

Evolution or Revolution: The Defence Offices in International Criminal Law

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Introduction

The past 20 years have seen scrutiny, debate, and sometimes litigation over what resources are necessary to ensure fair trials; more specifically, what do Defence Counsel and teams need to ensure equality of arms with the Prosecution in presenting a case? While there is general consensus that “mere access to the courthouse doors” is not sufficient to guarantee a fair trial in the International Criminal Tribunals and Courts,² until now it has been a brick-by-brick building from the mere notion of a fair trial with Defence Counsel to the reality of the Defence possessing an institutional presence.

With the transition of the *ad hoc* Tribunals to the Residual Mechanisms we have reached a critical point in time that allows us to look back at the work of these trail-blazing institutions and take stock. In looking at the body of work created and the practices employed by these courts, we must also examine the structures in place to determine how the system served the actors within it or missed opportunities to do so. Importantly, we have the benefit of these institutions to apply to the continuing work of the permanent International Criminal Court.

The Legacy of the ad hocs

Since the inception of the first *ad hoc* Courts, academics, experts, politicians and civil society have debated the best system to ensure adequate representation of suspects and accused and how best to administer and support the Defence. Without doubt, each institution has had the same battles in constructing a Prosecution section that can meet the needs of the institution’s mandate; however, those discussions have been, for the most part, internal discussions of an organ of the Court.

The Nuremberg and Tokyo Tribunals “paid very little attention to the rights of the accused”.³ The right to Counsel was nominally established in the texts, but, beyond that, there is little else guaranteed. ‘Fair trials’ were a goal, but what would actually contribute to such standard was left

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² *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985): “Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain he has access to the raw materials integral to the building of an effective defence.”

³ Kenneth S. Gallant, *Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard and What Might be Done About One of Them*, 14 Criminal Law Forum 317, 318 (2003).

largely unexamined beyond the enumeration of a handful of rights.⁴ The Defence did not have resources to put forth proper cases; in fact, as noted by Rupert Skilbeck, the Defence of the International Military Tribunal for the Far East was perceived as incredibly weak, “frequently causing laughter in the courtroom”.⁵

The ICTR, along with the ICTY and SCSL, was one of the first international criminal courts to actually look at what a Defence or defendant needed to receive a fair trial. Calling upon the ICCPR and other internationally renowned standards,⁶ the drafters of the ICTR and ICTY Statutes recognised a litany of rights, including:

- Equality of persons before the Court;
- A fair and public hearing;
- A presumption of innocence;
- To be informed of the charges “promptly” and in detail and in a language he/she understands;
- Adequate time and facilities in order to prepare a Defence;
- The choice of counsel and the ability to communicate freely with that counsel;
- A trial without undue delay;
- To be tried in person;
- To legal assistance if found indigent;
- To test the evidence through cross-examination;
- Free assistance of an interpreter if necessary to understand the proceedings;
- The right of silence and no inference to be taken from invocation of such right.

To further define a “fair” trial, the *ad hoc* Tribunals quickly adopted the principle of equality of arms, equating the recognised principle of fair trial in their own Statutes as equal to the intent as established in the ECHR and ICCPR.⁷ In *Prosecutor v. Tadic*, equality of arms was clearly defined as requiring equality of the Prosecution and Defence before the Trial Chamber, requiring “every practicable facility [the Court] is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case”.⁸ In *Prosecutor v. Kayishema & Ruzindana*, the Appeals Chamber recognised equality of arms as an important component of a fair trial.⁹

Unfortunately, equality of arms was less obvious in the structural systems created for these Tribunals, where the Defence Counsel and teams have remained largely as outsiders, external to structures that only recognised three organs — Chambers, Prosecution, and Registry. While there were offices created to assist these “outsiders”, they were often done not with a focus of assisting the Defence, but

⁴ See Chapter IV, Article 16, of the Constitution of the International Military Tribunal.

