Defence counsel in international criminal law

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CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

Doing justice in international criminal proceedings requires a delicate balancing of the interests of the defence, the interests of victims and witnesses and those of the international community. Every suspect and accused is entitled to an effective defence, no matter what the accusations entail. Only if international criminal courts succeed in providing the proper conditions for an effective defence, will their juridical role be seen as effective and legitimate.

One of the aims of this research was to examine how particular features or conditions of international criminal proceedings influence the position of the defence. This study has illustrated that the novelty of the international criminal justice system, the absence of a firmly established organisational structure or framework, the vast complexity and magnitude of cases, the politics that may be involved in the administration of justice of international criminal courts, the purposes of these courts, and its remoteness from the crime scenes can all have significant implications for the defence.

Damaška's theories provide important insights for a better understanding of the nature of international criminal proceedings. Many problems that defence counsel face in international criminal practice however occur irrespective of what model of proceedings would be employed by international criminal courts.

To conduct a defence effectively and efficiently in an international criminal case, counsel must be aware of the parameters of his role. Counsel's particular role in specific proceedings is plainly dependent on the character of those proceedings. The exact character of international criminal proceedings is not yet precisely clear. This study shows that this creates difficulties for the defence, especially where counsel's interpretation of his role in international criminal proceedings clashes with the expectations of judges or where international criminal practice clashes with the legal culture and professional standards to be found in counsel's domestic jurisdiction.

8.2 AN ADEQUATE AND EFFECTIVE DEFENCE IN INTERNATIONAL CRIMINAL PROCEEDINGS

An Effective and Adequate Defence

The right to an effective defence is an essential corollary of the right to a fair trial. The provisions in the statutes of international criminal courts that enshrine the accused's right to legal assistance and to a fair trial are almost identical to the provisions of international human rights treaties. As a result, only the bare minimum is provided in the Statutes. Initially, free legal aid assigned to an indigent accused would consist of a

single defence counsel. This immediately proved to be insufficient at the first ICTY trial. Two defence counsel, one or two legal assistants and one or two investigators is the current complement for a defence team at the *ad hoc* Tribunals. International human rights standards regarding that which constitutes an effective and adequate defence, once a defence counsel is apppointed to a suspect or accused, are not particularly strict. This may be due to the fact that international human rights treaty monitoring bodies need to set a standard that is acceptable and feasible in respect of every legal system. That might also help preserve the independence of the legal profession and avoid unwarranted interference in the client-counsel relationship.

In order for counsel to be able to provide the accused with an adequate and effective defence, he must be allowed to present all necessary evidence on behalf of the defence, to have sufficient and privileged access to his client and to have adequate time and facilities to prepare and present the defence case. The defence should have access and be able to comment on the evidence against the accused, to present and examine witnesses on the accused's behalf and to be confronted with and to cross-examine the witnesses against him. This involves, at the least, having as equal facilities as the prosecution has to present his case. The right of an accused to counsel of his own choosing is not an absolute requirement where it concerns legal aid provided by the court.

The accused's right to a counsel of his own choosing was almost removed altogether from international proceedings, but now applies mainly to the initial choice for lead counsel. According to international human right standards, an indigent accused has no absolute right to legal assistance of his own choosing. International criminal courts therefore felt legitimated to allow counsel to remain assigned to an accused even though his client clearly objected to his representation. The long duration of proceedings, but also the long duration before a trial may start resulting from the limited trial capacity of these courts, have made the *ad hoc* Tribunals think thrice before withdrawing a defence counsel halfway through a trial on the request of an accused. Considering the vast dimensions of international criminal cases, a withdrawal of defence counsel can cause significant delays and can be particularly costly as a new lawyer needs time to prepare and study the case. Arguably, this delay will not weigh up to the inconvenience for an accused of having a defence counsel whom he no longer trusts. If accused are tried jointly, a defence counsel's withdrawal can also interfere with fair trial rights of co-accused. Therefore, exceptional circumstances warranting a replacement of counsel are very difficult to establish, unless counsel has fallen seriously ill.

To ensure the accused's right to effective legal assistance, when providing legal aid, courts should assign competent counsel. To be eligible for appointment under the legal aid programme of an international criminal court, counsel should meet a number of qualification requirements. These include having a substantial number of years of relevant experience, speaking a working language of the court and having no criminal or disciplinary record. Only the SCSL requires experience as a criminal defence counsel. The *ad hoc* Tribunals also allow a university professor to conduct the defence. It is difficult to design a successful method to select counsel who are capable of conducting highly complex cases involving issues of criminal law as well as international humanitarian law in an international team and in an international legal environment. If international criminal courts would be over-demanding in respect of

counsel's qualifications, this could unnecessarily impede the free choice to legal representation and the autonomy of the defence. It has proved to be a problem for the defence where an accused has been unable to communicate in a common language with his counsel. As a result, the ICTY made an exception to the working languages rule. A lawyer speaking the same language as the accused can request to be appointed as co-counsel. Additionally, the ten years of experience requirement at the ICTR and the ICC may prove to be over-demanding. It cannot be guaranteed that counsel will function more effectively in international criminal proceedings with ten years of practice experience in a national legal system than they would with seven years. Conducting an international criminal case involves skills that any lawyer without former experience in such cases needs to develop. It requires substantial flexibility.

