

THE DEVELOPMENT OF THE DEFENCE AT THE ICTY FROM AN INSTITUTIONAL PERSPECTIVE: LESSONS LEARNED WITH REGARD TO COUNSEL'S QUALIFICATION, REMUNERATION AND PARTICIPATION

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ABSTRACT

The article highlights the changing perception of the importance and role of the Defence in international criminal proceedings. It seeks to shed light on the steps taken by the ICTY to ensure that the Defence has emerged from being a mere afterthought at the outset of this *ad hoc* tribunal to the vital role they have come to play at the end of the tribunal's mandate. It focuses on the lessons learned along the way and how those lessons are reflected in the practice of Special Tribunal for Lebanon and the International Criminal Court.

The article examines the need for highly qualified defence counsel to ensure fair and expeditious trials. Experience before the ICTY has shown that it is crucial to strike a balance between having counsel familiar with the history and region of the relevant conflict, and having counsel proficient in the working languages of the tribunals, as well as the procedural law applied. The article reflects on both the difficulties encountered in this regard and also the solutions found to overcome those difficulties. The article further examines the lessons learned on the way to a comprehensive, transparent and fair legal aid system, and critically compares the ICTY's approach with those of the Special Tribunal for Lebanon and the International Criminal Court. The article finally examines the benefits of early participation of defence counsel in the development of a tribunal's legal and administrative framework outside the court room. It argues that an independent association of defence counsel is indispensable to achieve such participation.

The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.

Justice Jackson, Nuremberg Prosecutor

Speech American Society for International Law, 1945

I. INTRODUCTION

With the closure of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal" respectively) at the end of 2017, it is a perfect time to reflect on the role of the Defence before the Tribunal. This article will examine the evolution of the Defence, including the legal aid programme, before the Tribunal from an institutional perspective. It will highlight the changing perception of the importance and role of the Defence in international criminal proceedings. It attempts to shed light on how the role of the Defence evolved from a mere afterthought to the vital role they have come to play at the end of the Tribunal's mandate. The article will focus on lessons learned and how some of those lessons are reflected in the practice of other international tribunals, especially the Special Tribunal for Lebanon ("STL") and the International Criminal Court ("ICC").

In particular, the article examines the need for highly qualified defence counsel to ensure fair and expeditious trials. Experience before the ICTY has shown that it is crucial to strike a balance between counsel familiar with the history of the region and the conflict, and counsel proficient in one of the working languages of the tribunal, as well as the applicable substantive and procedural law. The article reflects on both the difficulties encountered in this regard and the solutions found to overcome them. Furthermore, the article examines the lessons learned on the road towards a comprehensive, transparent and fair legal aid system, which attracts qualified counsel and is still financially prudent. It critically compares the ICTY's approach with those of the STL and the ICC. Finally, the article examines the benefits of early participation of defence counsel in the development of an international tribunal's legal and administrative framework. It argues that it is indispensable that the Defence is organised to accomplish such participation and that an independent association of defence counsel is essential to achieve this.

Right to a fair trial

Any comprehensive examination of the role of the Defence should start at its foundation – the right to a fair trial. Enshrined in both national constitutions and numerous international instruments, it is safe to say that the principle of a right to a fair trial is a universally accepted norm.¹ Fairness is an essential element of any justice system and without it, justice cannot be done or be perceived to have been done.² This becomes especially apparent in a post-conflict environment where there is an inherent risk of the perception of victor's justice. While bringing perpetrators of serious international crimes to justice is indeed imperative, not protecting their right to a fair trial would not only affect the individual perpetrators, but would severely undermine the establishment of the rule of law in a recovering society.³ As Judge David Hunt in an interlocutory appeal in the *Milošević* case stated:

This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.⁴

¹ See, e.g., European Convention on Human Rights ("ECHR"), Article 6(3); International Covenant on Civil and Political Rights, Article 14(3); American Convention on Human Rights, Article 8(2); African Charter on Human and Peoples Rights, Article 7(1)(c).

² Elise Groulx, "Equality of Arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System, *Revue Québécoise de Droit International (Hors-Série)*, 2010 ("Groulx"), p. 21. A previous version of the article can be found here <http://ouclf.iuscomp.org/equality-of-arms-challenges-confronting-the-legal-profession-in-the-emerging-international-criminal-justice-system/> (accessed on 19 March 2018).

³ Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, *Boston College International & Comparative Law Review* Vol. 30, 2007 ("McMorrow"), p. 153, <http://lawdigitalcommons.bc.edu/iclr/vol30/iss1/8/> (accessed on 19 March 2018); Groulx, p. 35.

⁴ *Prosecutor v. Slobodan Milošević*, Case No. It-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, public, 21 October 2003, para. 22.

The right to a fair trial is enshrined in Article 21 of the Statute of the ICTY (“ICTY Statute”), which mirrors Article 6(3) of the European Convention on Human Rights (ECHR) and Article 14(3) of the International Covenant on Civil and Political Rights.⁵

II. QUALIFICATION

Article 21(4)(d) of the Statute guarantees each suspect and accused the fundamental right to defend themselves in person or through legal assistance of their own choosing. It provides for accused to have legal assistance assigned to them, where the interests of justice so require, and without payment by them if they do not have sufficient means to pay for it.

The European Court of Human Rights has found that the rights guaranteed in the ECHR should not be “theoretical or illusory, but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the defence afforded.⁶ It further found that “the right to be effectively defended by a lawyer...is one of the fundamental features of a fair trial” (emphasis added).⁷ Hence, in order to ensure that a trial is fair, an accused must be represented by a competent counsel.⁸ This also accords with the UN Basic Principles on the Role of Lawyers, which require that any person who is entitled to legal aid is “entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance”.⁹ It follows that an institution which aims to protect the right to a fair trial needs to ensure that accused are represented by counsel who are competent to provide an effective defence.

What makes a counsel competent to represent an accused before an international criminal tribunal? In 1994, the original Rules of Procedure and Evidence (“Rules”) of both *ad hoc*

⁵ Article 21 reads as follows: 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.

⁶ *Salduz v Turkey (Application no 36391/02)* EctHR 2008, para. 51 with further citations.

⁷ *Ibid.*

⁸ *The Prosecutor v Akayesu* (Case No ICTR-96-4-A) Judgement, 1 June 2001 (“*Akayesu*”), para. 78.

⁹ UN Basic Principles on the Role of Lawyers, Article 6, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> (accessed on 19 March 2018).

Tribunals¹⁰ required privately retained defence counsel to merely submit a power of attorney and to be admitted to practice law in a national jurisdiction, or to be a university professor of law,¹¹ while the original Directive on the Assignment of Defence Counsel (“Directive”) in addition required that counsel assigned under the legal aid system of the Tribunal spoke one of the ICTY’s working languages.¹² Notably, the Rules neither required specific experience in relevant substantive law, nor a minimum number of years of experience.

