason of their direct participation in the perpetration of such breaches or by reason of their position of authority. In either case, the presumed role of the accused is necessarily important.

Finally, it is surprising that the Chambers refer to the duration of pre-trial detention in determining whether provisional release is warranted by exceptional circumstances. The right to liberty during investigation and trial and the reasonable duration of pre-trial detention are two separate questions. The European Convention on Human Rights provides in particular that any person detained during his trial has the "right to be tried within a reasonable time or to be released during the proceedings".⁴⁰ The pre-trial detention of an accused person may be contested in all cases where it exceeds a reasonable period. According to the permanent jurisprudence of the European Court of Human Rights, provisional release

³⁹ *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnil Delalic, *loc. cit.* (note 31), at p. 1509.

⁴⁰ European Convention on Human Rights, Art. 5, para. 3.

must be granted as soon as maintenance in detention is no longer reasonable.⁴¹ In the context of the International Criminal Tribunal, it is essential to preserve the right for an indicted detainee to contest the duration of his custody as unreasonable. Indeed, any accused person must be presumed innocent until the sentence is pronounced, and the main purpose of monitoring the duration of pre-trial confinement is to order provisional release as soon as maintenance in detention ceases to be necessary.⁴² With regard to the actual duration of pre-trial detention, no provision of the Statute or the Rules of Procedure and Evidence stipulates a specific time limit beyond which provisional release becomes a right. The Chambers concluded that the period upon the expiry of which detention ceases to be lawful depends on the individual circumstances of each case, but nevertheless observed that detention cannot continue beyond a reasonable period.

Concluding remarks

The inherent difficulties of reconciling the requirements of international humanitarian law with those of fair trial have emerged from the judicial practice of the two International Criminal Tribunals themselves. The problem was long ignored because of the absence of an international criminal court, and discussions on crimes under international law, particularly in terms of establishing their constituent elements, have until very recently been the prerogative of experts and have been conducted at the level of theoretical debate. On the other hand, the parameters of fair judicial procedure have been the subject of many international instruments since the Second World War and have been monitored by competent bodies set up at the international level. Nevertheless, these developments generally envision application by national courts to all kinds of offences and fail to take account of the specific features of international repression of serious violations of humanitarian law.

This article has sought to identify certain points of convergence between international humanitarian law and human rights law. Two questions have been dealt with. One is procedural and concerns the admissi-

⁴¹ *Neumeister v. Austria*, 27 June 1968, Series A, No. 8. The Committee on Human Rights considers that maintenance of pre-trial detention should be not only lawful but also reasonable in all respects (No. 305/1988, *Van Alphen v. The Netherlands*, Decision of 23 July 1990, UN doc. A/45/40, Vol. II).

⁴² *Neumeister v. Austria*, *ibid.*

bility of evidence of a consistent pattern of conduct relevant to serious violations of humanitarian law. At first sight, the fact that the admissibility of such evidence is expressly provided for in the Rules of Procedure and Evidence may seem surprising, since exclusion of this type of evidence might be justified by the fact that its probative value is likely to be greatly outweighed by the prejudice caused to the accused. Evidence of a consistent pattern of conduct is nevertheless an integral part of the constituent elements of certain crimes falling within the competence of the International Criminal Tribunals. Evidence aimed at establishing the existence of a consistent pattern of conduct must be communicated to the accused, so that he can fully prepare his defence. In addition, such evidence must of necessity be linked to the accused, either by reason of his own conduct or by reason of a broader context of serious violations of which he is aware or which he cannot ignore and which encompasses the crime with which he is charged.

The other question dealt with concerns the right to provisional release during investigation and trial. In this connection, the Rules of Procedure and Evidence of the International Criminal Tribunals run counter to the international rules on this matter, in that they make pre-trial detention the rule and provisional release the exception. This contradiction is only apparent, however, since the conditions under which the Tribunals operate are in fact the circumstances that authorize pre-trial detention under the international rules in question. It should be noted, however, that the International Law Commission avoided this contradiction in its draft statute for an international criminal court, even though the nature of the crimes falling within the competence of the future court is similar to that of the crimes which the two International Criminal Tribunals have the power to prosecute.

A discussion of the criteria adopted by the Chambers to define the "exceptional circumstances" warranting provisional release showed that the Chambers were greatly influenced by the decisions handed down by the judicial bodies of the Council of Europe, which work on the basis of a treaty under which provisional release is the rule. A consequence of the restrictive interpretation of the Chambers is that provisional release can be ordered only in cases where the accused may also seek rejection of the indictment, on the grounds that it does not meet or no longer meets the conditions which authorized its confirmation by a judge of the Tribunal. The fact that an accused person would be unlikely to be granted provisional release should not be assimilated to a negation of this right. Hence it is suggested that the Chambers of the International Criminal Tribunals should specify the "exceptional circumstances" warranting provisional

release, in the light of the Tribunals' respective Statutes and Rules of Procedure and Evidence.

The thorny question of the protection of witnesses could have been dealt with in the same way. Effective repression of serious violations of humanitarian law depends on the evidence of eye-witnesses, who may, however, hesitate to appear before an international court for fear of reprisals against themselves or against those close to them. How can the International Criminal Tribunals guarantee them appropriate protection, while ensuring that the measures ordered do not detract from full respect for the rights of the accused?

The International Criminal Tribunals are in the vanguard of international repression of serious violations of humanitarian law, and their activities may serve as a basis for the work of the future permanent court. The credibility of such international action will nevertheless depend on decisions made to determine the guilt or innocence of accused persons, while ensuring that all the judicial guarantees designed to secure respect for the individual are provided. Despite all the indignation aroused by the crimes that the International Criminal Tribunals are called upon to prosecute, the accused must be accorded the right to a fair trial. Effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable to each other, since they both contribute to upholding the rule of law.

**Statute of the International Criminal Tribunal
for the former Yugoslavia**

Article 21 — Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
 - (g) not to be compelled to testify against himself or to confess guilt.