Once appointed, defence counsel are presumed to be competent, unless the accused can prove gross professional misconduct or if the court clearly noticed that counsel have failed in their duties. To receive any compensation for ineffective representation, the accused needs to show that he has been prejudiced by counsel's ineffective assistance. Prejudice is established if it can be shown that, had counsel properly defended the accused, the outcome of the case may have been different. If prejudice cannot be established, a finding that an accused's right to legal assistance has been violated is generally deemed sufficient compensation. Remedies could potentially include a more lenient sentence, the exclusion of evidence or, in the most egregious cases, a re-trial or immediate release. It would seem that, in the case of any serious doubt as to the overall fairness of the original trial, a re-trial would be required.

An Adequate Defence in Light of the Character of International Criminal Proceedings

Chapter IV concentrated on two procedural models of Mirjan Damaška, the conflict-solving model and the policy-implementing model, which are connected to two types of government. The laissez-faire government grants substantial autonomy to its citizens. Its proceedings are consequently structured as an adversarial party contest. An activist state will try to implement its policies through conducting trials. This results in proceedings that are organized as an inquest to obtain a result that the government deems proper.

Obviously, the defence has a broader playing field in contest proceedings than in a policy-implementing system. In itself, both models can render fair trials. However, if policy-implementing goals are pursued in adversarial proceedings, this may distort the autonomy of the parties and prevent them from effectively and independently presenting their cases to the judges.

The question of whether or not the parties are sufficiently able to effectively present their cases should be considered independently of the question as to whether a trial is fair. That latter test depends on whether or not specific fair trial requirements are observed. Damaška's theory mainly addresses the question of whether or not proceedings are likely to function effectively given the goals of justice that a state pursues and its structure of authority. If the structure of proceedings conflicts with the goals of justice or the structure of authority, it is not only more likely that proceedings fail to achieve those goals, but also that the parties to the proceedings cannot perform their role appropriately and effectively or may even be oblivious to the precise parameters of their role.

Chapter IV has shown that tensions could occur as a result of the policy-implementing objectives international criminal courts pursue and the adversarial character of their proceedings. As the international community does not function as a state, no useful conclusions could be drawn from the ambiguous structure of authority of international criminal courts.

The proceedings of the *ad hoc* Tribunals (and consequently of the SCSL which has very similar legal provisions) are structured as a contest between two adversaries, the prosecution and the defence. This also applies to the ICC, albeit to a lesser extent.

In proceedings that are organized as an adversarial contest, the defence should be able to operate in a rather autonomous manner. Adversarial proceedings require that there is equality of arms between the prosecution and the defence in the sense that there should be proportionality between their capability to present their respective cases. It is therefore legitimate for counsel to expect that he will receive adequate resources and facilities to independently conduct investigations, assemble evidence and to have adequate time to prepare and present the defence case. The same should apply to an accused who chooses to conduct his own defence.

The principle of equality of arms as a corollary of the right to a fair trial requires proportionality to the extent that the defence is not put at a substantial disadvantage vis-à-vis the prosecution. The complexity and magnitude of cases tried by international criminal courts generally generates more research and requires better organisation of the defence than cases tried in national jurisdictions. This implies that more manpower is necessary to effectively conduct the defence in a case than in average domestic trials.

The ICTR in particular has apparently underestimated the importance of the role of co-counsel in a defence team. To establish equality of arms in complicated international criminal cases, two defence counsel are necessary to carry the workload and to safeguard continuity of the defence in case one counsel falls ill or has to withdraw. In addition to the appointment of two defence counsel for an indigent accused, the legal aid system of international criminal courts should provide for consultants, legal assistants, investigators and translators.

Defence investigators are needed to assemble evidence and to track down potential defence witnesses who may be spread all over the world. A war or civil unrest often causes migration. To trace witnesses can be difficult, time-consuming and expensive. Most international criminal courts recognize the importance of the defence being able to conduct its own investigations and as a standard assign one or two investigators to the defence. However, the appointment of defence investigators alone may not be sufficient to warrant the defence's capability to assemble evidence.

To guarantee the safety of its personnel and the accused, the *ad hoc* Tribunals were deliberately located in countries remote from the crime scenes. Because of its fixed location, the ICC too will be remote from the vast majority of crime scenes under its jurisdiction. One of the most disadvantageous consequences for the defence is that it has more difficulty in collecting evidence and obtaining cooperation from state authorities than the prosecution.

At the *ad hoc* Tribunals, the prosecution has an office located in the area where the crimes were committed, and a large number of investigators at its disposal. In addition, the prosecution enjoys full immunity under the Statutes, whereas the defence only enjoys noteworthy privileges and immunities at the ICC. Immunity and

such special privileges help in the conduct of investigations at locations where the defence is not deemed particularly welcome, such as at the *locus delicti*. It enables the defence to be more autonomous. This should have been taken into account by the *ad hoc* Tribunals.

