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De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia

by *Brianne McGonigle*

IN THE WAKE OF EGREGIOUS HUMAN RIGHTS ABUSES, the international community is under increasing pressure to shift from a culture of impunity to true accountability, endorsing principles of impartial justice and advancing international law. In the early 1990s, some 50 years after the judgments at Nuremberg, the United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to prosecute atrocities that took place in those countries. In 2002 the international community established a permanent International Criminal Court (ICC) to try individuals accused of war crimes, crimes against humanity, and genocide. The past few years have also seen the formation of hybrid courts to prosecute war crimes in Sierra Leone, East Timor, Cambodia, and Iraq.

Defense attorneys play an essential role within such tribunals. Among the most important principles of justice is the right to a fair trial, based on the notion that all individuals have a right to a proper defense. A fair and impartial trial is also vital to the credibility and integrity of a court in the eyes of the international community, the media, and the public. Yet due to the rapid development of international criminal law over the past decade and the emphasis on ending impunity, the international community has too often overlooked the right to a fair trial as protected by an adequate defense. Numerous inequalities exist between the Prosecution and Defense in every functioning international criminal court. Defense attorneys have significantly fewer resources than prosecutors and little, if any, institutional support. These fundamental inequalities threaten the legitimacy and credibility of the international criminal justice system.

This lack of equality is particularly evident at the ICTY. Although the ICTY provides statutory equality, Defense Counsel are in practice at a significant disadvantage, and this fundamentally affects the fairness of proceedings. The Association of Defense Counsel for the ICTY (ADC-ICTY), established in 2002, has secured hard-won advancements for Defense Counsel in the past few years; however, they continue to lack any real institutional support within the Tribunal. More than 10 years after its establishment, Defense Counsel still struggle with numerous aspects of the Tribunal, including its budget, translation services, and disclosure practices.

THE HURDLES FACED BY DEFENSE COUNSEL AT THE ICTY

ARTICLE 20(1): The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

ARTICLE 21(1): All persons shall be equal before the International Tribunal.¹

In theory, the Prosecution and Defense at the ICTY have an equal opportunity to make their best arguments. In practice, however, this is not the case. Like all international court structures, the ICTY suffers from a prosecutorial bias. This bias exists for several reasons: (1) the purpose of the court is to prosecute war criminals and end impunity; (2) many of the judges have backgrounds in human rights and are accustomed to advocating for victims rather than alleged perpetrators; and (3) the investigators for the Prosecution are part of an independent branch of the Tribunal and therefore state officials are obligated to cooperate and facilitate their investigations. The prosecutorial bias of the ICTY manifests itself in myriad ways, from requirements during the early days of the Tribunal that chaperones accompany Defense Counsel staff while using library facilities (though no similar requirement existed for the Prosecution)² to a prohibition of Defense Counsel's use of the Tribunal cafeteria.³ The most important biases against Defense Counsel at the ICTY, however, lie in the very structure of the Tribunal and in the lack of resources made available to Defense Counsel.

STRUCTURAL BIASES

The ICTY has three formal organs: the Chambers, the Office of the Prosecutor, and the Registry. Although the ICTY has an organ devoted exclusively to the Prosecution, Defense Counsel is subsumed within the overburdened Registry, which is also responsible for administration and judicial support services. Within the

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Registry, the Office of Legal Aid and Detention Matters (OLAD) oversees defense issues. The Registry acts as the liaison between Defense Counsel and the Tribunal and directs court management, public relations, victim and witness support, detention issues, language services, and financing. Defense Counsel feels that the Registry is unable to adequately support the Defense because of its other obligations.

A conflict of interest became apparent in 1997 when the Registry attempted to reduce costs by restricting the maximum number of hours per month Defense Counsel could bill for fees and greatly limiting the number of investigators and consultants they could hire.⁴ Lacking the status of an independent organ, Defense Counsel at that time had no structured defense association to lobby against such changes.

