Defence counsel in international criminal law

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SUMMARY

ABSTRACT

The field of international criminal law is relatively new and rapidly developing. This dissertation examines whether international criminal courts enable defence counsel to conduct an effective defence. When the International Criminal Tribunals for the former Yugoslavia and Rwanda (the *ad hoc* Tribunals) were set up in the mid-nineties to prosecute those responsible for serious violations of international humanitarian law, not much thought had been given to the organisation of the defence. The Statutes of international criminal courts are concise about the right to legal assistance and the role of the defence in its proceedings.

International criminal trials generally involve highly complicated issues of criminal, international and international humanitarian law. Therefore, the assignment of only one counsel is insufficient to guarantee a fair trial to the accused. Currently, two defence counsel, one or two investigators and one or two legal assistants are generally assigned to defence teams at international criminal courts.

This dissertation examines the position of the defence at international criminal courts given the *sui generis* character of international criminal proceedings. It analyzes important defence issues, such as legal aid, equality of arms, professional ethics and disciplinary law and the right to self-representation.

STRUCTURE

The study consists of three parts. Part I, '*The Implementation of the Right to Counsel in International Criminal Proceedings*', examines what the right to defence counsel and legal assistance for defendants comprises at international criminal courts and how the defence is organized at these courts.

Part II, '*Procedural Perspectives*', defines the character of the procedural system of international criminal courts to help establish how the position of the defence should be evaluated. To determine the role that defence counsel should appropriately adopt in international criminal proceedings, the character of the proceedings should be clear. , the theory of Mirjan Damaška from his book 'Faces of Justice and State Authority' is applied to the organisation of international criminal courts, to their goals of justice and to their procedural rules. Damaška's theory may also provide an overall explanation for some of the difficulties defence counsel encounter at these courts.

Part III, '*The Role of Defence Counsel in International Criminal Practice*', examines the scope of the role of defence counsel in international criminal proceedings. Chapter V examines the degree to which equality of arms between the prosecution and the defence is guaranteed. Chapter VI examines what professional ethical standards defence counsel should observe, who sets those standards and what mechanisms are implemented to ensure their observance. It also scrutinizes whether those standards are accurate and satisfactory in the context of international criminal proceedings. Chapter VII examines what role defence counsel should ideally perform when ordered to conduct the defence of an accused who prefers to conduct his own defence and

refuses to cooperate with counsel. It also answers the question what solution is most appropriate to guarantee a fair trial and an effective defence and to avoid ethical problems for the lawyers involved. The concluding Chapter VIII gives recommendations that should help international criminal courts create an environment in which defence counsel have ample opportunities to provide an adequate and effective defence to their client.

PART I THE IMPLEMENTATION OF THE RIGHT TO COUNSEL IN INTERNATIONAL CRIMINAL PROCEEDINGS

THE RIGHT TO ADEQUATE AND EFFECTIVE LEGAL ASSISTANCE

The right to adequate and effective legal assistance in criminal proceedings is a cornerstone of the right to a fair trial of an accused.

In national legal systems, only since the 1960-ies the right to counsel was considered an absolute right of each accused facing criminal charges and possibly a prison sentence. The right to legal assistance involves that an accused should have competent counsel, counsel of his choice, and counsel assigned for free if he lacks financial means. He has the right to communicate in private with counsel and counsel must keep the information thus received confidential.

As long as a defence counsel is appointed, human rights standards concerning what constitutes effective legal assistance are fairly minimal. The right to counsel of his own choosing is not absolute for an indigent accused who receives free legal aid. How to conduct the defence is a matter between counsel and his client. A defence counsel is presumed to be competent, unless he manifestly fails his duties. Only in the latter case, a court should intervene. To prepare for trial, an accused should have sufficient opportunity to discuss the case with his defence counsel in private.

International criminal courts do not apply much stricter standards. In fact, the Statutes of international criminal courts do not provide more than a basic right of accused and suspects to legal assistance. These provisions resemble those of international human rights treaties.