States and government authorities may be uncooperative with the defence and suspicious of the intentions of defence team members. This inequality resulting from a lack of state cooperation is not compensated for by the *ad hoc* Tribunals, as it concerns an issue that is beyond the control of the court. It is considered to be outside the scope of the principle of equality of arms as a human rights guarantee. The fact that international criminal courts have no enforcement system implies that if states are unwilling to cooperate, their hands are tied. But even though these courts cannot compel states to comply with their orders to cooperate with the defence, some form of redress should at least be seriously considered, as gathering evidence is plainly a vital task of the defence. Compensation for any significant disadvantage should include the exclusion of part of the evidence, having fewer disclosure obligations than the prosecution or, in case of a conviction, to obtain a more lenient sentence. If the defence is unable to function effectively as a result, the trial as a whole must be considered unfair. If the prosecution refuses to disclose exculpatory material to the defence, the charges that the undisclosed evidence concerns should be withdrawn. Otherwise, the release of the accused and discontinuation of the prosecution case should be considered.[1]

To solve this particular problem, it could be argued that an inquest model of proceedings, where the prosecutor – possibly in combination with an investigative judge – is primarily responsible for assembling all the relevant evidence, would seem more effective. Whether the prosecutor should assist the defence through actively searching for exculpatory evidence has been subject to debate in international criminal justice. Such assistance is required under the ICC Statute, but not under the Statute of the *ad hoc* Tribunals.

At the *ad hoc* Tribunals, the prosecution is under an obligation to *disclose* any exculpatory evidence it knowingly has in its possession to the defence. One problem involved in this obligation is that the prosecution has had difficulty in determining what is useful for the defence in this respect. To be safe, the prosecution has occasionally overloaded the defence with a vast amount of evidentiary materials giving no indication as to which particular items might be exculpatory. Defence teams often lacked the manpower to sort out such a volume of uncategorized material. Having a case manager to examine all the evidentiary materials that are continuously being disclosed by the prosecution is indispensable.

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[1] In the *Lubanga* case at the ICC, the prosecution consistently withheld exculpatory evidence from the defence and was unwilling either to disclose it or to withdraw any of the charges involved. Therefore, the Trial Chamber refused to try the case and decided to order the immediate release of the accused. Whether or not the Appeals Chamber leaves the decision intact, needs to be awaited. Due to the limited time scope of this study, this exceptional decision is not included in Chapter V, but is noted here. See ICC Tr. Ch., Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Lubanga Dyilo* **(**Case No. ICC-01/04-01-06/1401), 13 June 2008; and - Decision on the release of Thomas Lubanga Dyilo, *Lubanga Dyilo* (Case No. ICC-01/04-01/06-1418), 2 July 2008.

How the prosecution conducts its case can thus be of paramount importance for the defence. To solve this problem, the prosecution needs to be better trained in identifying exculpatory evidence and to hand it over to the defence in an appropriate manner. It should be avoided that exculpatory or mitigating evidence remains undisclosed to the defence. Therefore, if the prosecution has any doubts about the exculpatory nature of specific materials and is reluctant to disclose it, it should show the materials either to the Chamber or to an independent defence consultant, such as a member of an independent defence office. This should also be required where a third party has urged the prosecution to keep evidentiary materials secret.

Experience at the *ad hoc* Tribunals so far does not generate the necessary confidence in the capability and willingness of the prosecution to actively search for exculpatory evidence. Because the Prosecution is under a lot of pressure to produce evidence establishing the guilt of the accused and exculpatory evidence could be overlooked, it remains necessary to provide the defence with adequate tools to conduct its own investigations. Therefore, changing the character of international criminal proceedings giving the prosecution primary responsibility over assembling exculpatory evidence is not desirable.

A significant drawback of proceedings structured as an adversarial contest is their length. The complicated facts and legal issues involved in international criminal cases in combination with the adversarial nature of proceedings cause trials to be so protracted that they risk becoming almost unmanageable.

The Completion Strategy, giving the two *ad hoc* Tribunals strict deadlines to finish their cases, influenced their administration of justice. To limit their duration, it made judges strictly manage trials. The time for the Prosecution and the defence to present their cases and the number of witnesses that they were allowed to present in this time were restricted. Even if the defence required more time to present its evidence, the court often argued that a time restriction was necessary to safeguard the accused's right to a fair and *expeditious* trial. The judges thus decided what was best for the accused, the latter's wishes notwithstanding. Therefore, the Completion Strategy is a clear example of a policy-implementing feature that impedes the autonomy of both parties in presenting their cases. At the ICTY, where judges limited the number of defence witnesses and the amount of time for the presentation of the defence case so much that it prejudiced their case, the Appeals Chamber intervened. Although the principle of equality of arms does not require that the defence is able to present an equal number of witnesses or to have the same amount of time to present its case as the prosecution, the defence should be able to effectively present its evidence. This requires proportionality between the defence and the prosecution.

International criminal courts should realize that there are alternative solutions for limiting the length of trials other than having judges take more control over trial proceedings. To keep trials manageable, international criminal courts should ensure that indictments are as concise as possible considering the nature of the crimes involved. In addition, the number of accused tried together in one trial should be limited. This will also avoid conflicts of interest within the defence. Particularly at the ICTR, practice has shown that international criminal trials generally consume less time if indictments are more concise and if fewer accused are jointly tried.

The complexity and magnitude of cases before international criminal courts is enhanced when multiple accused are tried together. This may seem to reinforce

equality of arms, as the total number of defence team members vis-à-vis the prosecution will rise. However, as illustrated in Chapter V, it may also result in additional complications, as it may be in the interest of one defendant to tarnish the position of another. Additionally, a prosecution witness called to testify against one defendant could unexpectedly make sweeping statements to the detriment of a co-defendant. This in itself has been found insufficient reason to separate trials at the *ad hoc* Tribunals, even though it can contaminate the adversarial contest. The advantages of judicial economy and for witnesses who would not have to tell their traumatic stories repeatedly in court prevailed over these disadvantages for the accused. A joint trial is not unfair *per se*. But if a trial will continue much longer than if all cases were to be tried separately, one after the other, the right to an expeditious trial is at risk. Particularly at the ICTR, some joint trials carry on for so many years, that the right of the accused involved to an expeditious trial becomes likely to be violated. Even though it may not prejudice the accused in terms of the outcome of the case, the extremity of the duration warrants compensation, such as a more lenient sentence upon conviction or financial compensation upon acquittal. Therefore, it is better to avoid combining too many trials.

