

DEFENDING ATROCITY CRIMES

The Requirements of Defense Counsel before the ICC

The experiences of the ad hoc criminal tribunals for Rwanda and the former Yugoslavia have deeply influenced the establishment of the International Criminal Court (ICC). It was to the case law and experiences of these tribunals that the founders of the ICC turned repeatedly in constructing the Rome Statute that created the Court. Acutely aware of an often repeated “victor’s justice” criticism of the Nuremberg and Tokyo tribunals, the framers of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) wanted to ensure that defendants were accorded the right to a fair and proper trial and effective legal counsel. They were determined in particular that the ICTY/R trials would be seen as balanced and impartial, and not merely exercising the wrath of the “winners.”

These tribunals have nonetheless still had a number of problems, especially with respect to various concerns encountered by defense counsel. Their experiences have alerted the ICC to the challenges they have faced, enabling the ICC to learn from them. This paper analyzes the requirements that are most necessary to the conduct of an adequate and satisfactory defense in any criminal proceeding and then applies these to trials in the temporary tribunals. The discussion of each requirement will consider the resources and assistance that have been available to defense counsel at the tribunals, what actions have been taken by the tribunals to address these issues, and how the ICC has acted on the experience of the tribunals.

This paper should be read in conjunction with its companion paper entitled, *"Filling the Gap in the Rome Statute on Defense Counsel."* This companion paper examines the current position of defense counsel at the ICC, identifies the procedural gap in the Rome Statute in terms of defense counsel, and discusses what still needs to be accomplished.¹

The requirements for an adequate criminal defense fall logically into two categories. Included in the first are those that determine the status of a defendant before the court and the degree of objective fairness and impartiality he or she receives. The second category includes those processes and procedures that must be in place if a defendant's lawyer is to be able to do a proper job for his or her client.

Category I - Defense Counsel Requirements Fundamental to Defending the Accused

The requirements listed below are fundamental to an adequate defense of a criminal accused. They are so basic that their absence severely prohibits the defendant's ability to have a fair and equal trial, as well as the ability of the defendant's lawyer to conduct a proper defense of his or her client. These can be subdivided in two: Rights of the Accused and "Equality of Arms."

¹ The reader should note that throughout the paper reference will be made to the companion paper when it expands upon and further discusses the content of this paper. The spelling of "defence" reflects usage in direct quotations from the Rome Statute and other legal documents of the ICC and the tribunals, but is otherwise spelled as "defense" following the American convention.

Rights of the Accused encompass those rights that must be afforded to persons under investigation and accused persons before the Court. Equality of Arms ensures that the defense team has adequate and equal access to the Court's facilities and the investigative process, also essential if there is to be an adequate defense.

First, a Defendant must be assured and accorded all the recognized rights²

Probably the most fundamental requirement of any criminal legal proceeding is to have the proper provisions and protections in place and implemented so that all rights are afforded the defendant. These rights are among the rights included in internationally accepted declarations and covenants, such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights.³ These are in order for an accused to receive a fair trial. The ICTY/R unfortunately failed to carry out these protections.

1. The Right to be told that he or she is a suspect and to have the charges against him or her known at the earliest possible stage in the proceedings, as well as to have his or her rights protected at every stage of the investigation

Issue at the tribunals

- Because the tribunals shared a Prosecutor, it is quite possible that the work load affected the timing of prosecutions and trials. This may have made it difficult for an accused to be informed promptly that he or she was a suspect, violating his or her fundamental rights to be informed as soon as possible that he or she is a suspect. This is directly linked to the right that the accused should be informed at the earliest time that he or she is a potential suspect.
- The respective Statutes of the tribunals (Article 17, ICTR, and Article 18, ICTY [Investigation and Preparation of the Indictment])⁴ do not describe in detail the provisions in the investigative process that are necessary for maintaining the rights of the

² These rights are included in the Universal Declaration of Human Rights and are also codified in the Covenant on Civil and Political Rights. Articles 7, 9, 10 and 11 of the Universal Declaration of Human Rights specifically refer to the rights that should be afforded to all persons, including the right to be “entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The United Nations, “Universal Declaration of Human Rights,” adopted by General Assembly Resolution 217 A (III) of 10 December 1948, available at <http://www.un.org/Overview/rights.html>. Articles 9 and 14 of the Covenant on Civil and Political Rights go into further detail and include rights such as the right “to be tried without undue delay, to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; and to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” Office of the High Commissioner for Human Rights, “Covenant on Civil and Political Rights,” adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. These internationally recognized rights are very similar to the due process rights included in the U.S. Bill of Rights.

³ *Id.*

⁴ The International Criminal Tribunal for Rwanda: Basic Legal Texts, “Statute,” available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>; The International Criminal Tribunal for the Former Yugoslavia: Basic Legal Documents, “Statute,” available at <http://www.un.org/icty/legaldoc-e/index.htm>.

defense. In fact, the only reference to the defendant is that he or she is entitled to counsel, which will be provided if he or she cannot afford it.

- In addition, the Articles only provide that the Prosecutor be able to demonstrate that a case exists *prima facie*, or on the face of it. Therefore, the threshold to be met in order to bring a case has not been very high.
- The Rules of Procedure and Evidence (RPE-ICTY/R)⁵ of the tribunals do not provide for the rights of the defendants during an investigation. Rule 39 [Conduct of Investigations] of the RPE-ICTY/R mentions only the rights of witnesses and informants, not those of individuals who have committed the alleged crimes.
- There was no Pre-Trial phase, nor was there a Pre-Trial judge at the tribunals to decide whether the Prosecutor was conducting the investigation appropriately.

Steps Taken by the Tribunals

- Originally, the tribunals shared a single Prosecutor. However, SC Resolution 1503 split the position so that each tribunal would have its own Prosecutor to conduct investigations and participate in the proceedings. This allowed the head Prosecutors to focus on his or her respective tribunal, with each having effectively half the work load that the sole Prosecutor initially had to handle.
- The establishment of a Pre-Trial phase. The pre-trial stage would identify the most pressing matters to be tried, thus quickening the amount of time that the detained person had to await trial.⁶ Rule 73 *bis* [Pre-Trial Conference] of the RPE-ICTY/R was added. The Rule stated that the Trial Chamber or Judge, prior to the commencement of the trial, may request information from the Prosecutor such as a list of witnesses that he intends to call, a summary of facts to which the witnesses will testify, and the length of time for each witness. The Trial Chamber may also request that the Prosecutor shorten the amount of time for the examination-in-chief of some witnesses.
- The RPE of the Yugoslav tribunal went a step further. Rule 65 *ter* [Pre-Trial Judge] was added. The Rule states that a Pre-Trial Judge must be designated not longer than 7 days after the accused initially appears. This judge facilitates communication between the parties and ensures that the trial is not unreasonably delayed. He or she also has the ability to request specific information from both the Prosecutor and the Defense. By requesting this information, and disclosing it to both parties, the judge effectively provides the defense more time to prepare before the trial.⁷

Steps Taken by the ICC

⁵ The International Criminal Tribunal for Rwanda: Basic Legal Texts, “Rules of Procedure and Evidence,” available at <http://www.ictt.org/default.htm>; The International Criminal Tribunal for the Former Yugoslavia: Basic Legal Documents, “Rules of Procedure and Evidence,” available at <http://www.un.org/icty/legal/doc-e/index.htm>.