⁵ Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, Essex Human Rights Review Vol. 1, No. 1, p. 72: <http://projects.essex.ac.uk/ehrr/V1N1/Skilbeck.pdf> (last accessed: 20 October 2014).

⁶ *Supra*, n. 3.

⁷ *Prosecutor v. Tadic*, IT-94-1-A, Appeals Judgement, 15 July 1999, para. 44.

⁸ *Id.* at para. 52.

⁹ *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-A, Appeals Judgement, 1 June 2001, para. 67.

with a focus of assisting the Court to deal with the Defence; as noted by Sareta Ashraph, the ‘Defence offices’ of the ICTY/R were largely created to respond to fee issues with Counsel.¹⁰ Most often, the office assisting the Defence is situated within the Registry—a necessarily neutral Organ of a Court, servicing all other Court organs and external actors; in sum, the Defence as a party to the proceedings has been dealt with as an “afterthought”.¹¹ Even more damaging, because the Defence did not possess an institutional presence of its own, as a non-neutral advocate for its needs, it had no champion among the decision-makers leaving them at a severe disadvantage in securing assistance in legal affairs, investigations, State cooperation, and even office space or equipment. As highlighted by Kenneth Gallant, while rights were recognised, “no specific organ was created in the Statutes to protect the rights of defendants”.¹²

At the ICTR and ICTY, this spurred the creation of associations of Counsel to serve as unions or lobbyists on the behalf of the Defence. In both cases, as noted by Human Rights Watch: “the defense was not created as an internal structure of the Court, and Defense Counsel there had to work, notably through independent associations of Counsel, to gain status and resources.”¹³ While membership of the Association of Defence Counsel was mandatory at the ICTY,¹⁴ the membership in the Defence association of the ICTR was voluntary.

The first innovation of an Office of the Principal Defender came in 2005 in the Special Court of Sierra Leone, Rule 45, which created such office with an overall mandate to ensure the rights of suspects and accused persons; even though only codified in the Rules of Procedure and Evidence (as opposed to the Statute), this Office was considered as the “fourth pillar” even if it was not an organ.

Great Expectations of the ICC

Building on the lessons of the *ad hoc* Tribunals, the ICC was meant to be the pinnacle of international criminal law, ending impunity for war crimes and crimes against humanity by a permanent presence possessing the highest standards of procedural fairness. The drafting of the Rome Statute provided an opportunity to examine the matter of the role of the Defence yet again. As noted by Skilbeck, there was “significant pressure to avoid the mistakes of the past” with many States Parties arguing for an

¹⁰ Sareta Ashraph, *The Naked Defence Office: How an Unclear Mandate, Poor Staffing and Registry Disinterest Stripped the Office of Principal Defender in The Sierra Leone Special Court and Its Legacy*, ed. Jalloh (CUP, 2014), p. 551.

¹¹ Vincent O. Nmehielle, *The Defence Office of the Special Court for Sierra Leone: A Watershed in Realizing the Rights of Accused Persons in International Criminal Justice*, in *The Sierra Leone Special Court and Its Legacy*, ed. Jalloh (CUP, 2014), pp. 527-528.

¹² *Supra*, n. 3.

¹³ See Human Rights Watch (HRW), *Courting History: The Landmark International Criminal Court’s First Years*, p. 76: <http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf> (last accessed: 20 October 2014).

¹⁴ See ICTY Rule 44.

independent office of the Defence to avoid those mistakes of the *ad hoc* Tribunals and ensure internal representation of the rights of the Defence.¹⁵ However, the resolution was an absence of a Defence Organ in the Rome Statute, leaving the Defence function to be yet again carried through the Court's Rules and Regulations which were then established as merely meeting administrative and functioning needs as doled out by Registry services.