A policy-implementing feature of the administration of international criminal courts is that while awaiting trial and during their trial, accused more often than not remain in custody. Accused have been detained for many years without their guilt having been established. The *ad hoc* Tribunals have become renowned for the extremely long periods of detention on remand.[2] At the ICTR provisional release has never been granted. At the ICTY this is being allowed to an ever increasing extent, for instance, to allow medical treatment or to attend a funeral of a relative. In light of the adversarial character of proceedings, the presumption of innocence and an accused's right to an expeditious trial, accused should have better opportunities to be provisionally released. This would also reinforce the autonomy of the defence. However, it is unsurprising that international criminal courts are strict in this respect. It has proven very difficult for those courts to get the persons who are indicted arrested and transferred to their seat. It has been an embarrassment to the ICTY that Milošević died in its custody. It would no doubt have been far more embarrassing if he had escaped while receiving medical treatment during provisional release.

Notwithstanding the fact that an accused has no absolute right to a counsel of his own choosing, the extraordinary length of trials in international criminal proceedings can require that in case of a deteriorated relationship between counsel and an accused, his continuous representation hinders the accused's effective representation and impinges on his right to a fair trial. In a policy-implementing model of proceedings, counsel is regarded as an instrument to safeguard the rights of an accused. Even if an accused does not desire his representation, it can be deemed necessary regarding the general interests of justice that the accused is being represented by a lawyer who can protect his rights. Compelled representation against the accused's explicit wishes harms the accused's autonomy and can harm the effective

[2] In 2006, half of the inmates at the ICTY had been in custody for over three years, one even for more than eight years. See Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, available at www.un.org/icty/pressreal/2006/DU-audit.htm, par. 2.3.

presentation of his case. It could interfere with the strategy desired by an accused. Therefore, counsel should not continue the representation of an unwilling accused in adversarial proceedings.

International criminal courts have denied requests of accused to replace their counsel because of a complete breakdown in communication, especially where counsel was willing to continue. It is doubtful whether a defence counsel should continue representation in this situation without being professionally embarrassed.

There are situations in which the continuation of representation of an uncooperative accused can be legitimate. For instance, if it concerns an accused who has distorted his own trial proceedings to such an extent that a Chamber can legitimately proceed in his absence. Or, if it concerns a period of transition, to guarantee a smooth transfer of the case to another counsel. If two defence counsel will be appointed to each case, this may however not be necessary.

International criminal courts have installed numerous solutions of a policy-implementing nature where accused requested to represent themselves. The court has regularly allowed its duty to safeguard the right to a fair and expeditious trial to prevail over the accused's individual wishes regarding the proper conduct of his defence.

It is doubtful whether the appointment of 'standby counsel' or 'court assigned counsel' will help guarantee a fair trial, let alone an effective defence. In other words, it is doubtful that this policy-implementing pursuit will establish any other desired effect than expediting the trial of an accused who wishes to represent himself.

If from the outset it is clear that an accused is unwilling to cooperate with any form of legal assistance assigned by the court, counsel's agreement to take such a position will inevitably cause problems of a professional ethical nature. International criminal courts should not manoeuvre defence counsel into a position where his legal representation will be notional. If an accused chooses to represent himself in proceedings which are structured as an adversarial contest, judges must ascertain that he is fully aware of its consequences. When an accused unequivocally chooses to represent himself in international criminal proceedings, despite the magnitude and complexity of such trials, he should abide by those consequences.

Judges in adversarial proceedings need to get sufficient input during trial proceedings to reach a proper conclusion about the accused's criminal responsibility. A court's dependence on the individual choices of a potentially uncooperative accused alone should be avoided. Therefore, the more neutral solution of appointing '*amici curiae'* to point out critical defence issues or fair trial concerns to the judges is the most appropriate solution if an accused wishes to represent himself.

Overall, the policy-implementing objectives of international criminal courts can hinder the parties' effective presentation of their cases in international criminal proceedings. Even so, to argue that the character of proceedings of international criminal courts should necessarily be adjusted to these goals would go a bridge too far. There are proper ways to expedite proceedings alternative to providing more control to judges or making the accused an object of proceedings rather than a subject. The seriousness of the allegations involved in international criminal cases deserve to be looked at from as many angles as possible. This is most effectively done by shaping proceedings as an adversarial contest and providing the defence with the necessary equipment to put an effective defence.

Should international criminal courts then change their goals? This too is not a realistic option where most of these goals are concerned. International criminal courts will always operate under the political pressure of the world. No wonder that general interests that could override the individual interests of an accused will regularly surface in this context. But courts should carefully consider how to balance the interests of the defence and the general interest in a proper administration of international criminal justice. In order to do justice on behalf of the international community to victims of atrocities, it remains vital that they do justice to the individuals they prosecute.

An effective functioning of the defence at international criminal courts does neither require a change of the character of proceedings, nor of the goals that international criminal courts pursue. At most these courts should look for alternative ways to pursue some of those goals, so that they hinder the defence least. For an effective conduct of the defence, it is essential that international criminal courts give due regard to the adversarial principle of equality of arms and grant the defence a sufficient degree of autonomy.