Counsel interested in assignment to suspects and accused before the ICTY who possessed these basic requirements of Rules 44 and 45 of the Rules simply notified the Registrar and were put on the list of counsel eligible for assignment to indigent suspects or accused in accordance with Rule 45 (“Rule 45 List”). Initially, it was the Registrar who selected counsel from the list and assigned them to an accused requesting legal aid.¹³ Later on, the Tribunal found that while legally aided accused are not absolutely free to choose their counsel, they should be offered the possibility to select their preferred counsel from the Rule 45 List.¹⁴ The Registrar took their preference into consideration unless there existed reasonable and valid grounds not to do so.¹⁵

Defence counsel in war crimes cases – which often have exceptionally complex indictments covering considerable temporal and geographical scopes and novel legal issues – are required to deal with tremendous amounts of documents and witnesses, and with a variety of fields of law. Furthermore, the procedural law before the ICTY, while *sui generis*, was mostly of an adversarial nature. This proved to cause challenges for lawyers trained in a civil law system, in particular when it came to cross-examination of witnesses and the Defence conducting its own investigations, tasks more typical for an adversarial system. During the first case heard before the ICTY, the *Tadić* case,¹⁶ it became apparent that both the minimal qualification requirements under the Rules and the provision of the assignment of only one counsel under the Directive,¹⁷ were at odds with the demands placed on the Defence acting before the Tribunal. Following a request from *Tadić*’s

¹⁰ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) (together “*ad hoc* Tribunals”).

¹¹ The then Rule 44 read as follows: “Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. A counsel shall be considered qualified to represent a suspect or accused if he satisfies the Registrar that he is admitted to the practice of law in a State, or is a University professor of law.” For counsel to be assigned to indigent accused, Rule 45(A) further provided: “A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44 and have indicated their willingness to be assigned by the Tribunal to indigent suspect or accused shall be kept by the Registrar”; ICTY Rules of Procedure and Evidence, IT/32, 11 March 1994.

¹² See, Directive on the Assignment of Counsel, IT/73/Rev 1, 1 August 1994, Article 14(ii).

¹³ Directive on the Assignment of Counsel, IT/73/Rev.1, 1 August 1994, Article 11(i).

¹⁴ *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, public, 3 July 2003, para. 75; *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, public redacted, 7 November 2003, para. 22; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Request for Review, 8 June 2005, para. 13.

¹⁵ *Prosecutor v. Martić*, Case No. IT-95-11-PT, “Decision on Appeal Against Decision of Registry”, public, 2 August 2002. Also see, *Prosecutor vs Gerard Ntakirutimana*, “Decision on the Motion of the Accused for Replacement of Assigned Counsel, Case No ICTR-96-17-T, 11 June 1997, p. 6.

¹⁶ *The Prosecutor v Duško Tadić*, Case No. IT-94-1, (“*Tadić*”).

¹⁷ Directive on the Assignment of Counsel, IT/73/Rev.1, 1 August 1994, Article 16(A).

counsel, the Registry acknowledged that it was impossible for one lawyer to handle an international war crimes trial alone and allowed the assignment of a legal consultant. Though both lawyers were highly qualified and experienced, they soon realised that their experience in Dutch civil law procedure had not equipped them with the requisite skills to effectively participate in an adversarial trial.¹⁸ The Registry therefore agreed to assign a third lawyer to the team, experienced in the adversarial system, who took over most of the cross-examinations in court. Although the “*Tadić* approach” – creating a team of highly experienced lawyers with complementary skills – was successful and led to an amendment of the Directive in 1996 to include the possibility of exceptionally assigning a second counsel to an accused,¹⁹ it did not immediately create a standard for the composition of defence teams before the ICTY. In fact, after *Tadić*, the ICTY’s inclination towards the adversarial system continued to pose considerable challenges for the Defence.

While most counsel from the former Yugoslavia were only trained in civil law procedure and many lacked the language skills necessary to defend a client before an international tribunal,²⁰ many accused still preferred counsel from the region.²¹ In this regard, one has to consider counsel’s dual role – both as advocates in the administration of justice and as confidants of their clients.²² Counsel are often the only individual with whom a defendant can communicate freely and confidentially. While defence counsel do not have to identify with their client’s viewpoint, they must zealously defend the interests of their client, and to do so they must empathise with their client and have their client’s trust.²³ While this applies to most criminal cases, it is particularly relevant in international criminal proceedings. The accused are rarely run-of-the-mill criminals. Instead, they are often high-level politicians and military leaders, standing accused in a court of law for the first time. They tend to feel more comfortable with someone they know, or at least someone with a similar national and ethnic background, someone who speaks their own language and who may have intimate knowledge of the conflict and the region – regardless of such individual’s qualifications in international criminal proceedings.²⁴

Early on, the institution did little to overcome these challenges. No training was offered to counsel. While the Tribunal took a step in the right direction with the creation of the “Manual for

¹⁸ For a detailed analysis of the history of Duško Tadić’s legal representation, see, Mark S. Ellis, Achieving Justice before the International War Crimes Tribunal: Challenges for the Defence Counsel, *Duke Journal of Comparative & International Law*, 1996-1997 (“Ellis”), p. 525, <https://scholarship.law.duke.edu/djcil/vol7/iss2/7/> (accessed 19 March 2019).

¹⁹ See, Third Annual Report, A/51/292, 16 August 1996, para. 106; Directive on Assignment of Defence Counsel, IT/73/Rev 3 (1996), Article 16.

²⁰ While counsel were allowed to speak Bosnian, Croatian or Serbian in court, motion practice and communications with the Registry had to be conducted in one of the working languages of the Tribunal, namely English or French. See, *Tuinstra*, Defence Counsel in International Criminal Law, TMC Asser Press, 2009, p. 43.

²¹ See, Third Annual Report, A/51/292, 16 August 1996, paras. 107-108, 110.

²² Michail Wladimiroff, Rights of Suspects and Accused, in “Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts”, Kluwer Law International, 2000, Volume I (“Wladimiroff”) p. 421.

²³ Wladimiroff, p. 421.

²⁴ Out of 127 accused before the ICTY who were represented by counsel, 104 (82 per cent) had at least one counsel from the region of the former Yugoslavia during at least one of the phases of the proceedings.

Practitioners”, which provided some basic information on the role of defence counsel and the procedures of the Tribunal,²⁵ it was unfortunately not sufficient to enable counsel, unfamiliar with the law, procedure and language of the Tribunal, to prepare an effective defence. Eventually the poor courtroom performance of some counsel raised the question whether the accused actually received the effective assistance of counsel required to protect their right to a fair trial.²⁶

Therefore, when the Secretary General appointed an expert group to evaluate the performance of both the *ad hoc* Tribunals in 1998, the group also undertook an in-depth review of the performance of the defence counsel and of the applicable rules and regulations regarding the qualifications and selection of counsel.²⁷ In their report, the Expert Group confirmed that the qualification requirements as established in the Rules and the Directive at the time were inadequate.²⁸

The expert report contributed to a growing awareness that to conduct fair and expeditious trials, the quality of the defence needed to be improved. This eventually led the ICTY to undertake two important steps.