Indigent accused receive legal assistance through the legal aid system of these courts. Initially, one counsel was provided per accused under the legal aid system of the *ad hoc* Tribunals. But from the first ICTY case onwards, it became clear that more assistance was required to guarantee a fair trial in international criminal proceedings. The trials involve complicated legal as well as factual issues that should all be examined in-depth. The amount of evidentiary materials is often overwhelming, as accused are indicted for crimes generally committed on a large scale such as genocide, war crimes and crimes against humanity. To conduct a vigorous defence, all these evidentiary materials need to be scrutinized and any exonerating or mitigating evidence materials should be gathered. Potential defence witnesses should be traced, wherever they may reside. All this is nearly impossible to pull off for a single lawyer, no matter how qualified he may be. International criminal courts have for the most part taken this need for adequate manpower into account and generally provide a defence team

as legal aid for indigent accused consisting of one or two counsel (lead counsel and co-counsel), one or two investigators and legal assistants or consultants, and sometimes a case manager. The assistance of translators or interpreters can also provided where necessary.

Each legal aid system has its advantages and its disadvantages. At the ICTR, the Registry scrutinizes each bill submitted by defence counsel. This is time-consuming both for counsel and for the Registry staff. Under the lump sum system of the International Criminal Tribunal for the former Yugoslavia, at the start of the pre-trial phase and again at the trial phase, a level one, two or three lump sum is assigned to the defence, depending on the estimated length and difficulty of a case. This system guarantees the independence and flexibility of the defence. It allows the defence to choose how to spend its resources, 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, the lump sum system appears to be the most appropriate legal aid system for international criminal courts to implement.

As far as possible, one lawyer of the accused's preference will be appointed as lead counsel. But this choice is limited to those lawyers who fulfil the qualification requirements of international criminal courts. The other defence team members are chosen by lead counsel. According to international criminal courts, an indigent accused has no right to choose each member of his defence team.

The qualification requirements for counsel are meant to safeguard a standard of competence. They generally include a certain number of years of relevant experience, a proper command of one of the working languages of the court and to for counsel to have no criminal or disciplinary record. At the *ad hoc* Tribunals, university law professors can also become defence counsel.

The working languages requirement can cause problems. If an accused cannot communicate with his counsel directly, it can be difficult to establish a bond of trust and misunderstandings may arise. The ICTY has taken this problem into account and on a case by case basis allows a second counsel (co-counsel) to be appointed who speaks the language of the accused, but none of the court's working languages.

No international criminal court requires defence counsel to be familiar with international criminal law or procedure. This lacuna should be repaired by requiring all defence counsel to pass a 'Bar exam' to ensure that they have sufficient knowledge of international criminal law. An entrance Bar Exam should guarantee the quality of defence counsel and sets a more objective standard than the number of years of practical experience. It may also be commendable for other lawyers participating in international criminal law, such as judges and prosecution counsel. It may enhance the overall quality of international criminal proceedings where a certain degree of familiarity with international criminal law is ensured. 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 replacement at all times, courts should invest in training counsel on the list who are not yet assigned.

Accused at international criminal courts are more often than not in detention while awaiting and during their trial. At the International Criminal Tribunal for Rwanda, it has been a problem for defence team members other than counsel, such as legal assistants and investigators, to visit the client in private. This is unacceptable for the following reasons. Defence counsel are likely to be away from the seat of an international court and its detention facilities during trial breaks. Where cases continue for months or even years in a row, any regularly appointed defence team member should be enabled to speak in private with the client in a detention facility. To require counsel to fly over to enable a defence investigator to share his results with the client is a waste of resources. Defence teams should be enabled to employ their resources as efficiently as possible.

To guarantee that international criminal courts meet the requirements of international human rights treaties, the possibility of consulting a human rights treaty body should be created, for instance through the process of submitting preliminary questions to it.

ORGANIZATIONAL STRUCTURES FOR THE DEFENCE

To protect the integrity of their proceedings courts should safeguard the fundamental right of the accused to adequate and effective legal assistance, the independence of the defence and the principle of equality of arms. An effective functioning of the defence requires an adequate legal aid system, a proper allocation of resources; a system of admission that safeguards quality assistance; efficient information and communication channels between the defence and the court, and; fair, but not over-intrusive, mechanisms to monitor defence counsel's professional conduct. All of this needs to be properly administrated.

The Statutes of most international criminal courts do not stipulate how the defence should be organized to achieve this. The defence could be organized in varying ways.