⁶ “Prosecution would provide a detailed pre-trial brief to the Defense, along with copies of all the exhibits it intended to lead in evidence at trial; the complete and final list of Prosecution witnesses would be disclosed; the pre-trial Judge would be given specific powers to deal with the parties; and the Chamber senior legal officer would be authorized to meet with the parties on behalf of the pre-trial Judge.” Stephane Bourgon, “Procedural Problems Hindering Expedient and Fair Justice.” *Journal of International Criminal Justice* (June 2004).

⁷ It should also be noted that Rules 73 *bis* and 65 *ter* were added in July 1998, the exact time that the Rome Statute was drafted.

- Article 55 [Rights of persons during an investigation] in the Rome Statute⁸. This article affords the person under investigation extensive rights, including the right to remain silent, the right to a speedy trial, the right not to be subject to arbitrary arrest or detention, and the right to have legal counsel provided if he or she cannot afford it.
 - Under this Article, he or she has the right to be informed before being questioned that there are grounds to believe that he or she has committed a crime within the Court's jurisdiction. In addition, the accused has the right to be questioned with counsel present.
- Once the accused has had the charges confirmed, and has been advised that he or she will be brought before the Court, Article 67 [Rights of the accused] in the Rome Statute, expands upon the rights in Article 55. Article 67 affords the accused the same rights as above, and also provides that he or she is to be tried without undue delay, will have adequate time and facilities for the preparation of defense, and will have, free of cost, an interpreter and translations as necessary for his or her defense.
- The Creation of the Pre-Trial Division.
 - The ICC learned from the experience of the ICTY/R and created the Pre-trial Division, comprised of two Pre-Trial chambers, in order to ensure the accused an expeditious trial.
 - The Pre-Trial chambers are completely separate and independent judicial chambers of the Court. Even though the ICTY did make some effort to create a similar function for one judge, this chamber has its own resources and staff, and is included in the language of the Rome Statute. It has also been established and has already begun to function properly in the situations currently before the Court.
 - Article 39(2)(b)(iii) [Chambers] states that the Pre-Trial Chamber is composed of either one or three judges.
 - The Pre-Trial Chamber is much more than a preliminary phase before the trial. Under its powers to ensure that the rights of the accused are upheld, it is an essential component of the trial.⁹
 - Pursuant to Article 57 [Functions and powers of the Pre-Trial Chamber], the Pre-Trial Chamber may, upon the request of the accused, assist the person in preparation of his or her defense in the capacity that the Statute allows. Furthermore, under Article 57, the Chamber may provide for the protection of persons who have been arrested or appeared due to the issuance of a summons. Therefore, it is this Chamber that oversees the actions of the Prosecutor at the early stages of the investigation, when it is usually too early to assign defense counsel.
 - In addition, the accused can seek the aid of the Pre-Trial Chamber and request it to order a state to cooperate and assist in the preparation of his or her defense. (Article 57 (3)).

⁸ The International Criminal Court, The Official Journal of the ICC: "Rome Statute," available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

⁹ The International Criminal Court, ICC Newsletter, October 2004, available at http://www.icc-cpi.int/library/about/newsletter/2/pdf/ICC_NEWSLETTER2-EN.pdf.

- The Pre-Trial Chamber at the ICC is responsible for the confirmation of charges, issuance of arrest warrants and issuance of summons to appear. Article 58 [Issuance by the Pre-Trial Chamber of a warrant of arrest of a sums to appear] provides for, in great detail, the necessary steps that the Pre-Trial Chamber must follow in order to ensure that the investigative process is carried out in the best possible manner.
 - After the Prosecutor has collected enough evidence, he or she must create an application to the Pre-Trial Chamber for an arrest warrant or summons.
 - The application must include the name of the person or any other information that identifies the individual, specific reference to the crimes within the Court's jurisdiction, a concise statement of facts and a summary of the evidence and other information which establishes the reasonable grounds that the person in question has committed a crime within the Court's jurisdiction.
 - From this information, the Pre-Trial Chamber judge or judges determines if the information provided by the Prosecutor is acceptable to issue a warrant. In order to do so, there must be reasonable grounds that the person committed the alleged crimes and that there is a chance that the person will not appear before the Court at the time of the trial, that the person will obstruct the investigation or that he or she will continue to commit the alleged crimes.
- Article 61 [Confirmation of the charges before the trial] also aids in assuring that the person being brought before the Court understands and knows what his charges are.
 - The Article specifically states, "within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."
 - It is also notable that the hearing shall be held with the Prosecutor present, as well as the defense counsel of the charged person. If the hearing is held in the person's absence, defense counsel may be assigned if it is in the interest of justice. The Prosecutor must give the person a description of the charges and a list of evidence that will be presented at the hearing at least 30 days before the hearing so that he or she (and counsel) may properly prepare a defense. In addition, if the Prosecutor is going to amend any of the charges before or after the hearing and before the trial, the accused must be informed of his doing so and given ample time to plan accordingly. Finally, it must be established that "substantial grounds," which are at a higher threshold than reasonable grounds, exist to believe that the person committed the alleged crimes.
- Article 56 [Role of the Pre-Trial Chamber in relation to a unique investigative opportunity].
 - This article specifically states that if there is a unique investigative opportunity, the Pre-Trial Chamber has the ability to take such measures

as to protect the rights of the defense. In addition, this article provides for the authorization of counsel for the person who has been arrested, or appeared before the Court.

- There is evidence that the Court is already utilizing the Pre-Trial Chamber in the fullest capacity. In the situation in the DRC, the Pre-Trial Chamber provided ad hoc counsel to ensure that the rights of the defense were maintained during the investigation.¹⁰

Comment

The investigative process of the ICC is detailed and intricate. The process serves two purposes. First, the process that must be followed when an individual is investigated by the Court ensures that he or she is made aware, at the earliest time possible, when charges are brought. It also establishes a high threshold of proof that must be met. This ensures that the individuals most responsible are tried, not lower-level individuals with less criminal responsibility. The establishment of the Pre-Trial Chamber may have been one of the most positive and proactive steps that the ICC has taken in regard to defense counsel.

2. The Right to be presumed innocent until proven guilty beyond a reasonable doubt

Issue at the Tribunals

- Article 20 of the ICTR Statute, and Article 21 of the ICTY Statute [Rights of the Accused], both provide for a presumption of innocence for a defendant; the statutes of the tribunal stop with this statement.

Steps Taken by the ICC

- Article 66 (1) [Presumed innocent until proven guilty] also provides for a presumption of innocence. In the Rome Statute, however, this presumption forms the basis of a separate article in and of itself, adding to its apparent importance. This article states clearly and emphatically that the burden of proof is on the Prosecutor to prove the guilt of the defendant beyond a reasonable doubt.

Comment

Placing the onus of proof explicitly on the Prosecutor to prove his/her case beyond a reasonable doubt is quite possibly the most fundamental of the rights that an accused should be guaranteed. It also gives true effect to the right to remain silent, since an accused clearly has the option of saying nothing in his or her defense, and the onus will remain on the Prosecutor to prove the accused's guilt beyond a reasonable doubt.