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ASSOCIATION OF DEFENSE COUNSEL AT THE ICTY

In September 2002, almost a decade after the establishment of the ICTY, Tribunal judges called for the creation of an association that could help ensure high-quality defense and make collective representations to the organs of the Tribunal on behalf of Defense Counsel. As a result, the judges modified the Rules of Procedure and Evidence. The adoption of Rule 44(A)(iii) required that every defense attorney be a member of an officially recognized association of counsel to be placed on the so-called Rule 45 List, which is the list of attorneys approved to practice at the Tribunal.⁵

To that end, Defense Counsel at the ICTY founded the non-profit and independent Association of Defense Counsel (ADC-ICTY). Created under the laws of the Netherlands, the ADC-ICTY is not an official organ of the ICTY, but nonetheless supports the function, efficiency, and independence of Defense Counsel practicing at the ICTY. The ICTY officially recognizes the ADC-ICTY as the Defense Counsel organization serving the Tribunal.

The objectives of the ADC-ICTY are to support the work and efficiency of the Defense Counsel, encourage it to participate in Tribunal activities, advise the Tribunal regarding procedural

have access to confidential filings available on the judicial database, even when they have acquired permission from the Court to access this material. Recently, the ADC-ICTY worked to allow Defense Counsel access to the Tribunal's software. Already in use by the Prosecution, this software facilitates the completion of everyday tasks. Although staff members from the Chambers, the Prosecution, and the Registry have received instruction on using the software, Defense Counsel are still struggling to train personnel for these programs.

A goal of the ADC-ICTY is to establish a Defense Legal Resource Center (Center) for the ICTY. The Center would make legal summaries, a defense motion bank, and analysis of the jurisprudence of the ICTY available to all Defense Counsel practicing before the Tribunal; provide research papers on general issues in international humanitarian law, international criminal procedure, and relevant national criminal law; offer an expert witness database; and provide a classified catalogue of useful textbooks, case materials, and articles. By improving the effectiveness of Defense Counsel, the Center would contribute to the Tribunal's completion strategy by minimizing delays.⁸ With the support of the Tribunal, the ADC-ICTY is currently attempting to secure funding for such a Center.⁹ Even with the creation of the ADC-ICTY, however, Defense Counsel still faces a formidable challenge in the unjust allotment of resources.

DISPROPORTIONATE BUDGETS

The ADC-ICTY believes that the budget for Defense Counsel and the Prosecution should be comparable with regard to trial activities.¹⁰ The budget of the ICTY has been and will remain strained. In 1994 the budget for the Tribunal was \$10,800,000.¹¹ By the 2004-05 term the budget had grown to \$271,854,600.¹² Defense Counsel, whose budget is allocated through the Registry, receives only 12 percent of the entire budget, while the Prosecution receives 50 percent.¹³ In theory the disparity initially existed because the Prosecution bears the burden of proof and because its budget includes all investigative work performed by the Investigative Division. The ADC-ICTY points out, however, that investigations have now formally ended, meaning that there is little need for a full investigation budget.¹⁴

But while the Prosecution continues to request and receive additional funds for investigative purposes, the UN General Assembly encourages the Registry to cut the budget for Defense Counsel. The ADC-ICTY submits that further cuts to the defense budget are neither reasonable nor viable, thus jeopardizing the Defense Counsel's ability to provide quality representation and the fairness of the proceedings.

Additionally, over the past year Defense Counsel at the ICTY lost approximately 30 percent of their funds because of the U.S. Dollar to Euro exchange rate.¹⁵ Whereas all other organs of the Tribunal have received adjustments, there has been no similar adjustment made for Defense Counsel for the loss of these funds. Currently, the ADC-ICTY is working with the Registry to remedy this disparity.

INADEQUATE TRANSLATION SERVICES

Article 21 of the ICTY Statute stipulates that the Tribunal must inform a defendant of the nature and cause of a charge promptly and in detail in the defendant's native language; provide the defendant access to counsel and adequate time and facilities for the preparation of a defense; allow the defendant equal opportuni-



Courtesy of NATO

ICTY Prosecutor Carla Del Ponte with NATO Secretary General Jaap de Hoop Scheffer.

changes, and oversee the Defense Counsel's performance. The ADC-ICTY works with the various organs of the ICTY to ensure that legal principles — particularly the need for a fair trial — are not compromised in an effort to meet the agreed-upon completion strategy.⁶ It aims at developing training programs to ensure professional integrity and oversees disciplinary conduct of Defense Counsel. Problems that still face Defense Counsel include the need for better funding, better facilities and resources, improved access to witnesses, improved translation services, and access to court databases. The ADC-ICTY has taken a leadership role in addressing both the interests of Defense Counsel and the rights of the accused they represent.