Counsel's Professional Conduct

The professional ethics of defence counsel while practising at an international criminal court will be formulated by his domestic legal background. Generally, being partisan, defence counsel in adversarial contest proceedings are obliged to zealously defend their client's interests. However, in common with adversarial proceedings, the concept of defence counsel being an officer of the court has been embraced by international criminal courts. As agents of justice, counsel have a duty to the court to act in the interests of justice. For English barristers, being an officer of the court, the duty to the court is an overriding duty. This duty can be confusing to counsel who are unfamiliar with the "officer of the court" concept. Defence counsel from non-adversarial systems may be caught between different legal cultures requiring opposite courses of action in order to maintain professional ethical standards. In addition, judges may disapprove of the choices defence counsel have to make between duties to their client and their duty to the court. They might misunderstand a lawyer's decision to follow his client's instructions as an attempt to obstruct justice. Because international criminal justice involves trial participants from many different legal cultures, clashes of opinion as to what should be required are more likely to occur than in national legal systems.

For counsel with vast experience in proceedings organized more as an inquest than as a contest, it may be difficult to adjust to the fact that the role of the defence in international criminal proceedings includes actively conducting its own investigations, to present its own evidence in court and to vigorously cross-examine the witnesses of the prosecution. As a practical solution so as to avoid a clash of legal cultures, it may be thought to be optimally efficient for defence teams to be composed of members with diverse legal backgrounds. However, to guarantee the independence of the defence and to preserve the right of the accused to legal assistance of his own choosing, it is debatable as to whether international criminal courts should intervene too much in the composition of a defence team.

To avoid ethical professional dilemmas, international criminal courts should engage ethical standards that are clear to any lawyer from any jurisdiction. A code of professional conduct that all lawyers can follow is necessary. Obviously, the

independence of the legal profession requires that lawyers should have some room for discretion as to how to observe these standards. The concept and consequences of being an officer of the court and to what degree that should prevail over a counsel's duty to his client are not stipulated in the codes of conduct of international criminal courts. A critical issue for defence counsel is to determine when, if at all, to let the general interest of justice prevail over the interests of their client. By letting such interests prevail, counsel may lose the client's confidence. If this happens, it is doubtful whether counsel should or could continue to represent an accused, at least to the required standard.

International criminal courts frequently refuse to reimburse the costs of motions that are deemed to be frivolous. Not being rewarded for *bona fide* and concrete efforts is demoralising for the defence, but it does not diminish the trust between counsel and client, unless the risk of motions being labelled as frivolous would be so high that it discourages counsel from filing motions that his client deems to be important.

The fact that the parameters of the role of the defence had not been properly contemplated has been a problem when international criminal courts have had to deal with situations that they had not anticipated and have had to come up with an *ad hoc* solution. It has sometimes been impossible for counsel to observe the court's specific instructions whilst at the same time observing professional standards.

This has particularly come up where counsel were compelled to represent accused that wished to conduct their own defence. Because it was clear that the accused did not want to cooperate or even communicate with them, it would have been warranted for the *amici curiae* in *Milošević* to withdraw rather than to agree to be appointed as 'court assigned counsel' and challenging their own appointment as such at a later stage.

At the ICC, a so-called *ad hoc* counsel was appointed to conduct limited defence activities in the investigative stage. But as soon as counsel made it clear that he required a wider mandate, his fees were withheld.[3] Where counsel is exploring the parameters of his new role, a certain amount of leniency allowing him to do so is required.

Counsel have refused to appear in court on their client's behalf, upon their client's specific instructions.[4] Obviously, the confidence of a client in his counsel and their whole relationship could be jeopardized if counsel refuses to follow instructions. Whereas no accused can be compelled to attend his trial, when a court has reserved court time, lawyers from an adversarial system would consider not attending as amounting to breaching their duties as an officer of the court. It could even be contemptuous. To lawyers from non-adversarial systems, the instructions of their clients not to appear are generally more likely to prevail over their duty to the court. On numerous occasions this dilemma has caused trouble to counsel in international criminal courts. In some instances courts have tried to resolve this problem by appointing counsel anew as "court-assigned-counsel".[5] Compelling counsel to allow his duties to the court to prevail was considered necessary to guarantee a fair and

[3] See *supra* Chapter VI, paragraph 6.5.

[4] *Idem.*

[5] See *inter alia* Chapter VI, paragraphs 6.3.1 and 6.5 and Chapter VII, paragraph 7.4.5.

expeditious trial. Aside from whether such an instrumentalist approach is warranted in adversarial proceedings, counsel cannot instantly disregard his independent role and discard his duties to his client.

Where a defendant instructs his counsel not to appear and his trial continues without the defence, the trial is not unfair as long as the defence have the opportunity to appear. It will be difficult for judges, however, to issue a fair verdict without being sufficiently aware of all the defence issues involved in the case. This will particularly impinge on the administration of justice in adversarial proceedings where most of the evidence is presented at trial. It is more appropriate for counsel to appear despite his client's instructions. Even if counsel does not make any specific contributions, it at least ensures that he can inform his client about what is going on at trial. However, to avoid such a professional dilemma, this duty should be plainly stipulated in a code of professional conduct. If it is not an option for counsel not to appear, it will be easier to convey this to his client than if counsel had a choice.