3. The Right to a Determination of the Appropriateness of Interim Release

Issue at the Tribunals

¹⁰ The International Criminal Court, Situations and Cases: DRC, "Decision on the Prosecutor's Request for Measures under Article 56," Pre-Trial Chamber I, 1 June 2005, available at http://www.icc-cpi.int/library/cases/ICC-01-04-35_En.pdf.

The language of Rule 65 [Provisional Release] of the RPE-ICTY/R originally had very limited provisions regarding interim release. The presumption was that the accused would be held pending his or her trial, and would only be released on an interim basis upon an order of a trial chamber and under exceptional circumstances. If such circumstances warranted his or her release, the Trial Chamber could impose such conditions upon such release as it deemed appropriate, including the imposition of bail and any other conditions considered necessary to ensure his or her presence at trial and the safety of "others."

Steps Taken by the Tribunals

- Rule 65 [Provisional Release] of the RPE-ICTY/R was amended to allow individuals to be provisionally released so long as they met certain requirements and it was believed that they would return to stand trial. The amended Rule also describes in detail how this decision can be appealed and the criteria that must be followed if such an appeal is made.

Steps Taken by the ICC

- The Rome Statute did not have to wait for its amendment to address the issue of provisional, or interim, release. Article 59 [Arrest proceedings in the custodial State] and Article 60 [Initial proceedings before the Court] address the arrest of accused individuals and whether interim release would be an option.
- Article 59 specifically states:
 - The Article provides that the "person arrested shall have the right" to make a request for interim release and that the Pre-Trial Chamber must be notified of such a request if the custodial state deems that there are circumstances to grant interim release.
 - The accused shall be brought promptly before the Court, "the person's rights have to be respected" and the person must be arrested in "accordance with the proper process."
 - In addition, if the individual is granted interim release, the Pre-Trial Chamber may request to receive periodic updates of the status of the release.
- Article 60 states that if the person does not satisfy the requirements set forth in Article 58(1), the Pre-Trial Chamber shall release the individual with, or even without, any conditions on that release.
 - This Article also mandates that the Pre-Trial Chamber will review its ruling of release, by its own accord or by the request of the Prosecutor or that person, and can therefore modify its ruling.
 - Finally paragraph 4 makes it overtly clear that the Rome Statute would not allow the person in question to remain detained for an unacceptable amount of time. It states: "The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions."

Comment

These articles are a step toward ensuring that the persons brought before the Court are not detained for unfair and unreasonable lengths of time before charges are confirmed, as was often

the case with the tribunals. The Rome Statute also made a fundamental change to the nature of the accused's right with respect to interim release.

4. *The Right to a speedy trial*

Issue at the Tribunals

Of all the internationally recognized rights for the accused that were not maintained properly degree at the tribunals, the right to a speedy trial was among the most cited. Defense counsel at the ICTY and ICTR have protested the length of time the judicial proceedings take - as much as 5 years for the gathering of evidence, and then 9 months to 2 years for the actual trial. There has been a great deal of criticism that the proceedings, at all stages, take too long.

- Stephane Bourgon, who is the President of the Association of Defence Counsel¹¹ (lawyers practicing at the tribunals) and has practiced before the ICTY,¹² has highlighted the problems with the ICTY's functioning from a defense perspective:
 - Accused individuals spend a long time in detention before their trials begin. The defense has charged that the length of time detainees are held is “unreasonable.”
 - The length of the proceedings inhibits reconciliation and a successful return to peace.
 - Extended proceedings also affect credibility and increase cost.
- Judge Patricia M. Wald, ICTY Judge from 1999-2001,¹³ states her own observations why the proceedings are so lengthy:
 - Some witnesses have to travel from far away, especially since the crimes occurred in many different locales.
 - It is difficult to even obtain the witnesses since many of them are living under assumed names. In addition, some refuse to appear in court.
 - Live testimony is favored by the tribunals and is very expensive and time consuming.
 - Locating and exhuming mass graves may take an extremely long time.
 - The amount of time that is necessary to translate all court documents into the various languages prolongs the process.
 - Conducting separate trials for individual defendants rather than joining them in one trial for crimes associated with the same events lengthens the process.¹⁴

Steps Taken by the Tribunals

In order to address this issue, the tribunals have amended their respective statutes and Rules of Procedure and Evidence (RPE-ICTY/R). These include:

¹¹ The Association of Defence Counsel is not an organ of the ICTY, but is an independent professional association that assists the tribunal. The association will be discussed in detail later.

¹² Bourgon, *supra* note 6.

¹³ Patricia M. Wald, “ICTY Judicial Proceedings -- An Appraisal From Within,” *Journal of International Criminal Justice*, ICJ 2.2(466), June 2004.

¹⁴ Wald states: “While I was at the Tribunal, three separate proceedings, involving eight defendants, were going on with respect to a single attack on the small village of Ahmici and the findings of the various chambers on the same factual disputes were not always readily reconcilable.” *Id.*

Chambers:

- The creation of another Trial Chamber.
- Expansion of the shared Appeals Chamber of the ICTR/Y. Security Council (SC) Resolution 1329 (2000) provided for the expansion.
- The creation of “joinder” trials (trying multiple defendants together based on the same events). The ICTR and ICTY have utilized these joinder trials extensively. (For instance, the Butare, Government and Military Cases in the ICTR, and the different concentration camp cases, such as Susica, Omarska and Keraterm in the ICTY). Rule 48 *bis* [Joinder of Trials] was added to the RPE-ICTY/R.
- The addition of *ad litem* (auxiliary) judges in order to aid the Chamber judges with the proceedings. The addition of these judges was pursuant to SC Resolution 1431 (2002). In 2003, Resolution 1512 was adopted, which changed the number of *ad litem* judges from four to nine.¹⁵
- The Security Council also authorized the *ad litem* judges to serve at the pre-trial stage.
- Rule 15 *bis* [Absence of a Judge] of RPE-ICTY/R was added to allow for the continuation of trials although one or more of the judge may be absent. The Rule does set parameters around the period of time that this may occur (only 5 working days). The Rule also states that the other judges must determine that it is in the interests of justice to continue the trial without the absent judge.

Trials:

- The Pre-Trial Stage, as discussed above, was created.
- Rule 65 *bis* [Status Conference] of the ICTR/Y was added which would allow the parties to confer in order to ensure that the trial was moving along expeditiously.
- A “twin-tracking” system was created to allow one trial to use the down time of another.¹⁶
- Rule 71 [Depositions] of RPE-ICTY/R was amended in 2000, removing the requirement that depositions may be used only if “exceptional circumstances” are found.
- In 2000, Rule 92 *bis* [Proof of Facts other than by Oral Evidence] was added to the ICTY/R Rules of Procedure and Evidence to allow transcripts in one trial to be used in another, so long as they proved matters other than the “acts or conduct” of the accused.
- Expediting the transfer of middle and lower level officials to national courts. The RPE-ICTY state that the President may establish a Referral Bench whose purpose is to assess whether an accused may be transferred to the authority of a state and tried by a national

¹⁵ Wald states, “A UN-appointed expert group, as well as the ICTY's own Judges, have responded with revised rules, strengthening judicial control over the number of witnesses and the length of their testimony, with increased emphasis on streamlining lines of proof in pre-trial proceedings, and, finally, with the addition of a corps of 29 *ad litem* judges, to sit on trials alongside the regular Judges.” *Id.*