In the past year the ADC-ICTY helped to secure limited access to the Tribunal's judicial database for Defense Counsel, an invaluable tool that allows attorneys to access Tribunal case law. Nonetheless, truly significant access to the database remains a problem because Defense Counsel must travel to The Hague to use the service, which takes away from the limited amount of travel days allotted to them by the Registry.⁷ Moreover, unlike the Chambers, Prosecution, and Registry, Defense Counsel do not

ty to examine witnesses; and provide the defendant the free assistance of an interpreter if the defendant cannot understand or speak the language used in the Tribunal.¹⁶

It is difficult to provide qualified attorneys or assistants that understand the languages of ICTY defendants. For this reason, the Tribunal's newly revised translation policy raises serious concerns. Translations are not fully covered by the Tribunal's Translation Service (CLSS). The ICTY fails to cover, for example, the costs of a number of services, including translations of inter-team communications, as well as written and spoken communication between an attorney and a client. Further, legal aids funds are not intended to cover these costs and the monthly allocations available to Defense Counsel are insufficient.

In addition, CLSS often fails to meet time-sensitive deadlines for the translation of evidence. In urgent cases, defense attorneys must cover the costs themselves and apply for reimbursement on a case-by-case basis. Such requests are not always approved, meaning Defense Counsel bears the costs. Another problem is paying for duplicate translations. Often, the Prosecution translates documents for its own purposes but only discloses the un-translated version to Defense Counsel, which must have the documents translated again.

“To ensure the legitimacy and integrity of the international criminal court systems, Defense Counsel and Prosecutors should have an ‘equality of arms.’”

DELAYED DISCLOSURE

Late disclosure on the part of the Prosecution is a major problem for Defense Counsel at the ICTY, particularly when documents need to be translated. Often the most compelling evidence is not made available until just weeks before the trial begins, even though suspects are sometimes held in pre-trial detention for 2-3 years. Although this disparity does not violate the procedural rules of the ICTY, it puts great pressure on Defense Counsel, particularly because there are so many cases before the Tribunal.

Problems also arise when the Prosecution discloses documents using the Electronic Disclosure System, a computer system accessible by both the Prosecution and the Defense. When the Prosecution, for whatever reason, fails to inform Defense Counsel of where a document is located in the system, the lack of software training mentioned above places Defense Counsel at a disadvantage. Unable to quickly obtain the needed documents, they have difficulty adequately preparing for trial.

A proposed rule change may require Defense Counsel to disclose exhibits and witness statements well before the close of the Prosecution's case, thereby increasing the Prosecution's advantage by permitting it, in effect, to begin rebuttal during the initial presentation of evidence. The ADC-ICTY argues that any disclosure

before the issuance of the Judgment on the Motion for Acquittal would violate the rights of the accused as provided for under Article 21, which provides for the right to a fair hearing.¹⁷

ADDITIONAL ISSUES

Further problems exist. ICTY regulations require Defense Counsel to collect fees from the defendant when the Registrar decides the client can contribute financially to his case. This creates an inherent tension between counsel and the accused, endangering the integrity of the proceedings. The Tribunal also excludes Defense Counsel from the working group on the scheduling of cases, which makes it difficult for them to appropriately allocate their funding and develop work plans. In contrast, the Prosecution participates in this working group, making it easier to develop successful work plans. Additional problems include the lack of access to daily court transcripts,¹⁸ the inability to participate in joint press briefings and exclusion from the weekly press briefing notes, the lack of electronic and face-to-face communication with clients, and inadequate travel expenses to and from The Hague. This list is by no means exhaustive.

Many of the problems facing Defense Counsel at the ICTY can be traced back to the lack of a fully supported defense structure that has its own organ within the Tribunal. In May 2005 the then-President of the ADC-ICTY withdrew from its Executive Committee out of frustration with the Tribunal's lack of progress over the past two years.