Providing the Registry, the court's administrative organ, with important responsibilities over the defence, and substantive discretionary power, in particular regarding the assignment and withdrawal of legal assistance and the monitoring of defence counsel's behaviour, is neither particularly efficient, nor satisfactory in some respects. Its staff members have not necessarily been legally trained. They could lack knowledge and insight in what is minimally required to safeguard an effective defence. In addition, because the Registry is servicing the whole court, it may not pay sufficient attention to the position of the defence. At occasions, it has prioritized its bureaucratic purposes to the detriment of defence rights. That is highly undesirable. For these same reasons, its serving as the defence's communication channel to the court is inappropriate. Particularly at the *ad hoc* Tribunals, the President's and the Chambers' powers to review the Registrar's decisions are limited. A more elaborate review mechanism would provide for a better control over his decision-making process and may enhance transparency for the defence, but preference may be given to a system whereby he was obliged to consult a defence body prior to determining an issue affecting defence interests. The International Criminal Court's Legal Aid Commission

in which defence counsel may advise on the allocation of funds to the defence is a positive example in this respect.

Having a separate, independent defence office discharge the most vital tasks concerning the defence is most appropriate. A separate defence body could spend more time in providing support to the defence, than the Registry that should also service the entire court or a Bar association that primarily consists of lawyers appearing before the court. Its incorporation in the Statute as a separate organ will provide it with a firm foundation. This will underline its independence from existing court organs, particularly the Registry. A defence office will not only safeguard the independence of the defence, but will also enhance the equality of arms between the prosecution and the defence. With its own budget, the defence will also be on a more equal footing with the prosecution. If its staff members will be experienced lawyers, resources and facilities can be more efficiently divided over different defence teams. The refusal from an independent defence organ to provide resources and facilities will be easier to digest for counsel than this refusal emanating from the Registrar. Courts should however be careful in allowing these offices to perform representational duties, as this could lead to conflicts of interest. This has thus far come up several times before international criminal courts and could harm the integrity of proceedings.

For a "healthy" balance of powers, some tasks should be shared with specialized Bar associations. Courts should recognize these associations and involve them in their decision-making as far as defence-related issues are concerned at least on an advisory level. Membership to these associations should be mandatory, even though this may not be without problems. Their advice should be admitted on a more regular and formal basis. In addition to fulfilling an advisory function, these associations are an effective communication channel, as long as they prioritize their goals. Power over admission, the assignment and withdrawal of legal assistance, should better be vested in an independent defence office than in a Bar association. If a separate defence office is responsible for these issues, Bar associations' advice regarding the review of such decisions could be desirable to ensure the integrity of the proceedings and to help judges guarantee an effective defence. It will equally be a safeguard against arbitrary use of powers by a defence office. Additionally, these associations' participation in disciplinary proceedings is vital to enhance the integrity of the profession. For this same purpose, Bar associations should organize training sessions for counsel, possibly in cooperation with a defence office.

International criminal courts should involve defence counsel in the decision-making regarding defence issues and in resolving defence-related problems. Their specific expertise is needed in order to find the most appropriate solutions to those problems. This may benefit the whole trial process and the public perception of the fairness and integrity of the court.

Views on the rights and obligations of the defence are closely related to the nature of proceedings. The proceedings of international criminal courts are not identical to any national legal system but consist of elements from different legal systems. International criminal proceedings, although hybrid, are frequently compared either to common law or civil law proceedings. For instance, it is often argued that the procedural system of the *ad hoc* Tribunals resembles the common law system.

In the Anglo-American adversarial or common law system most of the evidence will be presented at trial by the parties and the judges will be passive. In these proceedings, the defence needs to conduct independent investigations. This requires qualified personnel and a proper budget. In European Continental civil law systems, most of the evidence is in written form, including the statements of witnesses. Judges have a full dossier containing all the evidence, primarily gathered by the prosecution, at the start of the trial. Therefore, to hear a witness in court the defence needs to prove that there is a genuine defence interest in hearing a particular witness in court.

Although the common law and civil law dichotomy may be useful at times, the nature of international criminal proceedings should be established in a more individual way to provide a starting point from which the position of the defence at international criminal courts can be properly evaluated.

In his work '*The Faces of Justice and State Authority*', legal theorist Mirjan Damaška asserted a relation between a state's legal procedural system and the way it is organized. Damaška has constructed two basic models of legal procedure that fit two archetypes of government. Each procedural model is connected to a certain view on the purpose of justice.