The first was the gradual increase of the qualification requirements for admission to practice before the ICTY. The second was a greater focus on the provision of training for counsel. This was initially organized by the Registry, but was subsequently taken over by the Association of Defence Counsel Practising before the ICTY (“ADC”),²⁹ with financial and logistical support from the Registry.

The increased qualification requirements

In August 2000, the ICTY took its first step towards increasing the qualification requirements. The Judges amended the Rules to include the requirement that all counsel, whether assigned or appointed, speak one of the two official languages of the Tribunal and that counsel assigned under the legal aid regime must have “reasonable experience in criminal or international law”.³⁰ Two

²⁵ See, Third Annual Report, A/51/292, 16 August 1996, para. 111.

²⁶ David Tolbert, *The ICTY and Defence Counsel, A Troubled Relationship*, p. 977. http://heinonline.org/HOL/Page?handle=hein.journals/newlr37&div=56&q_sent=1&casa_token=&collection=journals (accessed 19 March 2018); citing John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in *Essays on ICTY Procedures and Evidence* 167, p. 170; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. GA 54/634, 22 November 1999 (“Expert Report”).

²⁷ See, Expert Report.

²⁸ Expert Report, para. 210 (“In both ICTY and ICTR, mere admission to the practice of the law is no assurance that an attorney is qualified with respect to trial or appellate work or criminal law, much less international criminal law. Similarly, a University Law professorship does not automatically carry with it knowledge or experience with respect to matters germane to criminal trials or appeals”).

²⁹ As outlined in part IV below, the Association of Defence Counsel practicing before the International Criminal Tribunal for the former Yugoslavia (“ADC”) was established on 20 September 2002, and was recently renamed to Association of Defence Counsel practicing before the International Court and Tribunals.

³⁰ ICTY Rules of Procedure and Evidence, IT/32/Rev.18 (2 August 2000), Rule 45. Notably the ICTR Rules of Procedure and Evidence were amended in 1998 to include the requirement of “10 years of relevant experience” for counsel to be eligible for assignment under the legal aid system of the ICTR, See, ICTR Rules of Procedure and Evidence as amended on 8 June 1998, Rule 45(A).

years later, after the establishment of the ADC, it became mandatory for all counsel to be a member in good standing with the ADC to be entitled to practice before the ICTY.³¹

Finally, in 2004, the plenary of Judges made further substantial changes to the qualification requirements for counsel under the Rules. Since then, all counsel were required, not just to speak, but to be proficient in one of the working languages of the Tribunal (although this requirement could be waived under certain circumstances)³², and prove that they have no disciplinary or criminal convictions.³³ To be eligible for assignment under the legal aid system counsel was further required to possess established competence in (international) criminal, humanitarian or human rights law as well as having at least seven years of “relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings”.³⁴ It is noteworthy that while the Rules did not directly impose these two latter requirements upon privately retained counsel, they were prerequisite for ADC membership.³⁵ Accordingly, whether directly or indirectly, they became applicable to all counsel appearing before the Tribunal.

Following the 2004 amendments, the Registry required all counsel to re-apply for admission to the Rule 45 List. Counsel who did not meet all of the new requirements, but were actively involved in on-going cases before the ICTY, were allowed to bring their mandate to an end to avoid prejudice to their clients. While several counsel did not succeed to be re-admitted to Rule 45 List, the number of counsel from the region remained high.³⁶ The increased qualification requirements benefitted the quality of the Defence and thereby the fairness of the proceedings.

Training of Counsel

In May 2001, the Registry’s Office for Legal Aid and Detention Matters (“OLAD”)³⁷ organised the first training session for counsel, covering substantive and procedural law, as well as practical aspects on how to use courtroom equipment and systems.³⁸ However, since its establishment in 2002, the ADC, in accordance with its principal objective to assist defence counsel in performing their duties, became the provider of invaluable training to the Defence.³⁹ Arguably, the ADC was better placed to provide practical training for counsel and support staff as through their membership it has access to practitioners who provide “peer-to-peer” trainings. Since taking charge, the ADC provided advocacy training throughout the year, covering both procedural and

³¹ ICTY Rules of Procedure and Evidence, IT/32/Rev. 24 (5 August 2002), Rules 44 and 45.

³² See, ICTY Rules of Procedure and Evidence, IT/32/Rev.32 (12 August 2004), Rule 44(B).

³³ ICTY Rules of Procedure and Evidence, IT/32/Rev.32 (12 August 2004), Rules 44 and 45.

³⁴ ICTY Rules of Procedure and Evidence, IT/32/Rev.32 (12 August 2004), Rule 44(B) (ii),(iii).

³⁵ ADC Constitution, Article 3(2), <https://www.adc-ict.org/documents> (accessed on 19 March 2018).

³⁶ Fifty counsel from the former Yugoslavia remained on the 2004/2005 Rule 45 List.

³⁷ Later on re-named into “Office for Legal Aid and Defence”.

³⁸ Eighth Annual Report of the ICTY, A/56/352 17 September 2001, para. 259.

³⁹ The ADC’s objectives include the following [...] to support the function, efficiency and independence of Defence Counsel practising before the ICTY; to promote and ensure the proficiency and competence of Defence Counsel practising before the ICTY in the fields of advocacy, substantive international criminal law and information technology systems relevant to the representation of persons Accused before the international Tribunal. See, ADC Constitution, Article 2.

substantive law applied before the ICTY. It organized mock trials and has established an online training portal. The Registry provided financial and logistical assistance for these trainings.

The impact on later international criminal tribunals

With its strengthened qualification requirements, the ICTY served as an example to other international criminal tribunals and courts, such as the STL and the ICC, who have built on these requirements and, at times, have imposed even stricter ones.

a) STL

At the STL, the Rules require counsel to be admitted to the practice of law, or be a professor of law (although the latter may only be appointed as co-counsel), be proficient in English or French, and have not been found guilty in disciplinary or criminal proceedings.⁴⁰ The Rules further require that counsel undertake mandatory continuing professional training if so directed by the Head of the Defence Office.⁴¹ However, no minimum years of practice or relevant experience are required, nor is membership with an association of defence counsel.

In addition to the above, for assignment under the legal aid regime of the STL, counsel has to possess established competence in criminal and/or international criminal law, as well as 10 years of relevant, practical experience for assignment as lead counsel and seven for assignment as co-counsel.⁴² Furthermore, candidates have to undergo an admission interview.

Considering that the trial before the STL has so far been held *in absentia*, all counsel have been assigned under the legal aid regime to date.⁴³ Accordingly, there is no experience with counsel who only meet the basic qualification requirements for privately retained counsel.

b) ICC

The ICC Rules went even further. All counsel, whether assigned or privately retained, are required to have established competence in international or criminal law, as well as relevant practical experience in criminal proceedings, and be fluent in one of the working languages of the Court. Professors of law without experience in criminal proceedings may only assist counsel.⁴⁴ These provisions are further clarified in the Regulations of the Court. Regulation 67(1) specifies that the relevant experience for counsel as described in Rule 22 shall be at least 10 years for lead counsel and eight years for associate counsel.⁴⁵ Furthermore, the ICC Code of Conduct for Counsel

⁴⁰ STL Rules of Procedure and Evidence, STL/BD/2009/01/Rev.4 (8 February 2012), Rule 58.