In creating and growing this Court, the ICC Prosecution was flooded with resources to ensure that it was up to the task. By 2004, the ICC Prosecutor had “programmes for legal advice, a separate public relations and mass media programmer, an entire appeals division to deal with the interlocutory appeals at the pre-trial stage, an analysis section, a knowledge-base section, investigations and prosecutions” as well as the ability to manage programmes “connecting with academic institutions around the world, consultations with over 120 leading international experts, creating a roster of leading experts”, which inspired the question: “when do the defence get to do the same?”¹⁶

An answer came in that same year when a need to greater serve the Defence was identified to remedy what was becoming apparent as a lack in equality of arms with respect for both status and resources at the international tribunals.¹⁷ That answer? To create an Office of Public Counsel for the Defence (OPCD) pursuant to the Regulations of the Court, adopted by the Judges of the Court on 26 May 2004, that would be tasked to: “support counsel and accused, including through the representation and protection of rights of the accused during the initial stages of an investigation.”¹⁸ Importantly, this allowed a division of legal aid and administration from the substantive assistance to remedy some of the difficulties experienced at the SCSL.¹⁹ Most importantly, the Office creates an institutional presence of the Defence; as aptly described by the IBA:

*[The OPCD] was established to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials. The office is also seen as the institutional voice of the defence.*²⁰

Established in April of 2006, I joined the Office as its first and current Principal Counsel in January 2007. For nearly eight years now, I've personally witnessed the growth of this Office in developing the very bare-bones core mandate of its founding-Regulation 77 of “providing general support and assistance to defence counsel and to the person entitled to legal assistance, including legal research and advice”.

¹⁵ *Supra*, n. 5, pp. 77-78.

¹⁶ *Supra*, n. 5, p. 78.

¹⁷ *See supra*, n. 15, p. 76.

¹⁸ Report of the International Criminal Court, A/60/177, 1 August 2005, §46: <http://www.derechos.org/nizkor/icc/iccreport.html> (last accessed 15 October 2014).

¹⁹ *See, e.g., supra*, n. 15, p. 77.

²⁰ International Bar Association (IBA), *Fairness at the International Criminal Court*, August 2011, p. 29.

This broad mandate, along with the Office's independence, has allowed the work we do to be guided by the needs of the Defence teams themselves and supplementing their work through tasks they simply do not have the capacity to take on.

The OPCD has been staffed with five full-time persons since 2008, and has worked to accommodate the many needs of the Defence teams to fulfil this broad mandate of "general assistance". The work has included legal research and advice, case management assistance, training and serving as a first point of contact to provide information about the Court. At the same time, the Office has taken on a role of ensuring Defence representation within the policy-making bodies of the ICC, by mere suggestion of Defence input where it is overlooked to collecting and representing the Defence team input for use of the various working groups. While the Office maintains independence in its function, it is not ideally situated as administratively linked to the Registry. This has an impact in relation to management of the budget (and, in turn, the ability to carry out the mandated assistance). Further, as not a Statute-based organ of the Court, the very existence of the OPCD is subject to review at any time by the organs of the Court creating instability and cautiousness in its ability to function.

A Great Leap: The Special Tribunal for Lebanon's Defence Office

When an organ for the Defence was included at the Special Tribunal for Lebanon, such progress was hailed as progress in the quest for equality of arms. The much-revered, late Judge Antonio Cassese lauded the development, stating:

Under the Rules, suspects and accused can benefit from the assistance and expertise of an independent and autonomous Defence Office, which is placed on an equal footing with the Office of the Prosecutor. The establishment, under the Statute, of a Defence Office, is aimed at ensuring equality of arms between the parties. The Defence Office has extended powers, in particular to select highly qualified counsel with experience in terrorism and international criminal cases, and to ensure that they have adequate facilities and legal support for their work. He can also provide other assistance to defence counsel.²¹

Then-Secretary-General Kofi Annan praised the independence of this Defence Organ and examined how "[...] the need for a defence office to protect the rights of suspects and accused has evolved in the practice of United Nations-based tribunals as part of the need to ensure 'equality of arms'".²² An independent Defence Organ allows not only equal institutional footing with the Prosecution, at the same time, this remedies deficiencies seen in previous Defence-focused structures of the Court as allowing the actual Defence to dictate the necessary resources to effectuate their role in the most effective manner. Now that the STL Defence Office has been functioning for some years, it is

²¹ *Statement on the Adoption of the Legal Instruments Governing the Organization and the Functioning of the STL*, 1 April 2009, Sec. 2: <http://www.stl-tsl.org/en/media/press-releases/statement-from-the-stl-president-judge-antonio-cassese> (last accessed: 22 July 2014).