¹⁶ “‘Twin- tracking’ ” implies that two trials are heard in consecutive slots, for instance according to the following patten: Trial A five weeks, trial B five weeks, trial A five weeks, etc. Defense Counsel in trial A will leave Arusha while trial B is heard. The purpose of this system is to use inevitable breaks during one trial to ensure progress of another case. Such breaks allow the Prosecution and the Defense to prepare for the next stage of the proceedings (for instance by interviewing witnesses). The International Criminal Tribunal for Rwanda, “ICTR Completion Strategy,” 24 May 2005,” available at <http://www.ictr.org/ENGLISH/completionstrat/s-2005-336e.pdf>.

court. It must “consider the gravity of the crimes charged and the level of responsibility of the accused.”¹⁷

Steps Taken by the ICC

- The Pre-Trial Division of the ICC has been discussed above. A consequence of the Pre-Trial Chamber is that it can carry out many of the functions that the pre-trial phase of the tribunals was unable to do, thereby ensuring that the accused will not be held for an unreasonable period of time prior to trial.
- In reference to those individuals that were transferred to national courts, the language of Articles of the Rome Statute automatically limits the Court’s reach to only those individuals who commit the gravest crimes and who hold the greatest responsibility.

Comment

It appears that a defendant's right to be tried as expeditiously as possible is at the forefront of the ICC's concerns. The ICC has acknowledged the various problems associated with very long trials at the tribunals and has taken a number of steps towards assuring a speedy trial process. The ICC's Pre-trial Chamber is intended to mitigate some of the problems faced by the two ad hoc tribunals. In addition, the Court is independent; it never has to share resources with another judicial entity, unlike the tribunals that shared a Prosecutor and still share the Appeals Chamber.

Second, "Equality of Arms" must exist between the Prosecution and Defense Teams

The second necessary component to have a good defense is that "equality of arms" must exist between the Prosecution and Defense teams, in addition to the fundamental requirement of the necessary rights for the defense’s clients. Defined simply, equality of arms means that the defense and the prosecution should enter into the legal battle "armed" equally, that is, with equal status before the court, equal access to its resources, and equal support facilities.

Fairness and equal access before the two tribunals have been contentious issues. There has been a great deal of criticism that the defense seriously lacks equality with the Prosecutor. Although both the statutes of the ICTY/R, in Articles 20 (1) and 19 (1) respectively, refer to the right to “equality of arms,” there have been multiple instances where defense counsel clearly lack the resources and support afforded to the Office of the Prosecutor. In referring to the defense, the ICC states “[i]t is vital to ensure equality of arms between the prosecution and the defense in the interests of a fair judgment being reached. The international community’s aim of protecting the fundamental human rights of victims and of administering justice can only be furthered if all parties are provided with an equal opportunity to prove or disprove allegations in a fair and justifiable manner.”¹⁸

¹⁷ Guilty pleas were also encouraged (while quite a few of the defendants in the ICTY pled guilty, there have only been three accused that have done so at the ICTR thus far). In exchange for the guilty pleas, some charges would be dropped or reduced. Part of the plea agreement included the accused providing detailed statements of their actions, naming the names of other individuals involved and testifying in the trials of their associates.

¹⁸ The International Criminal Court: Defense, available at <http://www.icc-cpi.int/defence.html>

The five rights below are among the necessary components to ensure that “equality of arms” exists between the defense and prosecution. Some were not adequately addressed or provided for at the tribunals.

1. *The right of the defense team to have total sharing of evidence, especially exculpatory evidence, and disclosure from the Prosecutor as required by the Court’s rules and the Statute*

Issue at the Tribunals

One of the most cited criticisms has been that information, sometimes exculpatory, has been withheld by the Prosecutor from the defense and the accused.

- Daryl A. Mundis, a trial attorney for the Office of the Prosecutor at the ICTY, discusses the *Krstic* case: the defense argued that important and valuable exculpatory material disclosed during trial was buried underneath a host of other material provided at the time and therefore the Prosecutor breached Rule 68 of the RPE-ICTY [Disclosure of Exculpatory Evidence]. The Appeals Chamber held that unless there is an order from the Trial Chamber, Rule 68 does not require the prosecution to identify the material as exculpatory. However, the chamber did state that the fact that there is no overt obligation on the prosecution to identify the material as exculpatory does not inhibit the accused from arguing that he suffered prejudice because of the Prosecutor's failure to do so.¹⁹
- In the case of *Tihomir Blaskic*, the defendant was convicted of war crimes and received a 45-year sentence. In the Appellate decision, Blaskic’s sentence was reduced to nine years, and he has since received an early release. This is because in this case the Prosecutor actually withheld exculpatory evidence from the defense.²⁰

Steps Taken by the Tribunals

The tribunals have taken certain steps to amend their respective Rules of Procedure and Evidence to achieve equality of arms between the defense and the prosecution:

- The Rule 66 [Disclosure by the Prosecutor] of the RPE-ICTY/R was amended so that the Prosecutor is now required to turn over "copies of materials which supported the indictment" to the defense as soon as possible after the initial appearance of the accused. If the defense requests it (subject to some restrictions), the Prosecutor must also allow the defense to inspect "any books, documents, photographs, and tangible objects in his custody or control, which are material to the preparation of the defense." The exception to such disclosure would be if it prejudiced further investigations of the tribunal or the security interests of any state.
- Specifically, Rule 66 of the RPE-ICTR was also amended to dictate time limits for handing over the material.

¹⁹ Daryl A. Mundis and Fergal Gaynor, “Current Developments at the Ad Hoc International Criminal Tribunals,” *Journal of International Criminal Justice*, December 2004.

²⁰ In the case of Kordic, the Appeals Chamber affirmed his sentence of 25 years.

- The ICTR and ICTY amended Rule 68 [Disclosure of Exculpatory and Other Relevant Material] of their respective RPEs. Rather than merely state that the Prosecutor must disclose exculpatory evidence “as soon as practicable,” the rule was expanded upon and other provisions were added to place more specific obligations on the Prosecutor.²¹

Steps Taken by the ICC

Unfortunately the language of the Rome Statute, just as the original RPEs of the tribunals, contains limited provisions for handing over evidence, and is similar to the language of the tribunals’ legal documents.

Comment

Although the tribunals went to great lengths to amend the above rules in their respective RPEs, they did not accomplish this until 2004. Since the Rome Statute was created in 1998, and the Rules of Procedure and Evidence of the ICC were adopted in 2002, the framers of these legal documents could not examine or consider the potential impact of the changes that the tribunals would make years later, nor were they able to use the hindsight provided by the actual experiences of the tribunals when initially drafting the articles and rules. However, the fact that the articles do not state extensively how and when evidence should be handed over may not become a problem. The manner in which the Court’s proceedings are carried out will determine whether or not the Statute will ever need to be amended in these regards. In addition, this could be handled by changes to the RPE or the Court’s regulations, which have already been negotiated by the ASP and are far easier to amend.

2. ***The right of the defense team to be able to conduct investigations without governmental or other interference, as well as adequate and unrestricted access to the accused, in order to mount an adequate defense***

Issue at the Tribunals

At certain periods, the governments involved have been extremely obstructive with respect to defense investigations. Especially in the countries in which the crimes were committed, the new governments and the country’s citizens view the defense team negatively because they feel that they are helping those who have committed grave crimes against their own people. There are serious examples of this in both the ICTY and the ICTR.

