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'Emaciated' Defense or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?

by Richard J. Wilson*

THE COMMENCEMENT OF THE TRIAL OF CHARLES TAYLOR, the former president of Liberia charged with international crimes by the Special Court for Sierra Leone, was to be a momentous occasion. It was billed as a rare moment of international accountability, with a former head of state facing trial on eleven charges of war crimes and crimes against humanity for his alleged criminal assistance to rebel forces in Sierra Leone. The trial was moved from the Special Court's site in Freetown, Sierra Leone to The Hague, Netherlands, for security reasons. But when the prosecution's opening statement commenced as scheduled on June 4, 2007, the accused was not in the courtroom. Presiding Justice Julia Sebutinde, a British-trained judge from Uganda, immediately took note of the defendant's absence but proceeded to recognize the other relevant actors in the courtroom. They included a prosecution team of seven lawyers, the defendant's assigned counsel, Karim Khan, and Duty Counsel from the Office of the Principal Defender Charles Jalloh. Khan had been assigned to represent Taylor more than a year before because Taylor was determined to be "partially indigent," meaning that he was without sufficient funds to hire counsel, but that if assets were recovered, he would be required to contribute to the costs of counsel.

The focus of the hearing quickly moved from the prosecution's opening statement to the defendant's absence. The day became a protracted standoff between the judges and defense counsel, with a scenario that culminated in Khan leaving the courtroom despite the threat of contempt of court. This short article examines the Taylor trial skirmish over defense counsel and its aftermath as a paradigmatic example of the ongoing struggle to define rules and structures to protect the independence of defense counsel, and the defense office in general, in international criminal tribunals. In addition to the work of defense counsel in the Sierra Leone tribunal, this article also will examine the structures of defense offices in the War Crimes Chamber of the Court for Bosnia and Herzegovina, set up in 2005, and the newly proposed tribunal for the trial of international crimes in Lebanon, approved by the UN Security Council Resolution 1757, of May 10, 2007. Each of these "hybrid" or internationalized tribunals — so-called because of their hybrid blend of national and international rules, institutions, and personnel — have adopted more independent structures for the provision of defense counsel than those available in either the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) or the International Criminal Court (ICC). Yet there is little doubt that the issue of equality of arms for defense counsel, particularly assigned counsel, will



UN Photo/Matthew Elavanathoduka

Charles Taylor, former President of Liberia, arrested in April 2006, has been appointed defense counsel by the Special Court for Sierra Leone.

continue to be a contentious issue in future international criminal trials. Virtually all defense counsel in such tribunals have been assigned, not retained.

CHARLES TAYLOR'S TRIAL

At the Taylor trial's opening session in June, Khan attempted to explain Taylor's absence and his own corresponding duties arising from his client's express wishes. He relied on two lines of argument. First, he asserted that although the court had, at an earlier pre-trial conference in May, instructed that Taylor be able to communicate directly with the Principal Defender Vincent Nmehielle about Taylor's concerns regarding "the size and composition of his legal team,"¹ that meeting had not taken place. Taylor was being held in a Dutch detention facility in nearby Scheveningen, a neighborhood of The Hague, while the Principal Defender's headquarters are located in Freetown, Sierra Leone, where other trials were under way. Second, Taylor himself sent a letter to the court, via his counsel, explaining his decision not to appear. The letter states, in relevant part:

Justice is blind, justice pursues truth, justice is fair, justice is immune to politics. It is not justice to preordain convictions or emaciate my defence to the extent that I'm unable to launch an effective defence... . Today marks the start of the trial against me. The Special Court's administration has been so dilatory that I have only one counsel to appear on my behalf, one counsel against a Prosecution team fully composed of nine lawyers. This is neither fair nor just... . It is therefore with great regret that I must decline to attend any further hearings in this case until adequate time and facilities are provided for my Defence team.

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The letter concludes with termination of instructions to counsel, a request that counsel “cease to represent me before the Special Court.” The court nonetheless ordered Khan to continue to represent Taylor, invoking (incorrectly, in the author’s view) the court’s Rules and Procedures regarding trial in the absence of the accused. Khan correctly invoked the Code of Conduct for defense counsel before the Special Court, which makes it mandatory for defense counsel not to represent a client if representation has been terminated. The court nonetheless insisted that Khan’s representation continue, at least by his presence in the courtroom, asserting that the “Code of Conduct [could not] override a court order.”

Counsel continued to argue after the court’s order, asserting that the issue presented was one of first impression in the law of the tribunal which needed to be properly adjudicated, but the court was unmoved. The prosecution then began an opening statement as Khan gathered his papers and books and stood to leave. As he stood, shortly after the prosecutor had commenced his statement, the court admonished:

Mr. Khan, you have not been given leave to withdraw. You don’t just get up and waltz out of here. You have not been permitted to leave There is a directive of this court asking you to sit down and represent your client, which you apparently have defied, and now you are walking out with further defiance, without leave.