⁴¹ STL Rules of Procedure and Evidence, STL/BD/2009/01/Rev.4 (8 February 2012), Rule 58(C).

⁴² STL Rules of Procedure and Evidence, STL/BD/2009/01/Rev.4, (8 February 2012), Rule 59.

⁴³ See, "Assignment of Counsel for the Proceedings Held in Absentia Pursuant to Rule 106 of the Rules", STL-11-01/I/PTJ, 2 February 2012.

⁴⁴ ICC Rules of Procedure and Evidence, Rule 22.

⁴⁵ Regulations of the Court, ICC-BD/01-01-04, (26 May 2004), Regulation 67(1).

requires that counsel maintain a high level of competence and participate in training initiatives to maintain such competence.⁴⁶

The lessons learned

The ICC's introduction of stringent qualification requirements for all counsel is welcome progress, and these should be enforced rigorously. The limited requirements for privately retained counsel before the ICTY, ICTR and STL fail to properly appreciate the realities of international war crimes proceedings. A balance needs to be struck between an accused's right to choose their own counsel and the need for competent counsel who can provide an effective defence. The ICTY experience has shown that counsel with little to no experience in relevant law and procedure may endanger an accused's right to a fair trial, cause delays and thereby substantially raise the overall costs incurred. Moreover, unskillful cross-examination of witnesses may impact on those most vulnerable in the proceedings. Limiting an accused's free choice of counsel to those qualified to deal with complex war crimes cases is not likely to prejudice the accused. This is particularly true when their preferred lawyer, who does not meet the qualification requirements, might still be assigned to the defence team in a different, supporting role, such as legal assistant or consultant.

In light of these experiences, any future international criminal court should, at least, require a minimum number of years of relevant professional experience for counsel to be admitted to practice. When formulating the requirements, it may, however, be worth considering that legal education has changed with the emergence of the *ad hoc* Tribunals and the ICC. International criminal law, which was up to the 1980s and 1990s a rather obscure field of study, has now become part of the mainstream curriculum. There is also a huge pool of young lawyers who have acquired valuable experience in defence teams before the *ad hoc* Tribunals and the ICC. Arguably such experience may better equip these young lawyers in dealing with complex war crimes cases than more senior counsel whose sole experience is in national criminal law in domestic jurisdictions.

To ensure a lasting high quality of the defence before an international tribunal, the institution needs to focus on the provision of meaningful and mandatory training for counsel and support staff. Such training should not only relate to substantive and procedural law, but would also benefit from inclusion of managerial topics. Defence counsel in national jurisdictions often work on their own or in small teams. The nature of international criminal trials requires bigger, multidisciplinary and multinational teams, which in turn require lead counsel to possess organisational and managerial skills. While such training should preferably be offered by experienced defence counsel, via an independent association like the ADC, the institution should be prepared to generously support such training logistically and financially. As outlined above, improving the quality of the Defence may shorten the duration of the trials, and hence decrease the costs of proceedings as a whole.

⁴⁶ ICC Code of Professional Conduct for Counsel, Resolution ICC-ASP/4/Res.1, (2 December 2005), Article 7.

Furthermore, while it is essential that defence counsel remain independent, they should be encouraged to compose a defence team with a variety of skill sets. The ICTY experience has shown that the most successful composition of a defence team includes one counsel familiar with the procedural law of the tribunal before which it is practicing and one counsel familiar with the conflict, the region and the language of the accused.⁴⁷ Equally important is qualified support staff. While the ICTY has only ever codified the qualification requirements for support staff to self-represented accused in the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused,⁴⁸ it may be advisable to provide more guidance in the future. The ICC has introduced a separate list of assistants to counsel requiring applicants to possess five years of relevant experience. Depending on the specific needs of a case, the five-year requirement could be unduly exclusive, as it may disregard support staff who may be helpful even with less experience.

III. REMUNERATION

Trials before the ICTY and other international tribunals are typically lengthy and complex. They require substantially more resources than regular domestic cases. Most accused are not able to cover all the costs of their defence.⁴⁹ In order to attract competent, experienced defence counsel, willing to give up on their private practices for a prolonged period of time to focus on one war crimes case, adequate remuneration is required. Hence, every international criminal tribunal will have to set up a fair and transparent legal aid system, which balances the right of the accused to an effective defence and equality of arms with the need for a responsible expenditure of limited public funds.

The founding documents of the ICTY provided little guidance on the establishment of the legal aid system. The original Directive provided for remuneration of counsel based on a retainer, daily fees, and a daily allowance for counsel.⁵⁰ The retainer was set at US\$400, the daily rate at US\$200 and the daily allowance was based on UN daily subsistence rates (“DSA”), but progressively reduced over the course of counsel’s stay at the seat of the Tribunal. The Directive further provided for coverage of limited travel costs.⁵¹ Based on an eight-hour working day, this meant that counsel’s hourly fee was around US\$25, which included general office costs. This was hardly enough to attract experienced international defence counsel.

⁴⁷ It seems that this general approach was also underlying the Head of the STL Defence Office’s choice for the counsel he assigned in the *Ayyash et al.* case. See, “Assignment of Counsel for the Proceedings Held in Absentia Pursuant to Rule 106 of the Rules”, STL-11-01//PTJ, 2 February 2012.

⁴⁸ ICTY Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 1 April 2010, part F.

⁴⁹ 121 out of 133 (approx. 90 per cent) ICTY accused facing trial received full or partial legal aid (this number includes self-represented accused who received financial support from the ICTY).

⁵⁰ Directive on Assignment of Counsel, IT/73.Rev.1, (1 August 1994), Article 23-31.

⁵¹ Directive on Assignment of Counsel, IT/73.Rev.1, (1 August 1994), Article 30.

The introduction of the hourly system

In 1995, upon petition of counsel in the *Tadić* case,⁵² the ICTY increased counsel's rates substantially. It set hourly rates for counsel ranging between \$80 USD and \$110 USD, depending on years of experience as a judge, prosecutor or attorney.⁵³ The hourly rates for legal assistants and defence investigators were set at between €15 and €25.⁵⁴ To be reimbursed, counsel were required to submit detailed time sheets that indicated a description of the tasks performed and the number of hours spent on each task.⁵⁵ In 1996, to control costs, the Registry introduced a monthly ceiling of 175 billable hours for lead and co-counsel, including hearing hours.⁵⁶

However, while the system improved the financial situation of the defence teams significantly, it had its weaknesses. There was limited incentive for defence teams to perform efficiently, as the system was based on payments of monthly maximum allotments for as long as a case lasted.⁵⁷ In addition, in cases with prolonged pre-trial phases defence costs tended to escalate. Finally, the administrative burden on the Registry was significant. In particular, the need for Registry staff to evaluate the reasonableness of the hourly invoices submitted, without undue interference with the prerogatives of counsel in preparing their defence was time consuming and prone to create tension and mistrust between the Registry and counsel.