Steps Taken by the Tribunals

Apart from the Security Council Resolutions, the tribunals cannot do much in terms of this issue. The tribunals are under the umbrella of the United Nations, and therefore do not have their own police force or local authorities to ensure that their work is not disrupted or inhibited. The United Nations can only appeal to their sovereign members to aid the tribunals in their

²¹ For instance, the Prosecutor, where possible, must make available to the Defense “collections of relevant material held by the Prosecutor,” in electronic format and provide the corresponding computer software so that the Defense can “search such collections electronically.” In addition, if confidential information is given to the Prosecutor that would suggest the innocence or mitigate the guilt of the accused, the Prosecutor must, at the consent of the provider, make the information, or the fact of its existence, available to the accused.

work, but cannot compel them to do so. It is especially difficult if those who have inhibited the work of the tribunals are the governments of the states themselves.

Steps Taken by the ICC

- Part 9 of the Rome Statute, “International Cooperation and Judicial Assistance,” creates an obligation on those States that ratify the Statute to not interfere or inhibit the work of the Court. It is their duty to assist the ICC in carrying out its functions. The Court may request States Parties to arrest and surrender persons to the ICC, identify and provide information as to the whereabouts of items and individuals, question persons being investigated and assist in the service of documents.
- Furthermore, the Agreement on Privileges and Immunities was created in addition to the obligations set forth in the Rome Statute. The agreement came into effect in July 2004, and to date 25 countries have ratified and 62 countries have signed the document. It gives court officials and staff certain immunities and privileges so that they may conduct their work independently and adequately. By ratifying this agreement, countries agree to respect the mandate of the Court’s staff and officials so that their work is not compromised or affected.²²
- The Prosecutor has already issued statements concerning government cooperation in reference to Sudan: “[the] investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice. Traditional African mechanisms can be an important tool to complement these efforts and achieve local reconciliation.”²³
- Positive governmental assistance is also very evident in Uganda. In September 2004, the Prosecutor concluded cooperation agreements with Ugandan government bodies. The Ugandan parties agreed to facilitate investigations and execute arrest warrants. The Prosecutor is especially concerned with traditional reconciliation methods and outreach in the country. He has met with leaders of the Acholi tribe, one of the groups most often targeted by the Lord’s Resistance Army (LRA), in order to discuss with them the purpose of the Court in general and to receive their feedback on the current situation.²⁴

Comment

By reaching out to the people of these countries and creating strong connections with their respective governments, the Court will be seen as a positive force in the area, unlike the previous experience with the tribunals. The Agreement of Privileges and Immunities also creates an agreement between the Court and its member states that the states will observe the rights of the Prosecution and defense teams to conduct their investigations on the ground. Furthermore, the states that become members of the ICC are taking the proactive step to do so. They therefore obligate themselves to aid the Court in whatever capacity they can.

²² The specific provisions that are afforded to defense counsel are discussed in the companion paper.

²³ The International Criminal Court: Situations and cases: Darfur, “The Prosecutor of the ICC opens investigation in Darfur, ICC Press Release, 6 June 2005, available at http://www.icc-cpi.int/pressrelease_details&id=107.html.

²⁴ The International Criminal Court: Situations and cases: Uganda, “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC,” ICC Press Release, 29 January 2004, available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.

3. ***The right of the defense team to feel an important and valued part of the Court's work, therefore mitigating any feelings of isolation, and to have the facilities necessary to carry out their functions adequately***

Issues at the tribunals

An argument made by defense counsel is that they often feel isolated from the overall life of the tribunals, whereas there is a strong sense of camaraderie between the prosecutors, judges and the administrators. The attorneys that represent the defendants are often very detached from the tribunals in general. In addition, no office of defense counsel or any proper defense facilities have been established at the tribunals.

- Defense counsel are disjointed and far removed from the tribunals. While the Prosecutor, judges and administrators have tangible offices and resources, the defense is an amorphous entity without the same level of cohesion. Consequently, the defense counsel must establish an office at the tribunals, which is a costly and time-consuming undertaking. In addition, defense counsel usually do not have support staff waiting and ready for them. They are truly on their own.
- The current Deputy Registrar of the ICTY notes, "one can hardly fail to notice that in its very physical layout, with the Prosecutor and Court located 'cheek by jowl' and defense counsel situated generally off site, there is perhaps a metaphor for where the defense fits into the scheme of things."²⁵
- Furthermore, *Internews*, an organization that disperses international and independent news media, suggests that the defense lawyers at the tribunal are secluded:
 - "Defense Counsel spend short intervals in Arusha, and arrive without the helping hand which awaits the UN employees who work for the Prosecutor, Registry and Chambers. Other Tribunal Staff form a small community in Arusha. It is one from which the defense counsel are largely excluded."²⁶
- In response to the isolation of the defense, an article in *Harvard Law Review* states that, "the inevitable result is that the culture of international criminal law excludes the defense."

Steps Taken by the Tribunals

There has been no action on the part of the ICTR to address this issue. The ICTY now has a professional bar association (see discussion in **Category II, Issue 3**, below) which has somewhat supported defense counsel in their tasks.

Steps Taken by the Tribunals or the ICC

The companion paper to this one discusses the procedural gap that is perceived to exist in the Rome Statute along with the attempts by the Court to remedy the situation. These steps include the creation of the Defense Support Section under the Office of the Registrar to handle

²⁵ Michael P Scharf and Christopher M. Rassi, "Do former Leaders Have an International Right to Self-Representation in War Crimes Trials?," *Ohio State Journal on Dispute Resolution*, 2005.

²⁶ Kate Gehring, "Getting to the Heart of the Matter – Defense Counsel Talk About Due Process at the ICTR," *ICTR Reports: Internews*, available at www.internews.org.

administrative and logistical aspects of the defense, and the establishment of the Office of Public Defense Counsel per the Regulations of the Court, which will handle all the legal aspects that the Defense Section does not. These institutions, along with other proactive entities, are discussed more completely in the companion paper. However, for the purposes of this paper, it should be noted that these institutions do exist, constitute attempts by the Court to provide adequate facilities for defense counsel, and are an effort to make the defense feel like an integral part of the Court.

Comment

With respect to the ICTR, it may be too late to address the issue of defense counsel detachment from the rest of the tribunal. The Completion Strategy indicates that all proceedings must be completed by 2010, which is only five years away. The ICTY has created a professional defense association that the Rwandan tribunal may be able to utilize as well for the remainder of its tenure (see discussion in **Category II, Issue 3**, below). At this stage, however, the time and resources do not exist to create an Office of Defense for the tribunals. The remaining resources should be used to make the proceedings as fair as possible.

The experience of an isolated defense may not occur at the International Criminal Court, however. The Court's permanence, in itself, will create a sense of community and camaraderie among its different actors. There are also plans for the creation of an ICC Office of Defense Counsel (see discussion in **Category II, Issue 3**, below), which may alleviate or curb completely the problem of defense counsel isolation. It is to be hoped that the defense lawyers will not feel as detached from the ICC as they did with the two tribunals.