Another issue that international criminal courts had not anticipated was the practice of fee-splitting. The *ad hoc* Tribunals inserted a provision in the code of conduct that compels counsel to report any possible fee-splitting solicitations by his own client to the Registrar. If counsel did that, it is almost inevitable that the client will no longer trust him. The ICC, at the last moment, removed the obligation of defence counsel to report fee-splitting solicitations to the Registry. The duty of confidentiality is appropriately deemed as being too important to circumvent. Being agents of justice, defence counsel should be trusted not to engage in fee-splitting arrangements with their clients.

If the duties and professional standards of the defence had been appropriately contemplated, international criminal courts would not have needed to adopt so many *ad hoc* solutions to deal with difficult defence issues. Since not every situation can be anticipated, if adopting an *ad hoc* solution is necessary, the defence should at least obtain sufficient leeway to develop a useful and effective role in the proceedings. If the code of conduct is incompatible with any individual requirements then adjusted standards should be implemented.

To ensure that the role of defence counsel in international criminal cases will be established properly, it is important that the defence is allowed to participate in any monitoring of counsel's conduct.

Organizing the Defence in International Criminal Proceedings

It is arguably disappointing that the defence's role was not more carefully considered, structured and organized when the *ad hoc* Tribunals were established. The UN SC was in a hurry to set up the *ad hoc* Tribunals with limited jurisdiction over crimes that had just been committed. The ICC could have learned from the experiences of the *ad hoc* Tribunals but the position of the defence was dealt with as the last piece of the puzzle. It is a matter of conjecture whether or not the prominent position of victims in ICC proceedings may have contributed to this or whether it was a matter of politics. It seems that making the defence of war criminals or genocidaires a priority does not square with the populist idea of bringing these offenders to justice and giving peace to their victims. Moral courage is necessary to acquit a person who is accused by an international criminal court. The acquittal of accused by the ICTR has prompted

protests in Rwanda, in spite of the fact that an acquittal demonstrates the innate fairness of the courts.

As set out in Chapter III, the administrative organ of international criminal courts, the Registry, has been entrusted with very broad powers over the defence, including the assignment of defence counsel and administering the legal aid system. At the ICTR, there being no separate organ to deal with disciplinary matters involving defence counsel, the Registrar also monitors counsel's professional conduct and imposes sanctions or issues remedies. Most of the Registrar's decisions regarding the defence can be reviewed by the President, or by the Chamber, if it raises "fair trial" issues. Nonetheless, as the Registrar has a broad discretionary mandate, these control mechanisms will only superficially test whether or not the Registrar's decisions were justified. In practice, the Registrar's decisions have seldom been reversed at the *ad hoc* Tribunals. The lack of a thorough review mechanism could result in arbitrary decisions that may have an important impact on the defence.

The more responsibilities that are vested in the administrative organ of the court, rather than in an independent defence organ, the greater the chances that any decisions concerning the defence are based on political or bureaucratic grounds. One example is the ICTR Registrar's refusal to appoint any more Canadian counsel to promote a better geographical distribution.[6] This jeopardized the right to legal assistance of the accused's choosing. Canadians were popular because they are often bilingual and also familiar with both adversarial and non-adversarial systems. Another example was the Registrar's hesitation to appoint a defence counsel who had years of relevant experience in criminal practice but had not yet handed in any proof of his experience as a professor.[7] To reinforce the adversarial nature of its proceedings, and to avoid policy-implementing influences, a separate and independent defence body should administer both the legal aid system and the appointment of counsel.

The SCSL, the ICC and the STL created defence bodies that were, more or less, separate and independent of the Registry. Even though the Registry of the ICC has fewer powers over the defence in comparison to those of the *ad hoc* Tribunals, some important responsibilities still belong to the Registrar's Division of Victims and Counsel rather than to the OPCD. At the SCSL, admission to the list of counsel and the appointment or withdrawal of counsel are the responsibility of the defence office, but as this power was delegated by the Registrar, the Appeals Chamber deems that it still belongs to the Registrar. This allows the Registrar to overrule the defence office. It would be more desirable to have a proper division of duties over the defence. The author's preference would be to create a defence office responsible for administering legal aid and appointing defence counsel. To guarantee its independence, it should be established under the Statute. This has only been done so far at the STL. The OPCD of the ICC should represent and protect the rights of the defence during the initial investigative stages. Once a regular defence counsel has been appointed to a case, this office has no authority – except with counsel's explicit authorization - to perform representational activities on behalf of an accused. The SCSL has a few permanent duty counsel to provide early assistance. There should be clear limits to the

[6] See *supra*, Chapter II, paragraph 2.5.3.
[7] See *supra* Chapter III, paragraph 3.2.2.

representational duties of independent defence offices to avoid any later conflicts of interest.

If individual defence counsel who appear before these courts seek to become more involved in the development of their role at international criminal courts, they should involve themselves with dedicated Bar associations. Special Bar associations have been created for counsel appearing before the *ad hoc* Tribunals and at the ICC, but not, as yet, at the SCSL. Currently, the Bar association of the ICTY, the ADC-ICTY is the only international criminal Bar association that is officially recognized by an international criminal court. It is also the only international criminal Bar association involving mandatory membership for all defence counsel on the Registrar's list. It has also set up its own disciplinary body to monitor proper professional conduct of defence counsel.