The introduction of the ceiling system based on complexity

In 2001, in order to improve the allocation of resources to cases varying in complexity, to create incentives for counsel to work more efficiently and to explore possibilities for cost saving, the Registry introduced a major reform of the legal aid system. The monthly ceiling of hours was replaced by an overall ceiling of hours for the entire pre-trial and appeals stages, regardless of their actual duration, but rather based on the complexity of the specific case.⁵⁸ Based on these factors the cases were ranked at one of three complexity levels: difficult (1), very difficult (2) and extremely difficult/ leadership (3).⁵⁹

⁵² See, Ellis, p. 530

⁵³ See, Directive on Assignment of Defence Counsel, IT/73/Rev.3, 25 June 1996, Annex VI.

⁵⁴ Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system of 12 August 2003, A/58/288, ("2003 Progress Report") para. 9. http://www.un.org/qa/search/view_doc.asp?symbol=A/58/288 (accessed 11 April 2018)

⁵⁵ 2003 Progress Report, para. 7.

⁵⁶ The rationale behind the number of maximum allowable hours was that if the rates were multiplied by 175 hours, the total would equal approximately a monthly gross salary of a senior trial attorney or trial attorney at the Tribunal, plus office overhead costs. Later on, in 1999, the ceiling was lowered to 125 hours per person per month. 2003 Progress Report, paras. 8, 9.

⁵⁷ 2003 Progress Report, para. 9.

⁵⁸ The complexity of a case was determined based on factors such as the number and nature of counts in the indictment; the number and nature of preliminary motions; the number of witnesses and documents involved; the temporal and geographical scope of the indictment; the previous ranking of the accused within the military or political hierarchy; and the legal issues expected to arise in the course of trial.

⁵⁹ Depending on the level of complexity, the maximum allotments of billable hours for pre-trial were between 1400-2800 counsel hours and between 2000- 4000 support staff hours. For the appeal, the maximum allotment was between 1050 and 2100 counsel hours plus hearing hours and between 450 and 900 support staff hours.

At the same time, changes were made to the remuneration applicable during the trial stage of the proceedings. The Registry set a maximum monthly allotment of 115 hours of preparation time for lead and co-counsel. The ceiling did not apply to hearing hours, which were paid over and above the hours allocated for the preparation of the case. In addition, the Registry set a further maximum allotment of 150 hours per month to be shared between support staff assigned to the case.⁶⁰

However, the implementation of this ceiling system had its own drawbacks. The preparation and the review of the hourly invoices still burdened the Defence and the Registry and often led to conflict. Furthermore, if defence teams exhausted their full allotment at the beginning of the pre-trial and appeal stages, requests for additional resources solely based on early exhaustion of funds were mostly denied by the Registry,⁶¹ which increased legal aid related litigation.

The introduction of the lump sum system

The Registry sought to further improve the situation and continued to research legal aid systems in different national jurisdictions. This led to the next major reform of the legal aid system in 2002: the introduction of a pure lump sum system for the trial stage.⁶²

The objectives behind the introduction of the lump sum system were to provide counsel with a maximum of flexibility for the preparation of their case and an incentive to manage their resources and time in the most efficient manner. It further took account of the fact that the cases differed in complexity and the need for resources and endeavoured to streamline and facilitate the administrative demands on both the Defence and the Registry. Finally, it aimed at facilitating responsible budgeting of the Tribunal's legal aid resources, by establishing a system that was less open to abuse and that allowed for more reliable projections of cost.⁶³

The calculation of the trial lump sum for any given case was, and remained, based on the complexity and the estimated duration of the trial proceedings.⁶⁴ The lump sum covered all aspects of representation, though excluded necessary travel costs and DSA for counsel⁶⁵ and had specific provisions pertaining to client-counsel related interpretation and translation costs.⁶⁶ Notably, while the system introduced in 2002 underwent a number of amendments, its basic features and ideas were applicable until the closure of the ICTY, and have since been incorporated in the legal aid system of the Mechanism for International Criminal Tribunals.

⁶⁰ Notably, this constituted a significant cut in comparison to the previous allotment of 125 hours per month for each assistant and investigator.

⁶¹ See, 2003 Progress Report, para. 20.

⁶² Notably, the lump sum system that was introduced in 2002 is in essence the same system applied until the ICTY's closure. The Mechanism for International Criminal Tribunals has equally opted for the same system.

⁶³ 2003 Progress Report, para. 24.

⁶⁴ During trial, a separate lump sum is calculated for the prosecution phase and the defence phase.

⁶⁵ ICTY Trial Legal Aid Policy, para. 4.

⁶⁶ ICTY Trial Legal Aid Policy, para. 5.

The different monthly allotments for the three complexity levels were based on the UN salaries of a P5 and a P4 Trial Attorney for counsel and co-counsel, plus an overhead for so-called office costs to cover administrative costs and the renting of office space, and an allocation for a varying number of support staff, depending on the complexity of the case. Counsel who did not reside at the seat of the Tribunal could further claim DSA. The estimated duration of the prosecution and defence phases of trial were based on the time the Chamber allocated for the presentation of the respective case.

Eighty per cent of the lump sum was paid out in equal monthly stipends over the entirety of each phase.⁶⁷ No formal accounting of the work performed by the Defence was required until the end of the phase, and the actual distribution of the monthly stipend amongst the team members was at the discretion of lead counsel alone. The remaining twenty per cent of the lump sum was paid out at the end of a phase, upon submission and acceptance of a detailed report which provided an accounting of what each defence team member had done during the respective phase.

The lump sum system also retained some flexibility. The complexity ranking could be increased should a change in the complexity factors warrant such a change,⁶⁸ or the Defence could request the allocation of additional funds, while maintaining the ranking of the case if an unexpected and specific development beyond the control of the Defence warranted a substantive amount of additional work.⁶⁹ Furthermore, if there were extended recess periods during trial, which were generally not remunerated, counsel could request to be paid for reasonable and necessary work performed during such recess periods.⁷⁰

The introduction of the lump sum proved to be more efficient and economical and facilitated the overall administration of legal aid tremendously. It was welcomed by the Defence and Registry alike. The problems connected with the preparation and review of the monthly hourly invoices were eliminated, and both Registry staff and defence teams could focus on more pressing matters. Delays of monthly payments caused by ongoing litigation of the reasonableness of the specific work performed were equally eliminated. In turn, the relationship between Registry staff dealing with defence matters and the defence teams improved.

In 2004, due to the success of the trial lump sum policy, the Registry also introduced a lump sum system for pre-trial.⁷¹

The disadvantages of the lump sum system

⁶⁷ If an accused was found partially indigent and able to contribute a certain amount to their defence, their contribution was deducted from the total lump sum available to their defence team.

⁶⁸ ICTY Pre-Trial Legal Aid Policy, para. 35.

⁶⁹ ICTY Pre-Trial Legal Aid Policy, paras. 9, 16, 37.

⁷⁰ ICTY Trial Legal Aid Policy, paras. 27-29.