4. ***The right of the defense to have support facilities that are comparable to those enjoyed by the Prosecutor, including assistance from the staff of the Court devoted to it alone and not subject to conflict of interest because of the sharing of facilities with the victims or the Prosecutor, resources for onsite investigations at least equal to those of the Prosecutor, and access to legal research of equal quality***

This topic is discussed in great detail in the companion paper in the section entitled, "Steps to fill in the Gap."

Comment

If the Prosecutor enjoys access to facilities that are never made available to the defense, there is no equality of arms; such access must clearly be accorded in equal measure to the defense. It is imperative that such access be accorded at the same time and as effectively as it is accorded the Prosecutor, or the delay or compromise in quality could affect the outcome of the prosecution and prejudice the accused.

5. ***The right of the defense to function with Rules of Evidence that are not biased toward the Prosecution and against the accused, and to participate in revisions and amendments to such rules.***

Issues at the tribunals

Various defense counsel have identified several areas where the procedures of the tribunals may deny the accused a fair trial: (i) the use of written statements, audiovisual presentations, and depositions as evidence, and (ii) witness anonymity.

(i) Written statements, audiovisual presentations, and depositions as evidence:

- Rule 92 *bis* [Proof of Facts other than by Oral Evidence] of the ICTY/ICTR allows for written statements, audiovisual presentations and depositions as evidence. This has certain implications:
 - The judges cannot question the witness, or evaluate his or her credibility.
 - The defense counsel cannot cross-examine the witness.
 - The defendant cannot confront his or her accusers.
 - The use of hearsay evidence is allowed, and may be the basis for conviction.
- The defense argues that the judges should not give more weight to these statements than to the live testimony of witnesses.
- A new procedure developed at the ICTY, in which judges are given a copy of the witness statement before the witness is called, also raises some concerns. Bourgon writes, “whereas the dossier provided to continental judges contains both incriminating and exculpatory evidence... which has been put together with some input from the Defense, the statement given to the ICTY Judge contains only incriminating evidence and it has been prepared and drafted by the Prosecution without the benefit of any input from the Defense... [it is] not unusual for live witness evidence to be significantly different from that contained in statements obtained by representatives of the Office of the Prosecutor.”
- It is extremely important for defense counsel and the judges to be able to question the authors of these statements. The defense’s criticism is that in these trials, cross-examination of witnesses becomes critical, which, in turn, requires that they be given not only the necessary resources to investigate the facts and the issues, but also the opportunity to conduct an effective cross-examination. In the tribunals, they were not always afforded this opportunity.

(ii) Witness Anonymity:

- The ICTY/R permitted witness anonymity, therefore the defendants did not know who was testifying against them.

Steps Taken by the ICC

- The Rules of Procedure and Evidence²⁷ (RPE) 68 [Prior Recorded Testimony]: The Rome Statute does allow prior recorded testimony but only if both the Prosecutor and the Defense have the opportunity to cross-examine the witness at the time of the recording if the witness is not going to appear in court. If the witness who has given previously recorded testimony will be at the trial, the witness will not oppose the submission of the testimony and the Chamber, Prosecutor and the Defense have the opportunity to cross-examine him or her during the proceedings.

²⁷ The International Criminal Court, The Official Journal of the ICC: “Rules of Procedure and Evidence,” available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf.

- The framers of the Statute understand the importance of protecting witnesses at every stage of the trial and took great measures to ensure their peace of mind. Rule 68 of the RPE states that the ability to cross-examine a witness must be in accordance with Article 69(2) [Evidence] of the Rome Statute. Article 69(2) states that witness testimony must be given in person, or can be video-recorded, or documents can be submitted if it falls under Article 68 [Protection of the victims and witnesses and their participation in the proceedings]. Article 68(2) specifically states that written testimony as well as testimony *in camera* are allowed in order to protect witnesses. This article ensures that the testifying witness does not have to physically confront the defendant, especially in cases where sexual violence occurred. Article 69(2) clearly states that this must all be conducted without prejudice to the defendant.
- Anonymous testimony might encourage false accusations or cases of mistaken identity, leading to a wrongful conviction for war crimes or crimes against humanity. These are valid concerns competing with the protection of witnesses, and the ICC is clearly aware of the problems faced by the tribunals. Therefore, the ICC does not allow complete witness anonymity. As can be seen, the ICC has taken great steps to balance the protection of the witness and the rights of the accused. For instance, the public may not know the identity of a testifying witness, but the defendant and his counsel know who is testifying against him. In addition, the ICC does allow hearsay evidence, but judges must exclude it if they are persuaded that it lacks probative value.

Comment

Of course, it is arguable that defendants who are on trial for war crimes or crimes against humanity are quite likely to be people who would seek retribution against their accusers. If witnesses have this perception and concern, it will be difficult to persuade them to give testimony unless steps are taken to protect them, including ways to testify other than actually physically appearing in court. This balancing is unavoidable, and requires that all participants in these trials conduct themselves with integrity and impartiality, keeping in mind at all times that the accused may well be innocent.

In addition, although Article 52 of the Rome Statute does not provide for the defense counsel to be able to amend the Regulations of the Court, the ICC has allowed defense counsel to offer remarks regarding specific aspects of the Court's legal documents, such as the seminars that have been conducted in relation to the Regulations of the Registry. This type of participation by defense counsel should be encouraged and expanded.

Category II - Requirements Fundamental to the Procedural Status of Defense Counsel

The following requirements relate to the general status, quality and standing of defense counsel at the ICC, as brought about or affected by the general rules, facilities and procedures of the Court.

- 1. The Rules for application by and admission of defense counsel to the ICC must be clear and precise, and administered without discrimination. In addition, the Rules***

relating to discipline, conduct and ethics, both interim and final drafts, must be prepared and revised in full consultation with the defense counsel and their associated ICB or other legal organization.

Issues at the Tribunals

The qualifications of the defense counsel who have appeared before the two tribunals have been examined and accepted, but with considerable reservations. Criticisms include (i) inadequate credentials, (ii) lack of knowledge of the relevant international laws, (iii) compromised quality due to lower pay scales, and (iv) splitting of fees between defense counsel and their clients.

Inadequate credentials:

- A common criticism of the tribunals is that they require little expertise or knowledge from defense counsel. *The Harvard Law Review* states, “The only substantive requirement, in fact, is that an attorney... [be] admitted to the practice of law in a State, or [be] a University professor of law.”
 - Rule 44 (a) of the RPE-ICTY adds that the individual should be a member in good standing of an association of counsel that practices at the tribunal.²⁸ Rule 45 (a) of the RPE-ICTY states that the individual must also have 7 years of relevant experience (10 in the ICTR). However, this language was not included in the original RPE-ICTY/R; these provisions and qualifications were added subsequently.

Quality of defense is compromised due to low pay scales:

- In addition, it was alleged that in the early stages of the tribunal, the quality of the defense counsel was inadequate due to the fact that the compensation offered was very low compared to the fees that American and European lawyers would charge.
 - According to the *Harvard Law Review*, the Registry of the Tribunal appeared to be arbitrarily selecting defense counsel for the accused. It appeared that they were more likely to choose a “non-Western attorney for whom the uniform pay scale is disproportionately high.” In return, defense counsel are obligated to the Registrar and will be deferential to him. It is extremely unfair for the Registry to have this power over defense counsel.
 - The Registrar would also expedite payment to defense counsel if counsel promised to return a portion of their fees.
 - It can be established that some of the defense attorneys were chosen because of their willingness to pay the defendants back some of the fees that they would receive, rather than for their credentials or their legal skills.