8.3 THE *AD HOC* TRIBUNALS VERSUS THE ICC

Since this study has focused on the *ad hoc* Tribunals and on the ICC, some improvements that the ICC has made vis-à-vis these Tribunals are worth emphasizing. The most important difference the ICC has made as compared to the *ad hoc* Tribunals is to reinforce the position of the defence by the establishment of a Defence Office, the OPCD, which works separately from the Registrar's Division of Victims and Counsel. Nonetheless, the latter remains responsible for the assignment of legal aid and for the appointment of counsel, for qualification requirements and for advising the court and the prosecution on defence issues.[8]

Additionally, the legal provisions of the ICC stipulate that the Registrar must consult with defence counsel in its decision-making regarding defence issues such as legal aid, or the drafting of a code of conduct. Nonetheless, the ICC has not officially recognized the ICB, the Bar association accommodating counsel appearing before the ICC. The Bar associations of lawyers appearing before the *ad hoc* Tribunals, ADAD and the ADC-ICTY, only recently have been allowed to attend the Plenary sessions where the judges discuss amendment proposals to the Rules of Procedure and evidence and other legal instruments.[9] However, any guarantee that the opinion of the defence is being heard does not imply that it will also be implemented.

The immunity granted to defence counsel appearing before the ICC will support them when conducting on site and other investigations.[10] The Prosecutor's duty under Article 54(1)(a) of the ICC Statute to actively search for exculpatory evidence may, on the one hand, help the defence obtain evidence to support its case and provide a better balance between the prosecution and the defence. On the other, the participation of victims in ICC proceedings may distort this balance, most particularly where they side with the prosecution. Being victims, the likelihood must be that they will.

The ICC has allowed the defence, *i.e.* the OPCD and "*ad hoc* counsel", to participate in the earliest stages of proceedings. In the Darfur situation, an *ad hoc*

[8] Rule 20 ICC RPE.
[9] See *supra,* Chapter III, paragraph 3.3.3.
[10] Cf. *supra,* Chapter V, paragraph 5.3.2.

counsel was appointed to address specific issues. However, in spite of having a limited mandate, it is only natural for lawyers to seize any opportunity to address other issues that are of importance for the defence. Because the responsibilities of *ad hoc* counsel and the OPCD may overlap, the tasks to be performed by the OPCD and whether or not it should cooperate with *ad hoc* counsel should be better defined. The more precisely the roles and the division of tasks between individual counsel and the OPCD are outlined, the more effectively the defence will function. The fact that judges have already demanded that the OPCD should intervene in a case without the authorisation of defence counsel, might imply that they are not fully aware of the notion of independence of counsel. Once a particular defence counsel is appointed to a case, the conduct of the defence is a matter between counsel and his client.

Nonetheless, the ICC has acknowledged the importance of team work within the defence. If, in the absence of counsel, an experienced legal assistant or advisor is at court, that defence team member can perform representational tasks with counsel's authorization. Clearly, this option should only be taken when strictly necessary and where it concerns tasks that are not over-demanding. Requiring defence counsel to meet strict qualification requirements to guarantee competent legal assistance to the accused and at the same time leaving important representational activities to less experienced team members would be undesirable. In particular the ICTR has shown reluctance to allow an investigator or legal assistant to visit the detained accused in private. The more liberal approach of the ICC is an important improvement that will benefit the accused as well as the working conditions of defence teams.

The ICC does not seem to have contemplated the problems that may occur when the principle of complementarity is applied to disciplinary proceedings concerning defence counsel. Such application could involve national authorities determining professional conduct of counsel while appearing before the ICC. Because the ICC's code of professional conduct may involve different standards than a national code of ethics, this could lead to unfair decisions.

8.4 Recommendations improving the defence in international criminal Proceedings

The following includes the main practical suggestions that were made in this study in order for international criminal courts to create an environment in which defence counsel have the best opportunities to defend the interests of their client and to provide an adequate and effective defence.

International criminal courts should reconsider which defence responsibilities should be vested in the Registrar and which responsibilities should be allocated to a separate defence body such as OPD at the SCSL or the OPCD at the ICC. A clear division of duties should be established.

If there is a separate defence body or organisation, or a special Bar association for counsel appearing before a court exists, this should function as the communication channel between the defence and the court and prosecution. It is recommended that, if the Registrar has discretionary power over defence issues, his decisions concerning

the defence should be more carefully reviewed and that his power over the defence should be clearly defined and stated.

Furthermore, the formal involvement of defence counsel, for instance through official recognition of Bar associations that represent defence counsel appearing before international criminal courts should be implemented. These Bar associations' current informal advisory powers should be transformed in more formal arrangements. Unlike a domestic legal system, the role of, not only the defence but of all participants in international criminal cases, is still developing. Therefore, a regulated input of the defence is indispensable. If the Defence is not a separate organisation, courts should create effective opportunities for defence counsel on the list to meet and discuss defence issues on at least a yearly basis and to involve defence counsel in setting the agenda for such meetings. In addition, defence counsel practising before these courts should be allowed to participate in bodies that monitor counsel's professional conduct.

To guarantee the quality of defence counsel and set a more objective standard than simply the amount of years of practical experience, an entrance Bar Exam should be set up for defence counsel. In fact, an entrance exam may be commendable for judges and prosecution counsel as well. This may enhance the overall quality of international criminal proceedings and ensure a certain degree of familiarity with international criminal proceedings. The current ten years of experience required at the ICC and the ICTR excludes young defence counsel that may be better trained in international criminal law than those with ten years of domestic experience. To have counsel available for replacements at all times, courts should invest in training counsel on the list who are not yet assigned.