⁷¹ With the difference that the pre-trial the lump sum was allocated solely based on the complexity of the case, regardless of the duration of the pre-trial phase.

Unfortunately, perfection is hard to come by, and even the lump sum system has its weaknesses. While the system acknowledged counsel's independence and full responsibility for the preparation of the case and the composition of the team, it offered little protection to support staff. There was no prescribed minimum rate to be paid to support staff, and any legal assistant or investigator could have been hired and fired at counsel's will. Furthermore, the system left room for abuse, as counsel could take the lion's share of the available monies for themselves, even if a substantive amount of the work was done by young support staff, without any job or social security.

Another difficulty was the adaptability of the trial policy to the general changes in court scheduling over the years. Originally, most of trials before the ICTY were heard five days a week with only two pro-longed recesses in summer and winter. Calculation of the duration of a phase was therefore straight forward and comparable from one case to another. However, due to the high number of simultaneous cases, as well as health issues of accused, the scheduling of cases started to vary more and more. Some cases were heard three days a week, others five. This impacted on the overall duration of the cases, and hence the calculation of the lump sum. While the time allocated to the respective party to present their case may have been the same from one case to another, a case heard only three days a week would take months longer and therefore, lead to a substantial increase in the lump sum compared to a case heard five days a week. At the same time, the three-days case would provide counsel with more time to deal with out-of-court matters. This does not seem to be fair. On the other hand, a lump sum purely based on the hours allocated to a party for the presentation of their case, regardless of the actual number of months necessary for such presentation, would lead to a significantly lower monthly stipend for the "three-days-case": If there is a reduced sitting schedule the monies would have to be distributed over a longer period, and may become insufficient to remunerate a fully-functioning defence team.

Remuneration at other Courts and Tribunals

a) ICC

The current legal aid system of the ICC is based on the idea of a limited "core team" consisting of counsel, a case manager and a legal assistant.⁷² An associate counsel may be added to the team during trial.⁷³ During pre-trial, remuneration is based on a ceiling of billable hours, whereas during trial, team members are paid at fixed rates per month,⁷⁴ and there is a separate fixed budget for investigations and case related expenses.⁷⁵ The fees for each defence team member are based

⁷² Registry's single policy document on the Court's legal aid system, ICC/ASP/ 12/3 ("ICC Legal Aid Policy"), para. 40.

⁷³ ICC Legal Aid Policy, para. 41.

⁷⁴ Although counsel may decide to hire more legal assistants with less experience "for the price of one", see, ICC Legal Aid Policy, para. 44.

⁷⁵ ICC Legal Aid Policy, para. 46

on a basic fee⁷⁶ and a professional uplift for professional charges directly related to legal representation before the ICC. During time of reduced activity, the set monthly fee is replaced by an hourly system. Additional resources can be requested based on a point system called Full Time Equivalent. Under this system the defence accumulates points for counts in the indictment, for each victim submitting an application to participate, and for disclosure. If the defence team has accumulated sufficient points, additional human resources may be assigned to the team.

At the time of writing, the ICC system is undergoing a major review process.⁷⁷ Both the Defence and the ICC Registry found the current system to be cumbersome and to provide inadequate resources to the Defence. While the new system is not yet agreed upon, the proposal developed by the consultant tasked with the review of the ICC legal aid system, keeps to a set defence team composition and hourly invoicing for parts of the proceedings. It does however, follow the ICTY's example of resources based on a complexity assessment, both for the investigation and expert budget, and for the assessment of requests for additional means.⁷⁸ The proposal further endorses the introduction of a lump sum for the appeals and the reparation phase, during which counsel would be free to set up his team as he sees fit, within a pre-approved budget.

Two particularly recommendable parts of the proposal are the introduction of a minimum fee level for legal assistants and case managers based on their years of experience, and the establishment of a tax exemption agreement with the Host State for the Defence, similar to that for staff members.⁷⁹ The latter would not only save public funds, as the current rates could be adequate if they were actually net payments, it would also eliminate the need for cumbersome paperwork regarding the proof and calculation of individual professional expenses for counsel, as is done to date.

Discussions about the right way forward are still ongoing.⁸⁰ Curiously, several stakeholders claim that the cases before the ICC are unsuitable for complexity determinations.⁸¹ They find the differences between the cases at the court too significant to be covered by universal complexity factors. They also argue that one cannot determine the complexity of a case at its very beginning. The authors respectfully disagree. First, certain factors will always be relevant and have an impact on the resources required, such as the geographical and temporal scope of the case, the amount of disclosure or the accessibility of the relevant region, and in particular the alleged crimes scenes,

⁷⁶ The basic fee is currently linked to the net income Trial Attorneys at a comparable level in the Office of the Prosecutor.

⁷⁷ For an in-depth analysis and comparison of the different legal aid systems, see, Richard J. Rogers, Assessment of the ICC Legal Aid System, 5 January 2017 ("Rogers Report").

⁷⁸ Rogers Report, p.12.

⁷⁹ Rogers Report, pp.12, 59, 61.

⁸⁰ For a number of different views on the proposal, see, the position papers published on the website of the International Criminal Court Bar Association: <https://www.iccbar-abcpi.org/commentariesicclegalaid> (accessed on 19 March 2018).

⁸¹ See, for a summary of the different views: Office of Public Counsel for the Defence, "Comments on the International Criminal Court Registry's Consultation on the Legal Aid System", 4 July 2017.

for investigations. These factors will also have to be considered when determining whether a case justifies the allocation of additional resources. Second, there is no need to be rigid with the complexity determination. The ICTY's system has successfully been built on the premise that the complexity of a case may change from the investigation phase, to trial, to appeal. A case can be extremely challenging during the investigation phase, but may not raise any particularly complex legal issues, hence a different ranking may be justified during pre-trial and trial. It is also somewhat puzzling that there appears to be a near consensus amongst stakeholders to maintain the application of an hourly system during pre-trial – despite the fact that the hourly system has proven cumbersome and likely to create litigation and delays, not only at the ICTY but also at the ICC.

b) STL

The structure of the STL legal aid system is comparable to that of the ICC, although it is a considerably more generous version of the same. The “core team” is bigger than that foreseen under the current ICC policy, and is established for nearly the entirety of the proceedings from pre-trial through to appeal. It consists of lead- and co-counsel, a legal officer, a case manager, an investigator or analyst and an interpreter or evidence assistant reviewer.⁸² Counsel also has the possibility to request the appointment of a second co-counsel, or other additional (human) resources and there is also a budget for experts and investigations. Without differentiation between cases based on complexity or other factors, all cases are allocated the same resources.