Khan responded, with great respect for the court “I am no longer instructed in this case. . . . I’m trying not to be difficult; I’m trying to be principled. Your Honor, I’m privy to the instructions of my client.” Khan left the room, pausing at the door to state, “Your Honor, I must. I do apologize.”

The court immediately appointed Duty Counsel Charles Jalloh to take over the defense of Taylor through opening statements. Jalloh willingly accepted. There followed a lengthy opening statement from the prosecution, which took the rest of the morning and much of the afternoon session that day. At the close of the day’s proceedings, however, the court again raised the issue alluded to in Khan’s morning argument, the inability of the accused to speak directly to the Principal Defender. The court couched the issue as “the matter of the fair-trial rights of the accused, Mr. Taylor, who’s not with us in court today for one reason or another.” The court noted, though without reference to Khan’s arguments, that Taylor “had expected to speak with the Principal Defender” after a prior pre-trial conference.

After much additional discussion and argument from Jalloh, the Court allowed acting Registrar Herman von Hebel to make a statement. Von Hebel bluntly stated that he “thought it was not necessary” that Taylor meet with the Principal Defender, and thus refused to fund the Principal Defender’s travel from Freetown to The Hague. Presiding Judge Sebutinde paused a moment, then stated wryly, “Well, that definitely sheds some light on the reason why we find ourselves in this unhappy situation.” In a complete shift of direction, the court then found that Taylor’s request to meet with the Principal Defender was “a reasonable request and falls within his rights to do so. The office of the Principal Defender was set up precisely for reasons like that.” It ordered the Registrar to facilitate travel by the Principal Defender to The Hague to meet with Taylor and adjourned the

proceedings until the end of June. No further mention was made of the contempt threat against Khan, that day or later.

Taylor’s trial ground to a halt after the prosecution’s opening statement. The Principal Defender flew to The Hague and met with Taylor in late June. At a hearing on June 25, 2007 to update the court on discussions with the accused, the court ordered the Principal Defender Vincent Nmehielle to assign new counsel to the accused, and further ordered the Registrar to ensure that the Principal Defender was able to assign a lead counsel, two co-counsel, and one senior investigator. At a brief hearing on August 20, 2007, Taylor appeared with his new defense team, led by Courtenay Griffiths, a Queen’s Counsel from England, and two British co-counsel. During a recent status hearing in early December, Griffiths indicated that the defense team now totaled eleven members.² At the request of the defense team, Taylor’s trial resumed again on January 7, 2008, more than seven months after the prosecution’s opening statement.

LESSONS FROM THE TAYLOR TRIAL

What are the lessons from this episode and its apparent dénouement, as this first trial of an ex-president in Africa finally resumed in January 2008? There are several. First, Khan’s action in refusing to proceed as Taylor’s counsel, and his courageous decision to leave the courtroom despite a court order to the contrary, appear quite well founded in law and ethics. This is borne out by his proper reliance on the code of ethics for counsel before that tribunal, which required him to stop all action on his former client’s behalf because his client had terminated his services, and because he was “privy” to or aware of those instructions. The court also abandoned its strong threat of contempt. The judge’s inaction at least implicitly supported Khan’s decision. Second, the Duty Counsel system of the Principal Defender Office provided the court with a convenient and effective vehicle to “fill the gap” created by Khan’s absence until new counsel could be found. Charles Jalloh, a young and capable Sierra Leonean lawyer, handled the situation with poise and confidence, stepping in on a moment’s notice, which is just what his office was designed to do. Third, the seven month delay in the proceedings was attributable almost exclusively to the parsimonious actions of the Registrar in refusing to allow the Principal Defender a simple round-trip air fare and related travel expenses to The Hague to meet with Taylor. The actions of the Registrar seem particularly misguided when one considers the extraordinary costs of moving the entire operation of the Special Court from Freetown to The Hague, with scores of personnel traveling on the Registrar’s budget for extended stays there. Denying a single trip to the Principal Defender appeared vindictive and small.