The policy-implementing model fits a state whose main objective it is to implement state policy through justice: the activist state. On the grounds of its organisation, hierarchical structure and its aspiration to reach governmental goals through its justice system, the policy-implementing model is the most suitable for an activist government. The second model is the conflict-solving model that is connected to a state whose objective it is to remain neutral, and whose only goal is to help its citizens solve their disputes: the reactive state. Hence, conflict-solving proceedings would be the most successful procedural form. Each type of these two main models produces different views on what should be the goals of justice and on the role of the participants in the proceedings, including defence counsel.

The *ad hoc* Tribunals and the ICC pursue conflict-solving goals as well as policy-implementing goals. Although none of these goals clearly prevailed over any other, the scales appear to tilt somewhat more toward the policy-implementing side than the conflict-solving side. These international courts foster the aim to bring peace and reconciliation to war torn areas and to record a truthful version of the facts that occurred in internal and international armed conflicts. In addition, their duty to "the international community" regularly surfaces where sentencing is concerned, but also

where certain procedural changes of a policy-implementing nature are being introduced, such as to expedite proceedings or to make them more efficient.

Proceedings before the *ad hoc* Tribunals are basically shaped as a party-driven contest with a passive arbiter as a judge. As the prosecution and the defence are procedurally roughly equal in such proceedings, defence counsel is more than a mere watchdog of the prosecution. With its own investigative resources, presenting its own case and its own evidence, including its own witnesses, the defence is a largely autonomous party in proceedings. The course that the ICC's proceedings will take is not wholly clear at the moment of finishing the research for this study. The ICC's defence teams are entitled to have their own professional investigator. Therefore, it appears likely that the defence will have substantial autonomy in ICC proceedings. But, overall, the proceedings of the ICC could involve stronger policy-implementing features elements than those of the *ad hoc* Tribunals where conflict-solving features clearly prevail.

Where policy-implementing goals are pursued in an overall contest model of proceedings, such as of the *ad hoc* Tribunals, tensions are likely to result. A policy-implementing mindset in respect of defence counsel's role in international criminal practice may accompany that pursuit. This may put pressure on the defence.

An example. As the structure of the *ad hoc* Tribunals did not include a jury as an adjudicator of fact, there were no strong arguments against expediting proceedings through the amalgamation of sentencing and guilt establishment stages. This had a strategic impact on the defence at the *ad hoc* Tribunals, in the sense of a negative impact. It forced the defence to fixate its position as to the responsibility of the accused for the crimes concerned from the earliest stage of proceedings onwards until the end. Conversely, were these two stages separated, the defence could change strategy after the guilt establishment stage and bring up any mitigating circumstances in the sentencing stage once guilt has been pronounced on any count on the indictment.

In the course of the *ad hoc* Tribunals' existence, to expedite proceedings more court control over the presentation of evidence and more reliance on written evidence was introduced, even though the Tribunals and the ICC still prefer oral evidence over written testimony. If parties are constrained in their presentation of evidence in an adversarial system, this may prevent them from presenting their case effectively.

If international criminal courts attach substantial importance to purposes of justice that do not match the basic ideas behind their procedural framework, either the basic structure of proceedings should be altered or they should shift the focus of their purposes of justice.

THE PRINCIPLE OF EQUALITY OF ARMS

The principle of equality of arms is a fair trial requirement that is intended to uphold the adversarial nature of criminal proceedings. It implies that no party to criminal proceedings, be it the defence or prosecution, is put in a disadvantaged position vis-à-vis the other.

It has been argued that full equality between the prosecution and defence 'is an idle aspiration from a practical perspective'.[16] The principle of equality of arms is generally regarded to refer to procedural equality. Even so, some proportionality in terms of resources and facilities between the prosecution and the defence may be required to achieve procedural equality in international criminal proceedings.