²⁸ Rule 44 (a) of the ICTR still does not state that the individual should be a member of an association of counsel.

Steps taken by the tribunals

- The defense counsel fees were raised and more lawyers became interested in taking the cases. However, fees were still disproportionately low compared to those paid to lawyers in western countries.²⁹
- Each tribunal created its own “Code of Conduct,” but this was not until a couple of years after the tribunals were created. The Code of Professional Conduct for the ICTY entered into force in 1997, four years after the tribunal was established and a year after the first trials commenced. The Code of Professional Conduct for the ICTR entered into force in 1998, three years after the tribunal was created, and a year after its first cases began.³⁰

Steps Taken by the ICC

Qualifications:

- Rule 22(1) of the RPE [Appointment and qualifications of Counsel for the defense] states that counsel must be competent in criminal law and procedure, as well as possess the necessary relevant experience in criminal proceedings, and be fluent in either of the working languages of the court - English or French.
- The Rule provides further that defense counsel may be assisted by other persons, including professors of law, but he or she must have had relevant experience. Therefore, the language of the Rule seems to indicate that professors may only assist the defense counsel, rather than be formally qualified to represent the defendant.
- The Registrar created the draft of the “Code of Professional Conduct for counsel before the ICC.”³¹ This document outlines the requirements for counsel and also highlights the standards that the counsel must abide by. The Code of Conduct is being created not only for the defense counsel, but also for the prosecution, the judges and the Registry. This document is setting a standard for all lawyers to meet, and will also serve as an internal enforcement mechanism for these entities by placing checks on one another.³²
- The Regulations of the Registry, although still in draft form, also provide for how the Registrar should maintain a list of counsel. Regulation 172 [List of counsel] provides

²⁹ In the ICTY, an hourly rate of \$80-110 (US) could be billed depending on the lawyer’s experience. There was a maximum of 175 hours that the defense could bill for. This was the case during 1995-2001. In 2001, however, the notion of a “ceiling” payment regime was introduced for the appellate and pre-trial stage. This was in a progression towards a lump sum payment. The amount of the ceiling depended on the level of complexity of the case. This ranged from Level 1 (medium) to Level 3.5 (extremely difficult/ leadership). A meeting is held beforehand between the Defense, the Registrar and the Office of the Prosecutor in order to determine the difficulty of the case, the number of OTP witnesses, etc. The trial is then broken down into the three stages and a lump sum is decided upon for each stage. In 2002, the tribunal decided to yet again alter its payment method and install a lump sum payment schedule for the trial phase. At the ICTR, the system is very similar. The counsel is paid based on experience. This had remained pretty much the same since the commencement of the tribunal. The hourly range is between \$90-110 with a maximum of 175 hours total that may be billed. This holds true for all phases of the trial. Statistics taken from: http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf.

³⁰ The International Criminal Tribunal for Rwanda, Code of Professional Conduct of the ICTR, available at <http://www.icttr.org/ENGLISH/basicdocs/codeconduct.htm> and Code of Professional Conduct of the ICTY, available at <http://www.un.org/icty/legaldoc-e/index.htm>.

³¹ The International Criminal Court, “Draft Code of Professional Conduct,” available at <http://www.icc-cpi.int/library/asp/ICC-ASP-3-11-Rev1-English.pdf> [hereinafter Draft Code].

³² The status of the Professional Code of Conduct for the Defense is discussed in the companion paper in further detail.

for the provisions that must be followed when maintaining a list of counsel. The provisions of the list include the name of counsel, the name and location of the bar association, and the language spoken by counsel. The Regulations also describe the requirements that must be made to assign assistants to counsel to aid the defense.³³

- The website of the ICC also provides the list of defense counsel that the Registrar maintains before the ICC. The website contains the application and details the necessary requirements to apply for a defense position. The website, in addition to the Code of Conduct, provides clear guidelines as to what the requirements are for defense counsel.
- This stringent and demanding set of qualifications for defense counsel before the ICC means that the likelihood of a defendant having the credentials to represent himself is much lower in the ICC as compared to the tribunals.

Low Pay scales

- The fees for the defense would be based on the salaries paid in the OTP and those paid at the ad hoc tribunals. The fees will be increased by 40% to compensate for costs such as setting up an office, travel costs, office and administrative work, as well as funds to pay for legal aids. This method of payment will apply to the pre-trial phase, the trial phase and the appeals phase. This ensures that certain principles such as “equality of arms” (see above) and objectivity would govern payments rendered for the defense.
- In terms of the ICC, the Assembly of States Parties (ASP) mandates that these requirements should be published and all aspects of the schedule, including costs, should be spelled out. This will make payments clear and transparent for all parties concerned, included the defense counsel. This payment system is available in the “Report to the Assembly of States Parties on Options for Ensuring Adequate Defense Counsel for Accused Persons” which was prepared by the Committee on Budget and Finance.
- The payment schedule is still under discussion.³⁴

Comment

Any assumption that non-Western lawyers are inferior in quality because the pay scales in their own countries are lower is very condescending. The work history and legal experience of the lawyer is a better measure of quality. Inevitably, it will be more difficult to attract competent Western defense counsel who are used to a higher pay scale, but there are other benefits than financial compensation to appearing before the ICC. These include prestige in the international community as well as personal satisfaction. The ICC should continue to stress the qualifications of the defense counsel as the foremost consideration.

The Code of Conduct is critically important to enabling the ICC to put a stop immediately and forcefully any perceived corruption displayed by defense counsel. Apart from issues of dishonesty, this perception could damage the reputation of the court beyond repair by making it appear that an acquittal can be bought with enough money. The court should have zero tolerance for any such incidents that might come to light, including barring the defense counsel from any future ICC proceedings.

³³ The companion paper discusses the current status of the Regulations of the Registry.

³⁴ Draft Code, *supra* note 31.

By including provisions in the Regulations of the Registry detailing the necessary functions of the Registrar, the Court has made the standards that defense counsel must meet and observe quite explicit. In addition, by making the list of requirements and standards available on the website, the ICC, through its clearly stated standards, appear both transparent and accessible.

2. *Defense counsel must be provided adequate training in the relevant international law, including procedure and jurisprudence, so that they can provide the best defense possible for their clients*

Issues at the Tribunals

Lack of knowledge of the relevant international laws:

- Questions have arisen as to whether defense counsel really understand the appropriate international and human rights laws:
 - An example of this is the appellate decision in *Prosecutor v. Drazen Erdemovic*. The accused was indicted on one count of crimes against humanity and one count of war crimes. Erdemovic pleaded guilty to crimes against humanity and the prosecutor dropped the war crimes count. The trial chamber affirmed the guilty plea and sentenced Erdemovic to ten years in prison. Erdemovic appealed the sentencing judgment. The Appeals chamber determined that crimes against humanity are clearly much more serious and grave than war crimes. They declared that Erdemovic's lawyer could not possibly have understood the law if he advised his client to plead to the greater charge. The chamber stated that, “neither the defendant nor his attorney had possessed a thorough understanding of the elements of either crime.”³⁵
- Some lawyers have never been exposed to the common law system and vice-versa. Therefore, there are lawyers who must learn how to cross-examine a witness since they are accustomed to the judges doing so in the civil law system. In some cases, the counselors are learning how to do this a few days before cross-examining a witness before the tribunal.
- Francois Roux, a French lawyer, human rights activist and the defense counsel in the Bagilishema Case (the only individual in the ICTR to be acquitted thus far) states: “the Tribunal was created in exceptionally difficult circumstances... there is not yet a successful harmonization of common law and civil or continental law in Tribunal Practice.”³⁶
- There has also been ongoing criticism that the proceedings do not provide a balanced mixture of common and civil law, and therefore have no real sense of continuity or cohesion.