Fourth, and most important, Taylor’s complaints that his defense team was “emaciated” — thin of representation by counsel to the point of starvation — and that he was being denied the right to adequate time and facilities for preparation of his defense, are well-founded. The right to adequate time and facilities for the defense to prepare, and adequate resources to that end, are cornerstones of the right to a fair trial. The right to equality of arms is a deeply established, and particularly apt, precept in the European system for protection of human rights, and one which has been imported into each of the international and hybrid criminal tribunals.³ While that guarantee does not



Taylor's trial has raised issues about the adequacy of defense before international criminal tribunals.

mean dollar-for-dollar parity with prosecution funding, the defense must be provided with resources — time, space, library, staff, and compensation — sufficient for the task. The actions of the court, although not explicitly acknowledging their grounding in the concept of equality of arms, implicitly recognized the premise by ultimately ordering significant additional funding for the defense, and by Nmehielle's appointment of a defense team more nearly adequate to the challenges posed by the trial of a former head of state.

Again, the court's action seems to take place over the steadfast resistance of the Registrar, who had not adequately funded the defense for trial until the court ordered it to do so. The principle running through each of these last two observations, a principle about the role of appointed defense counsel in any tribunal, national or international, is that a structure for the provision of defense services that relies on the Registry of the court for its funding or decision-making approval is hamstrung from the outset and lacks that fundamental independence that is the hallmark of an effective defense operation. The defense units in the ICTY, ICTR and ICC are all situated within the Registry, and selection and coordination of defense counsel are functions of Registry personnel.⁴

This is not to suggest that the Office of the Principal Defender in the Special Court for Sierra Leone is not "a step in the right direction," as one of the most recent and most comprehensive reports on that office has found.⁵ As that and other studies have pointed out, the Defense Office system brings a number of important innovations to the organization of defense services in internationalized criminal tribunals.

THE IMPORTANCE OF THE DEFENSE OFFICE

Notably, there was no mention of the defense office in the original agreement between Sierra Leone and the United Nations (UN) setting up the Special Court. The office came into being as a result of an agreement between the Registrar and the court's then-President, Justice Geoffrey Robertson. The concept of a separate Defense Office grew and evolved, and the office is recognized widely as "novel," "innovative," and "unique."⁶ It includes some separation from the Registry, in that the Principal Defender selects lawyers to be placed on the list

for assignment to the accused, and also hires the in-house staff of Duty Counsel, who perform duties similar to that of Jalloh in any of the cases before the court, particularly during the crucial initial stages when an accused is without formally assigned counsel and needs advice for initial appearance and other early decisions. In addition, the office performs a number of roles in administration, training, legal research, drafting assistance, and outreach that none of the other defense structures offered until this innovation.

CRIMINAL DEFENSE AT THE BOSNIAN WAR CRIMES CHAMBER

In some ways, the work of the defense office in Sierra Leone parallels the work of the Criminal Defense Section of the War Crimes Chamber (WCC) of the Court of Bosnia and Herzegovina. The WCC came into being in 2005 as a result of the actions of the High Representative, an official position created under the Dayton Peace Agreement, as part of an overhaul of the national justice system to allow it to try war crimes and other international offenses in the local courts or by transfer from the ICTY. This structure brings the WCC within the ambit of other internationalized or hybrid courts.⁷

The Criminal Defense Section is known by its Bosnian acronym OKO (Odsjek Krivične Odbrane). The OKO has a director with a professional staff, and like its counterpart in Sierra Leone, it is the licensing authority for attorneys who wish to obtain an appointment before the WCC. It provides legal and administrative support to defendants and advocates. For the defendant, this can be as basic as advice on how to select a qualified defense counsel, while for defense counsel, the office provides advice and assistance in preparing submission of legal arguments, as well as training courses on defense issues.⁸ The OKO is part of the administrative structure of the court's Registry; the director of the office is selected by the Registrar and raises money for the OKO.⁹

THE NECESSITY OF INDEPENDENT DEFENSE OFFICES

Independence is the key element that is lacking in both the OKO and the Defense Office in Sierra Leone. When asked to specifically rule on that issue, the Sierra Leone Appeals Chamber made clear in *Prosecutor v. Brima et al.*, that "the Defence Office is not an independent organ of the Special Court, as Chambers, the Office of the Prosecutor and the Registry are," and that the office is under the administrative authority of the Registry.¹⁰ This lack of independence led the authors of the War Crimes Studies Center report to offer, as their first recommendation, that any future tribunal should "include the establishment of an Independent Defence Office in the Statute of the Tribunal."¹¹

That is exactly what the newest internationalized tribunal does. Perhaps taking heed of prior experience, and just before his retirement, Secretary-General Kofi Annan proposed the establishment of a special tribunal for Lebanon in December of 2006.¹² When the Lebanese government could not reach agreement on the structure of a tribunal, the Secretary-General stepped in. For the first time, he proposed a tribunal of four separate and independent organs: chambers (judges), the prosecutor, the registry, and the defense office. The head of the defense office would be selected by the Secretary-General, and

the office would be financed through the budget for the tribunal. “The need for a defence office to protect the rights of suspects and accused,” says the Secretary-General’s report, “has evolved in the practice of the UN-based tribunals as part of the need to ensure ‘equality of arms.’”¹³