Only disproportionate differences between defence and prosecution resources will violate the principle of equality of arms as a human rights standard. Generally, there are no truly disproportionate differences in the basic provisions of international criminal courts amounting to a violation of this principle. But the adversarial principle requiring that each party should have adequate opportunity effectively to prepare and present its case, could be at risk. The defence should be funded at a level allowing it to conduct its own investigations. Conducting an effective defence in international criminal cases is a complicated task. Compared to what should be provided in regular domestic cases, the inherent complexity of these cases requires extra resources and facilities to be provided to the defence to satisfy the principle of equality of arms and the right to a fair trial. The International Criminal Tribunal for the former Yugoslavia's (ICTY) lump sum system most efficiently tailors the needs of the defence to the complexity and expected duration of a case. Granting immunity to defence counsel and other defence team members will assist the defence in the conduct of its own investigations.

In criminal proceedings, an accused is entitled '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'. To ensure that trials will not last forever, judges may limit the number of witnesses that the defence may call and determine the time available for the presentation of its evidence prior to the defence case. Judges have similar powers regarding the prosecution's case. The principle of equality of arms may be at stake where the defence is required to limit its number of witnesses solely to expedite the trial proceedings.

According to the Appeals Chamber of the ICTY, the amount of time as well as the number of witnesses allotted to the defence should be reasonably proportional to the prosecution's allotment and should give the accused a fair opportunity to present his case. This two-step approach of applying "a principle of basic proportionality" as well as an objective test to establish whether the allocated time would be "objectively adequate" for the accused to conduct his defence is a more appropriate solution than applying a principle of mathematical equality to the amount of time and the number of witnesses for the defence and the prosecution to present.

To gain access to evidence, the cooperation of state authorities is generally indispensable in international criminal proceedings. Due to the lack of adequate enforcement mechanisms, international criminal courts can have more difficulty to compel uncooperative authorities to cooperate, even though states have a duty to cooperate with international criminal courts. States can be reluctant to provide sensitive information or material to the defence, to protect national security interests. If states are more likely to cooperate with the prosecution than with the defence, the defence is plainly at a disadvantage.

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[16] See Zahar, Alexander and Sluiter, Göran, *International Criminal Law: a Critical Introduction* (Oxford UK; New York: Oxford University Press, 2008), par. 8.5.1, p. 293.

This disadvantage could be substantial as it may prevent the defence from achieving one of its core goals in adversarial proceedings: to assemble exculpatory evidence to present to the court. The *ad hoc* Tribunals recognize this problem, but out of practical considerations, have excluded this disparity from the scope of the principle of equality of arms. This does not in itself violate ECHR case law on the principle. Nonetheless, considering the consequences for the defence at international criminal trials of consistently being denied access to evidence that may be vital to its case, in light of its adversarial proceedings, international criminal courts should compensate the defence for this obvious disadvantage vis-à-vis the prosecution.

Whereas the defence used to enjoy some procedural advantage over the prosecution regarding disclosure obligations, the ICTY removed this tactical advantage out of "fair play" concerns. It would have been more appropriate to have left them intact, thus compensating the defence for difficulties accessing evidence due to a lack of state cooperation. It makes no sense to attempt to establish absolute procedural equality in certain respects without properly considering the overall differences between the prosecution and the defence.

REGULATION OF PROFESSIONAL CONDUCT

International criminal courts should adopt clearly formulated professional conduct standards to help lawyers make the most appropriate decision in complicated situations. A common set of professional conduct standards should bridge any divide between counsel who are used to different legal traditions. These standards should be reasonable for all involved.

Broad standards will leave considerable room for interpretation. If a lawyer's legal background is decisive in his interpretation of standards of conduct, the enforcer of these standards has a substantial impact on the development of the interpretation of such standards. The judges and the Registrar, being the main enforcers of standards of conduct in the context of international criminal courts, will therefore significantly influence those basic standards as to the conduct of defence counsel.

The duty of confidentiality is one of the cornerstones for a defence counsel to be able to conduct an effective defence. Only if an accused can trust his lawyer, he will provide him with the necessary information to do his job efficiently.

Much effort has been made to counter the practice of fee-splitting. The importance of the reputation of international criminal courts cannot be underestimated. Doing whatever may be necessary to prevent alleged war criminals from making a profit out of their being indicted, is important. Therefore, providing in the code of conduct that fee-splitting agreements are illegal removes any uncertainty for counsel about this. His agreement to any such solicitations on the part of his client constitutes professional misbehaviour.