Each legal aid system has its advantages and its disadvantages. The lump sum system of the ICTY guarantees the independence and flexibility of the defence, as it allows the defence to choose how to spend its resources, it does not create an incentive for over-billing and it avoids frustration over unnecessary paperwork. The most important disadvantage is that the highest level involved requires the defence to hold that the accused had an important leadership position. If this requirement was removed and if courts were flexible in providing further resources when a case continued much longer than estimated, that would appear to be the most appropriate legal aid system for international criminal courts to implement.

If defence counsel are compelled to represent accused, this may prevent the accused and counsel from conducting an effective defence. Ideally, counsel should not be compelled to represent an accused against his wishes.

If international criminal courts refuse to allow the accused to bear the consequences of his choice to self-representation, the measure of appointing experienced defence counsel as *amici curiae* to make legal contributions to add to the Judges' informed decisions seems to entail fewer undesirable ethical consequences for counsel than being added as "standby counsel" or "court assigned counsel". Through occupying a neutral position and not being required to represent the accused, the *amici*'s input may balance the flow of defence and prosecution arguments and thus contribute to the

fairness of international criminal trials. The time that any specially appointed court assigned or standby counsel or *amicus* consumes should not be deducted from any defence time allowance, as that would disproportionately damage the accused's right to present his case as against the prosecution.

To further promote equality of arms between defence and prosecution, courts need to make a genuine effort to compensate the defence when it is clearly disadvantaged, particularly where the ability to assemble evidence is concerned. Granting immunity to defence counsel and other defence team members will assist the defence in the conduct of its own investigations.

To make sure that international criminal courts actually meet the requirements of human rights treaties, it would be valuable to create the possibility of consulting a Human Rights Treaty Body, for instance through the process of submitting preliminary questions to it. Naturally, it should be ensured that the body dealing with such questions will issue an opinion within a limited and specific time scale.

Finally, a politically delicate issue. When accused persons are acquitted by an international criminal court, they may nonetheless not be welcome to reside anywhere in the world.[11] Even though this does not directly concern the administration of justice of international criminal courts, it is a problem that needs to be resolved. It is unacceptable that an individual who has been in custody for many years, and who is subsequently acquitted, will nonetheless be unable to find a place where he will be accepted, let alone be reunited with his family.[12] Therefore, international criminal courts should make appropriate efforts to help persons who have been acquitted find an acceptable domicile. Defence counsel and NGO's should assist where they can in efforts to remedy this problem. This has already arisen in respect of some acquitted at the ICTR. A return to Rwanda is plainly impossible.

8.5 FINAL OBSERVATIONS

The fact that international criminal courts have not fully formulated the position of the defence in advance of proceedings may be compared to how the position of the defence has been developed on a national level. As Chapter II has shown, only since the 1960-ies has each accused in criminal proceedings had an absolute right to defence counsel, whether he can pay for it or not. This requires each national system to come up with a solution as to how to fund criminal litigation on a wide scale and how to guarantee a standard of competence. Lawyers providing free legal aid often lack the time and resources to put all necessary efforts into each case that it deserves. In

[11] Cf. for instance, Africa news, 'ICTR optimistic over completion strategy', 23 June 2007, available at www.africanews.com/site/list_messages/4536, lastly visited 27 March 2008.
[12] For instance, André Ntagerura, who has been acquitted by the Trial Chamber at 25 February 2004 and by the Appeals Chamber at 7 July 2006, has not been able to see any of his three sons since 1994 and still remains in Arusha.

comparison with most national legal aid systems, international criminal courts provide a generous amount of resources and facilities. As this study has illustrated, to guarantee a genuinely effective and adequate defence, this degree of commitment is necessary in an international criminal case.

The currently established international criminal courts have limited trial capacity and try only those individuals who allegedly bear the highest responsibility. In between its establishment in 1994 until March 2008, the ICTR has convicted 30 persons and acquitted 5 persons. In Rwanda, a very large number of individuals were engaged in the actual killings. Most of those are in national prisons.[13] There are simply no means or resources to provide them with the same facilities for a defence or proper detention facilities as those tried at the ICTR. Until 1998, persons who were convicted for committing genocide have been executed.[14] This is not an option at the ICTR. In July 2007, Rwanda abolished the death penalty.[15]

Even though improvements could be made to the position of the defence at international criminal courts, we must keep in mind that the individuals that are prosecuted by an international criminal court, allegedly bearing the most responsibility, are likely to receive a higher quality defence than the supposedly lesser responsible individuals tried in domestic courts. The attempt in this study to investigate how the position of the defence at international criminal courts might be improved should not blind us for the fact that much can probably be improved in respect of the defence of individuals bearing lesser responsibility who are tried by national courts.

[13] In 2006, 16 Rwandan prisons held 67921 detainees, 80 per cent of whom were charged with genocide. See Hirondelle News Agency, 'Rwanda/Prisons - Near 10 Millions USD for the Relocation of Kigali Prison', 8 June 2007, available from www.hirondelle.org.

[14] See Amnesty International, 'Rwanda abolishes death penalty', 2 August 2007, available at www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802.

[15] See Hirondelle News Agency, 'Rwanda/Justice - The Death Penalty Abolished in Rwanda', 30 July 2007, available from www.hirondelle.org.