³⁵ “Developments in the Law – International Criminal Law: III. Fair Trials and the Role of International Criminal Defense, 114 HARV. L. REV. 1982, May 2001 [hereinafter Fair Trials, HARV. L. REV.].

³⁶ Gehring, *supra* note 26.

Steps Taken by the ICC

- The framers of the Rome Statute were extremely meticulous and worked hard in examining and considering fully procedures from both common law and civil law. They went to great lengths to ensure a harmonious and effective blend of the best of both. To do this, they ascertained which legal system on a given point would produce the better result in the conduct of a fair trial.
- The Regulations of the Registry,³⁷ although a draft, also provide for training for legal counsel. Section 4 of the Regulations of the Registry [Training of Counsel] devotes an entire section of the Regulations to training of defense counsel. This section declares that the Registrar is responsible for this process, and that it is part of its functions to provide adequate training for defense counsel. Regulation 147 [Role of the Registrar] states that the Registrar, among other things, must provide “training materials, comprehensive information on the Court, and offer training with the aim of qualifying persons to train counsel.” Regulation 148 [Training Programmes] is also contained within the Regulations of the Registry. The Regulation states that, “the Registry shall develop a standard for training programmes aimed at fostering knowledge of the law of the Statute and the Rules.”

Comment

Clearly the blend of common and civil law was a deliberate choice, made out of respect for both systems of law and to give a voice to each. The resulting combination is an entirely new legal system, which is expected to find its own unique voice. Although there may be familiar elements in the process, counsel must approach it as a completely new and different system, and learn its necessary components. This process will simply take time as the court develops and acquires experience, but will have an overall positive impact on the quality of the defense counsel. It should also be noted that as a result of the Court’s permanence, the attorneys will have the time to learn from one another and to become accustomed to the different systems of law as reflected in the court’s own processes. Moreover, counsel will find elements of their own systems in the Court’s “blended” procedures and this will help them to understand quickly the unfamiliar elements and thus the procedure as a whole.

The draft of the Regulations of the Registry clearly demonstrates that the ICC realized the necessity to train defense counsel so that the accused can receive the best counsel possible. Although still in draft form, the Regulations have provided defense counsel the opportunity to comment, and the staff of the Registry has taken these comments into account when creating the final version.

The companion paper describes in detail the seminars that occurred in relation to the Regulations of the Registry.

³⁷ The International Criminal Court, Organs: Registry: Consultations, “The Draft Regulations of the Registry,” available at http://www.icc-cpi.int/library/organs/registry/RoR2005April_En.pdf.

3. *The tribunal and ICC defense Counsel should be able to organize themselves into a professional bar association*

Issues at the Tribunals

This issue is closely associated with the issue of defense counsel isolation and lack of facilities discussed above. No professional bar association or formal organization has been established at the tribunals. The isolation of the defense counsel may well be a result or outgrowth of the lack of a formal support structure.

- There is no professional bar to oversee the quality of counsel or to provide a venue in which they may mobilize and speak with one voice. This criticism is also related to the equality of arms issue. The defense is truly at a disadvantage.

Steps Taken by the Tribunals

- The Association of Defense Counsel (ADC-ITY) was created in September 2002. This organization represents the defense counsel practicing at the ICTY. It is not an organ of the tribunal, but an independent professional association. It is acting under Rule 44(A)(iii) [Appointment, Qualifications and Duties of Counsel] of the RPE-ICTY, which provides that the defense counsel must be “a member in good standing of an association of counsel practicing at the Tribunal recognized by the Registrar.” The association was adopted at the judges' plenary meeting in July 2002 and was then passed by the General Assembly of the United Nations.
- As of yet, there is still no such organization for defense counsel at the ICTR.

Steps taken by the ICC

- Rule 20(3) [Responsibilities of the Registrar relating to the rights of the defense] of the ICC RPE states that in order to properly manage legal assistance, the Registrar may confer with “any independent representative body of counsel or legal associations,” including an organization that may be established with the aid of the Assembly of States Parties. Rather than allude to such a representative body as the Rules of Procedure and Evidence did in the ICTY, stating that the defense counsel should possess membership in a recognized professional association, the Rome Statute clearly indicates that the Registrar should consult with outside organizations to ensure that counsel before the Court meet the highest legal standards.³⁸

Other Action Taken:

- The International Criminal Bar (ICB) has been created through the efforts of legal associations, bars and individual lawyers to represent defense counsel before the ICC.

Comment

Although lawyers and other legal associations were able to create the International Criminal Bar, this was not realized soon enough. The ability for the defense to mobilize and to have an association that independently represents their needs is a fundamental necessity. This

³⁸ The companion paper describes the provisions of the RPE in this regard in further detail. Please see it for further analysis.

association must exist outside and beyond the rules of the Court, but at the same time there should be established procedures in place for giving it recognition at the Court.

4. *Physical facilities or an office provided by the ICC inside the Hague for a representative of the International Criminal Bar or comparable legal organization, including the overt support and assistance of the Secretariat.*

Comment

As it currently stands, the International Criminal Bar is not recognized by the Court, but the Assembly of States Parties may shortly be determining if and when it wishes to designate the ICB as an association whose establishment it wishes to facilitate pursuant to Rule 20(3) of the RPE. Once the ASP so designates the ICB, a component of that designation should include facilities provided for the ICB at the Court.

In addition, the Secretariat should assist the ICB or lawyers/legal organizations to share information, insights and experiences so that a forum for discussion is created. This would facilitate the sharing of lessons learned and knowledge acquired.

Conclusion

It is self-evident that a defendant must be accorded equal status before a relevant Court – equal rights with the prosecution and equal access to the mechanisms of justice. This is necessary if the standard of complete objectivity and absolute impartiality is to be met. No less is acceptable in a court of law. And no less is true of the ICC than any other criminal court.

The individuals that come before the tribunals and the International Criminal Court are accused of committing crimes that are so abhorred by the international community that it may be very difficult for a judge to listen objectively to the defendant's side. *The Harvard Law Review* writes, "[b]iases toward conviction, such as judicial bias or ineffective appointed defense counsel, undercut the benefits of 'pro-defendant' rules and magnify the effects of rules that favor the prosecution."³⁹ If there are such biases toward a conviction in the operation of the ICC, the critical standard is not met.

This issue of necessary equal and equitable treatment before the law is one that will always exist in relation to international criminal law and the functioning of the International Criminal Court. It is imperative for the International Criminal Court to provide the most competent counsel that it can, thus ensuring defendants fair trials. It is also critical for the judges to be impartial, uphold the highest standards of behavior, and have impeccable credentials, so that the impartiality of the trial is never questioned and the Court's status never compromised.

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³⁹ Fair Trials, HARV. L. REV., *supra* note 35.