On May 30, 2007, the Security Council adopted Resolution 1757, establishing the Special Tribunal for Lebanon, by a vote of 10-0, with five abstentions (China, Indonesia, Qatar, Russian Federation, and South Africa).¹⁴ Debate on the resolution does not reveal a single question about an independent defense office. The resolution follows the recommendation of the Secretary-General. Article 13 of the Statute for the Tribunal creates, for the first time in UN history, an independent Defence Office, whose director is to be appointed by the Secretary-General, in consultation with the President of the Tribunal. The same provision states that the Defence Office “may also include one or more public defenders,” and will provide services similar to those of the OKO in Bosnia and the Defence Office in Sierra Leone.¹⁵ Should the Special Tribunal for Lebanon come into being, the Defence Office will provide a model and precedent for national and international justice. Such an office provides an

apt model for amendment of the Rome Statute of the ICC during the review conference of States Parties in 2009.

CONCLUSION

FROM THE VERY START OF THEIR OPERATION, international criminal tribunals have struggled with issues regarding the independence of defense lawyers. In the Nuremberg trials and subsequent proceedings, defense counsel complained that there was not equality of arms between the prosecution and defense. The ad hoc tribunals for the former Yugoslavia and Rwanda have struggled with structural issues in the provision of defense services, including fee-splitting between counsel and clients and other embarrassing ethical lapses by defense counsel. The UN has shown foresight and common sense in moving away from a defense office that works under the thumb of the registry and toward a truly independent structure for defense services, a structure that is, because of defense counsel’s true independence, more likely to assure fair proceedings and carefully reasoned, sound outcomes. The system of international criminal justice deserves no less.

HRB

ENDNOTES: ‘EMACIATED’ DEFENSE OR A TREND TO INDEPENDENCE AND EQUALITY OF ARMS IN INTERNATIONALIZED CRIMINAL TRIBUNALS?

¹ All quotations relating to the hearing of June 4, 2007 come from a transcript of the hearing, *Prosecutor v. Taylor*, SCSL, Case No. SCSL-03-01, June 4, 2007, available at <http://www.sc-sl.org/Taylor-transcripts.html> (last visited Feb. 13, 2008). The author was present in the courtroom as an observer during the afternoon session of this hearing.

² *Taylor Trial*, Reuters and ICC Video, Dec. 11, 2007, <http://tvscripts.edt.reuters.com/2007-12-11/242d61cd.html> (last visited Dec. 13, 2007).

³ See, e.g., Elise Groulx, “Equality of Arms:” *Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System*, (2006) OXFORD U. COMP. L. F. 3 available at <http://ouclf.iuscomp.org/articles/groulx.shtml> (last visited Feb. 13, 2008).

⁴ I have criticized this system elsewhere. See Richard J. Wilson, *Issues in the Assignment of Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach*, 2 INT’L CRIM. L. REV. 145 (2002).

⁵ Alison Thompson & Michelle Staggs, *The Defence Office at the Special Court for Sierra Leone: A Critical Perspective*, War Crimes Studies Center, University of California, Berkeley, 53 (April 2007), available at <http://socrates.berkeley.edu/%7Ewarcrime/documents/DefenceOfficeReport.pdf> (last visited Feb. 13, 2008).

⁶ *Id.* at 11.

⁷ Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, 2, 5 (Feb. 2006).

⁸ OKO, *Additional Rules of Procedure for Defence Advocates Appearing Before Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of Bosnia and Herzegovina*, (June 20, 2005), available at http://www.okobih.ba/files/docs/Additional_Rules.pdf (last visited Feb. 10, 2008).

⁹ Human Rights Watch reports that the OKO “functions independently of the Registry in the provision of legal advice to defendants” and that it was anticipated that the OKO would become an independent institution in 2006. The author found no such action by the High Representative.

¹⁰ *Prosecutor v. Brima et al*, SCSL, Case No. SCSL-04-16, Decision on Brima-Kamara Defence Appeal Motion (Appeals Chamber), Dec. 8 2005, ¶ 83.

¹¹ Thompson & Staggs, *supra* n. 5, at 55.

¹² 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).

¹³ *Id.* at ¶ 30.

¹⁴ U.N. Security Council, *Security Council authorizes establishment of special tribunal to try suspects in assassination of rafiq [sic] Hariri*, U.N. Doc SC/9029 (May 30, 2007), available at <http://www.un.org/News/Press/docs/2007/sc9029.doc.htm> (last visited Feb. 10, 2008).

¹⁵ *Id.* at 30.