From three months before trial⁸³ until the end of the trial, counsel are paid a fixed monthly fee, which is calculated based on the equivalent Prosecution Trial Attorney salary scale, plus tax compensation and professional charges.⁸⁴ Counsel can further claim work related expenses, such as business lunches. It appears that unless the trial is interrupted for a prolonged period, the monthly fixed fee basically serves as a monthly salary, even if they are only at the seat of the Tribunal for fifty per cent of the time. During appeal, counsel is paid by lump sum. The appeal is divided in three stages, for which three different lump sums are allocated, depending on whether there is a cross-appeal and whether it is an appeal of both guilt and sentence.⁸⁵

A crucial difference is that defence support staff are hired as STL staff members, with all benefits that such employments entails. This is, of course, a welcome development for support staff. Unfortunately, other courts and tribunals may not be in a position to implement this idea, in particular if they are part of the United Nations' system. For example, the STL policy provides that

⁸² STL Legal Aid Policy for the Defence, STL/PL/2011/01/Rev.1, 19 October 2015 (“STL Legal Aid Policy”), para 1.11. Notably, upon a reasoned request, counsel may deviate from this composition, see, para. 1.13.

⁸³ Before that, Lead Counsel and Co-Counsel can request remuneration for up to 130 hours of necessary and reasonable work per month.

⁸⁴ Interestingly, the professional charges component may also be used to pay for secretarial work, clerks or other outside associates.

⁸⁵ STL Legal Aid Policy, part 7.

support staff “work under the sole responsibility and supervision of the Lead Counsel”.⁸⁶ Given that lead counsel are not staff members themselves, this would be incompatible with the staff rules and regulations of the United Nations.⁸⁷ Counsel also have a vested interest in being able to choose their support staff. However, under UN rules and regulations, being external actors, counsel could not act as a hiring manager, or even be part of a recruitment panel. Equally, while UN staff members may be reassigned to other tasks during phases of little activity, including in other cases, this would be difficult with defence support staff working under the direction of counsel. All in all, financially speaking, the STL approach is the most beneficial for the Defence and is likely to reduce legal aid litigation to a minimum. However, it cannot be ignored that the STL is somewhat exceptional, given that there is currently only one case being heard and none of the accused are present or otherwise involved in their defence.

The lessons learned

Experience at the ICTY has shown that a legal aid system before an international court or tribunal has to be flexible but transparent and should fully respect the independence of counsel. The defence staff should be remunerated at rates comparable to that of prosecution staff at the same level, to ensure qualified candidates are interested in assignments. Furthermore, as not all cases require the performance of the same tasks, not all cases require the same amount of resources. To be fair and to ensure a responsible expenditure of limited public funds, a distinction between cases has to be made at some point. The more transparent and foreseeable the determination of funds for a case is, the more such determination will be accepted. Universal factors to determine the required resources are therefore advisable. Finally, the “core team system” does not consider that the diverse nature of war crimes cases calls not only for case-by-case allocation of financial resources, but also case-by-case allocation of human resources. One case may necessitate extensive local investigations, another in-depth legal research into novel issues, and a further may require specific military or ballistic expertise. Counsel is best placed to determine the need for the presentation of the case and should have as much freedom as possible to decide the constitution of their team.

The authors are further of the view that support staff interests should be protected before international courts and tribunals. They should at least set minimum fee levels and some basic social security standards. While the STL’s innovative approach of hiring support staff members is

⁸⁶ STL Legal Aid Policy, para. 10.2.

⁸⁷ See, e.g.: UN Staff Rule 1.2(d): “staff members shall neither seek nor accept instructions from [...] any other source external to the Organization [...]”; Rule 1.2(e): “[...] staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view; Rule 1.3(a): “Staff members are accountable to the Secretary-General for the proper discharge of their functions.”

commendable, it will be difficult to apply in other, structurally less independent, settings, such as the UN.

Finally, the ICTY's experience has shown that the application of a pure lump sum system is a good and efficient approach for both the pre-trial and the appeals stage of proceedings. However, its suitability for trial proceedings should be evaluated. During ongoing trials, monthly salaries for defence teams with minimum accounting requirements, rather than a lump sum, seem fair and sufficient, as the performance of the team can be observed on a daily basis, and experience has shown that teams generally work full-time. Hourly accounting should only be applied exceptionally for specific phases and proceedings, such as extended recess periods or for example contempt proceedings which are not comparable to a full war-crimes trial.

IV. PARTICIPATION

The establishment of a functioning legal aid system, including competent counsel and the fair remuneration of defence teams, is crucial to ensure a fair trial and the equality of arms. The ICTY jurisprudence established however that equality of arms does not necessarily amount to the material equality of possessing the same financial and/or personal resources, but rather obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.⁸⁸ According to the Human Rights Committee, equality of arms entails that "the same procedural rights are [...] provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".⁸⁹ In order to ensure that such procedural equality of arms is afforded to the defence right from the establishment of any international court, the participation of the Defence in the development of a court's legal and procedural framework is indispensable.

The Defence has never been a part of the ICTY's internal structure. The mandate of the ICTY, namely the prosecution of those most responsible for the crimes committed during the conflict in the former Yugoslavia, contributed to a strong focus on prosecution.⁹⁰ Some even say it resulted in an inevitable prosecutorial bias.⁹¹

This notion saw itself confirmed during the establishment of the Tribunal, when the Defence was not given a say in the development of the original Rules of Procedure and Evidence or any of the

⁸⁸ *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, public, para. 23. Also see, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Judgment, public, 15 July 1999, paras. 44, 48.

⁸⁹ Human Rights Committee, General Comment 32 "Article 14: Right to equality before courts and tribunals and to a fair trial" (CCPR/C/GC/32), 23 August 2007, para. 13.

⁹⁰ McMorrow, p. 144.

⁹¹ Groulx, p. 21. Also see, Mark A. Ellis, The Evolution of Defense Counsel, *New England Law Review* Vol. 37:4, 2003, p. 971, <http://heinonline.org/HOL/P?h=hein.journals/newlr37&i=961> (accessed on 5 April 2018): citing *Developments in the Law - International Criminal Law*, 114 *Harv. L. Rev.* 1943 (2001), pp. 1956, 1994, 2005, <http://heinonline.org/HOL/P?h=hein.journals/hlr114&i=1971> (accessed on 5 April 2018).

other original documents relevant for the work of the Defence. Moreover, unlike the Prosecution, they had no offices in the building, and only a limited number of defence rooms that needed to be shared by all defence teams in trial. For some time, the Defence were not even allowed into the cafeteria without a security escort and had very limited access to the rest of the main building. Such measures not only impeded the work of the defence teams, it also resulted in the social isolation of the Defence.⁹² Without a collective voice, defence teams were left to fend for themselves.⁹³

An organised and inclusive Defence before the ICTY

A first step to enhance the integration of the Defence in the overall administration of the ICTY was taken when a designated Registry office was established that dealt with defence matters. This office eventually became known as OLAD. OLAD's primary goal was to safeguard the suspects' and accused's right to qualified defence counsel at all stages of the proceedings and to act as a liaison between defence counsel and the ICTY Registry. OLAD administered the Rule 45 List, developed and administered the Tribunal's legal aid system and provided the Defence with technical, logistical and administrative support to enhance their working conditions, thereby contributing further to the realisation of the principle of equality of arms. Furthermore, it supported the training of counsel and defence support staff by logistically and financially assisting the ADC in organising annual training events. OLAD's mandate was of a mainly administrative nature and did not include the provision of substantial legal advice to the Defence.