The requirement at the *ad hoc* Tribunals that counsel should report any fee-splitting solicitations of their client to the Registry is a disproportionate interference with the duty of confidentiality. The accused and his defence team will remain dependent on the Registrar throughout proceedings. Therefore, informing him of undesirable behaviour of an accused can harm his rights.

It is important to ensure that lawyers observe high professional standards while conducting international criminal cases. A broad range of unprofessional behaviour can be most effectively challenged by having multiple regimes of enforcement. The Rules of Procedure and Evidence contain provisions to address misconduct and to address contempt of court. The Codes of Conduct for defence counsel at the ICTY and the ICC also contain a separate disciplinary procedure.

The application of different enforcement systems simultaneously is disproportionate. If counsel's conduct can be addressed both under the misconduct provisions and under contempt of court provisions, letting the most serious procedure, the latter, take preference is unsatisfactory. An analysis on a case-by-case basis would be more appropriate.

It has happened that lawyers were reprimanded by their national disciplinary authorities for unprofessional behaviour while practicing at an international criminal court. It is undesirable and unduly cumbersome to counsel, if his conduct in an international criminal case will be examined by national disciplinary authorities after it has already been examined by an international court. A body established by an international criminal court is better able to examine counsel's behaviour, because it will be familiar with the unique context of international criminal justice. International criminal courts' codes of conduct ought to prevail over national standards of professional conduct. For national bodies it may be difficult to make any more than an estimated guess of what would constitute appropriate conduct of a lawyer before an international criminal court.

To protect the rights of the defence in the unique context of international criminal law, the international criminal courts sometimes appoint lawyers to protect defence interests, but who have a different mandate than defence counsel. For instance, the *ad hoc* counsel in the Darfur situation at the ICC. When fulfilling a unique mandate, it is inevitable that the limits of this mandate will be put to the test. Until such limits are clearly established, lawyers should receive appropriate discretion to explore the boundaries of these limits. The *bona fides* of defence counsel should be presumed, just as the presumption of innocence as to an accused, until there is irrefutable proof to the contrary. Unfair and prompt sanctions will do little to attract the best candidates to practise in this field which would be to everyone's disadvantage.

ASSISTING AND ACCUSED WHO REPRESENTS HIMSELF

The right of the accused to represent himself instead of being represented by defence counsel is one of the 'minimum guarantees' accorded to the accused by the fair trial provisions of the Statutes of international courts. An accused representing himself before an international criminal tribunal is unlikely to provide for the same standard of representation as a qualified defence counsel. International criminal courts have made substantial efforts to compensate this. To guarantee a fair trial, they gave accused that expressed an unambiguous wish to represent themselves the opportunity to obtain advice from lawyers and to make use of certain facilities such as a phone.

Nonetheless, the right to self-representation is no absolute right. International criminal courts have limited, refused and even revoked this right, to prevent delay or

disruptions of trial proceedings. Courts must strike a proper balance between allowing an accused to represent himself and safeguarding a proper administration of justice.

Since there were no provisions on how to deal with an accused choosing to represent himself, different kinds of substitutes for defence counsel (*amici curiae*, standby counsel, and court assigned counsel) were introduced to the justice system of international criminal courts. Their tasks were set out in individual and specific court orders.

The approach regarding this issue bears important consequences not only for the rights of the accused, but also for the position of 'imposed' counsel. These lawyers have to assist an accused who will not accept any help, and who refuses to provide any instructions. Undoubtedly, that will have an impact on the normal exercise of the counsel's functions. Counsel is bound to have difficulties with adhering to codes of professional conduct meant for "regular" defence counsel. If it is impossible for them to guarantee an effective defence, the very existence of such "imposed" counsel might harm the integrity of the legal profession and, more broadly, the fairness of the proceedings.

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.

CONCLUSION AND RECOMMENDATIONS

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. Particular features that can all have significant implications for the defence are 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.

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.

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 creates difficulties for the defence.

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.

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. To enhance equality of arms and safeguard the independence of the defence and the integrity of international criminal proceedings, a separate and independent defence body should administer both the legal aid system and the appointment of counsel.

Facilities to gather exculpatory evidence are vital. In 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.

Compensation for any disproportionate disparity between the defence and the prosecution, particularly where access to evidence is concerned, 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 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.

A final observation. International criminal courts have limited capacity to conduct trials and therefore generally focus on those allegedly bearing the highest responsibility. 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.