²² UN Security Council, Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, U.N. Doc., S/2006/893, (Nov. 15, 2006), para. 30.

certainly worth examining the lessons learned from its foundational years and comparing them with the lessons learned of the *ad hoc* Tribunals to ensure that such important institutional progress is preserved.

Full cycle: The Future of a Defence Office in the ICC

In 2011-2012, the ICC took on an extensive review of the OPCD's presence and mandate, examining all possibilities including potential elimination of the Office. The process, led by Judge Adrian Fulford, called upon broad discussions with Defence practitioners, the Court and civil society; when complete, it was determined that the role of the OPCD should be not only preserved, but strengthened; the amended Regulation 77 entered into force on 29 June 2012. To my mind, and many others, this was a step toward one day seeing a Defence Organ at the ICC. Indeed, as recently stated by François Roux, Head of the STL Defence Office:

The dream was that reality would prompt a change in the status of [the OPCD], transforming it into an organ of the Court, ultimately giving the defence an institutional position equal to that of the prosecution, while making the necessary structural improvements based on the model of the Special Tribunal for Lebanon.²³
[translated from French]

However, to date, there has been no progress toward making the Defence an Organ of the Court, building on the establishment of its OPCD. In fact, quite the opposite in the sense of structure as the recent review in a Registry restructuring project has suggested to remove the independent OPCD altogether, merging the OPCD's substantive assistance with the existing Counsel Support Section's administrative assistance to create one neutral Registry office while creating an outside association of counsel to take on the role of representation of Defence needs to the Court as an institution. Such suggestion, on its face, may appear to have sent us full circle to the model of the *ad hoc* Tribunals in that there will be no Defence advocacy within the institutional structures; again, no ICC Organ, Section or Office to advocate for the Defence.²⁴ These renewed discussions of structuring the Defence in the ICC means that we must look at the legacy of the ICTY and ICTR closely – not simply as an academic exercise, but one that must be undertaken *de novo* to re-establish the need for the Defence to maintain an institutional presence. The lessons learned through the titanic efforts of those who practiced in institutions without the Defence represented equally with the Prosecutor must be considered in any such substantial structural change.

In my opinion, nothing short of an institutionally based independent office can best serve the Defence of the ICC – preferably regarded as an organ – to serve the Defence and to advocate for the advocates of the Court. Now, in 2014, we have seen how lessons learned have been applied to make an

²³ François Roux, *La défense mise à la porte de la Cour pénale internationale?*, Gazette du Palais – Edition Professionnelle, 19-20 September 2014, Nos. 262-263 (unofficial translation).

²⁴ *Supra*, n. 13.

institutional, independent Defence presence not only a ‘dream’, but a necessity as evidenced by the evolutions (and revolutions) of the international courts of the last 20 years. As aptly captured by Kenneth Gallant:

*A Defence Organ does not wholly eliminate the possibility of conflicts about the Defense, but it eliminates a great deal of conflict seen in the ICTY, ICTR, and ICC between Registry and defence counsel. Most importantly it makes the overall structure of the Court much fairer.*²⁵

²⁵ Kenneth S. Gallant, *Addressing the Democratic Deficit in International Criminal Law and Procedure: Defense Participation in Lawmaking in The Sierra Leone Special Court and Its Legacy*, ed. Jalloh (CUP, 2014) p. 584.