In addition to the assistance provided by OLAD to the Defence, the role of the Defence before the ICTY drastically improved with the establishment of the ADC in 2002, providing the Defence with a collective voice. The ADC was constituted at the initiative of ICTY judges who deemed it necessary to have an association that represents the collective of counsel acting before the Tribunal. As mentioned earlier, the ICTY Rules of Procedure and Evidence were amended to include obligatory membership of all counsel appearing before the ICTY in the ADC. The ADC was established as an independent association under Dutch law and was not part of the ICTY's internal structure. However, since its inception it became an integral part of the functioning of the Tribunal and has acted as an important bridge between the Tribunal and the Defence in representing their interest. The Defence was finally able to contribute directly to the development of the ICTY's rules and procedures. The ADC's Rules Committee could present amendments to the Rules as well as review other proposed amendments thereto. The ADC further played a vital role in the adoption and amendments of all defence remuneration policies, the Directive as well as the Code of

⁹² McMorrow, p. 152. Also see, Isabel Dusterhoft & Dominic Kennedy, How to Manage the Defence – Experiences from the ADC-ICTY, in *The Defence in International Criminal Trials, Observations on the Role of the Defence at the ICTY, ICTR and ICC*, Nomos Verlagsgesellschaft, ("Dusterhoft & Kennedy"), p.230.

⁹³ Dusterhoft & Kennedy, p. 230.

Conduct. The Rules and Directive further assigned seats on various working groups and committees to the ADC.

With ADC membership becoming obligatory for all defence counsel acting before the ICTY, the ADC has also played an important role in safeguarding the qualifications of defence counsel. It has added enormous value to the Defence before the ICTY by offering training and professional development and by monitoring the conduct of its members through its internal disciplinary regime which exists next to the disciplinary regime in the Code of Conduct.

Organisation of the Defence before other international courts

a) ICC

While the establishment of the ADC has shown that an independent defence organisation is an effective way to organise the Defence and represent their interests, there are many ways in which various courts and tribunals deal with the participation of the Defence. The ICC, like the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone, opted for an integrated defence office. The ICC's Office of Public Counsel for the Defence provides substantive legal support and assistance to defence teams as well as advocates for and protects the rights of the Defence, ensuring that the Defence has an institutional presence. In addition, the Counsel Support Section administers the legal aid system, similar to OLAD. In addition, in July 2016, the International Criminal Court Bar Association ("ICCBA") was established with the aim of providing collective representation and support to counsel and support staff before the ICC. However, unlike the ADC, membership of the ICCBA is not mandatory for counsel under the ICC Rules of Procedure and Evidence.

b) STL

The STL has gone one step further in creating the Defence Office as a separate organ of the court. This Defence Office provides for legal aid as well as logistical and operational support and substantive legal advice to the Defence. While defence counsel themselves are still independent, the Head of the Defence Office is one of the principals of the STL and has the same rank as the Prosecutor and the Registrar. He is part of any decision-making process at the STL and can independently enter into bilateral cooperation agreements for the Defence. Most importantly, the Defence Office has its own budget, unlike at the ICTY, where the legal aid budget was part of that of the overall Registry. Some scholars have argued that this approach – the Defence as its own organ – is the only way to truly safeguard the principle of equality of arms.⁹⁴ The STL's Legal Aid Unit of the Defence Office administers the legal aid system, maintains a list of qualified counsel and ensures their assignment to indigent accused. The Legal Advisory Section of the Defence

⁹⁴ See, e.g., Groulx, p. 21.

Office further provides support to defence counsel by performing legal research and providing advice to counsel. The Operational Support Unit of the Defence Office further provides logistical and operational support to the Defence.

The lessons learned

Through equal participation of the Defence, not only in court proceedings, but also through its representation by a defence office as part of the institutional structure as well as via an independent association, a great contribution to the legitimacy of a court or tribunal and the credibility of its trials can be generated. In that manner, the Defence can provide a meaningful contribution to the development of the rules of procedure and other important legal instruments that may affect the course of proceedings.

The lack of Defence participation during the establishment of the Tribunal and the creation of its founding documents as well as the isolation of the Defence during the early years of the ICTY proved to be counterproductive and led to strained relationships between the Defence and the organs of the Tribunal. Through the creation of the ADC and with the assistance of OLAD, the Defence became more integrated into the Tribunal.

The STL model is an important step forward towards the equal recognition of the Defence before international criminal tribunals, and it can indeed ensure that general interests of the Defence are considered from the very beginning of such an institution. The Head of the Defence Office, for instance, is in a good position to represent the overarching interests of the Defence within the institution. Moreover, being responsible for their own budget, the Defence Office only needs to consider the interest of the Defence when making budget submissions, rather than those of the Registry as a whole.

However, even with a strong defence office, the need for an independent association of counsel remains. As an organ of the institution, it is unavoidable that a defence office has certain institutional commitments. Considering further that defence counsel's main loyalty should be towards their client, not the institution, it is important to have the Defence represented in an independent association in addition to any defence office. The Defence, far from being a homogenous group, also needs a forum where they may voice their individual views and concerns and reach decisions regarding their collective representation before a court or tribunal via a democratic process. Accordingly, while an independent strong defence office is certainly contributing to strengthen the interests of the Defence, it cannot replace an independent, democratic association of counsel.

The ICTY experience further teaches that while having a voluntary, independent association of defence counsel is a good start, mandatory membership for counsel practicing before the ICTY has proven even more useful. Unlike the ICCBA, it is clear that the ADC speaks for all counsel and

that its recommendations and advice are a result of a democratic process of the entire defence counsel population before the ICTY. Moreover, the ADC has become a gatekeeper for the qualifications of defence counsel by not only being the main actor in the continuous learning and development of their membership, but also through their own disciplinary regime. Without such mandatory membership, the benefit of an independent association runs the risk of only being piecemeal.

V. CONCLUSION

If one subscribes to the importance of the right to a fair trial and the principle of equality of arms, the recognition of the role of the Defence in international criminal justice is imperative. Experience before the ICTY has shown that international criminal tribunals need to ensure that only competent counsel are admitted to represent accused in war crimes trials. This is not only essential to safeguard the rights of the accused but also to ensure the overall integrity and credibility of the proceedings. Considering the duration and complexity of war crimes proceedings, international criminal tribunals further need to establish comprehensive legal aid systems that provide sufficient funding to the Defence. Such legal aid systems must be transparent, easy to understand and require a minimum of administration, while guaranteeing a responsible expenditure of limited public funds. Furthermore, the principle of equality of arms can be protected through equal participation of the Defence, not only in court proceedings themselves, but also through providing a meaningful contribution to the development of the rules of procedure and evidence and other important legal and administrative instruments that may affect the course of proceedings. In order to facilitate such contributions, the Defence must be given a voice, preferably through both an independent, democratically organised defence association, and a strong defence office as part of the institutional structure. This will contribute greatly to the legitimacy of a court or tribunal and the credibility of its trials.