LOOKING AHEAD: IMPLICATIONS FOR THE INTERNATIONAL CRIMINAL COURT AND THE IRAQI SPECIAL TRIBUNAL

RECENTLY THE ICTY APPEARS TO HAVE ACKNOWLEDGED some of Defense Counsel's concerns. The ADC-ICTY continues to develop a productive relationship with the Registry. Legal aid talks continue between the Registry and the ADC-ICTY, and a new translation policy is being fleshed out. A Defense IT Network, established in June 2005, allows Defense Counsel to access the jurisprudence of the Tribunal from outside The Hague, safely store materials, and receive official filings in electronic form. The Tribunal also recently gave Defense Counsel better, larger facilities outside the Tribunal building. For more than 10 years, the Defense had shared two rooms at the ICTY that were too small to accommodate the various teams. Although these steps are important, they would have been far more useful at an earlier stage. Further, the ICTY has already set a bad precedent for future international criminal tribunals, such as the ICC and the Iraqi Special Tribunal (IST) appear to have adopted similar structural and practical biases.

Like the ICTY, the ICC has three permanent, independent structural components, but no equivalent defense structure. Rule 20 of the ICC Rules of Procedure and Evidence, however, requires the Registry to conduct its operations “in a manner that promotes the rights of the defense, consistent with the principle of fair trial as defined in the [ICC] Statute.”¹⁹ This includes the protection of confidentiality, support of defense investigators, access to information, and advice to the Prosecution and judges on defense-related issues. Most importantly, Rule 20 requires the Registry to “ensure the professional independence of defense counsel.”²⁰ During the development of the first budget for the ICC, delegates established a Defense Counsel Unit as part of the Registry. Similar to the ICTY Office of Legal Aid and Detention Matters, the Defense Counsel Unit deals with legal aid, legal matters, and general assistance to defense attorneys.

Members of the ICC seem to agree that procedural protections must be in place to ensure a fair trial for the Defense. To this end the ICC modified Rule 140 of its Rules of Procedure and Evidence to allow the full right of Defense Counsel to examine witnesses. But the ICTY experience shows that procedural guarantees do not always translate into institutional practice. Instead, the real test for the new court will be whether it guarantees fair trials for the accused by ensuring equal resources and support for the Defense.

Concerns also surround the treatment of defendants and counsel at the IST. Spokesperson for the Iraqi Prime Minister Laith Kuba announced in June 2005, “the *judges* are confident that Saddam and his co-defendants from the ousted regime will be convicted of all the 12 charges” (emphasis added).²¹ For obvious reasons legal experts have raised serious concerns about what they view as a rush to judgment. In addition, some have expressed fear that the trials could become highly politicized, undermining their credibility. Despite assurances by the Iraqi Government that the IST will meet international standards, Saddam Hussein’s defense team has continuously complained about not having sufficient access to their client or time to prepare an adequate defense.

CONCLUSION

THE OFFICE OF THE PROSECUTOR for the ICTY receives more support, training, and resources than Defense Counsel at the ICTY. To ensure the legitimacy and integrity of the international criminal court systems, Defense Counsel and Prosecutors should have an “equality of arms.” Defense teams must have adequate facilities, security, access to witnesses, and research support. Defense teams need to be reasonably funded and organized. Although advance-

ments have been made in recent years, a wide gap remains.

Even if many legal scholars believe the “institutional bias towards the prosecution that defense have reported at international prosecutions from Nuremberg to the ICTY and ICTR” will remain,²² a well-funded and equally advantaged defense will alleviate many of the existing inequalities. As Judge Hunt stated in the *Milosevic* case, “This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.”²³

Until defense structures for international courts are given independence, adequate funding, and access to research support, the principle of equal “justice for all” will remain only rhetoric within the international justice system. Prosecuting individuals for serious international crimes when there are a large number of victims is complex and expensive. Defending an individual against such charges is just as daunting. To ensure fairness, international defense structures need institutional support and recognition to solve these systemic problems.

The practices of the ICTY have a significant effect on the practices at the newly formed ICC. Ambivalence toward defense issues during the negotiations of the Rome Statute resulted in little discussion on the rights of the Defense. Although the ICC provides statutory guarantees for Defense Counsel and the accused, defense attorneys are concerned that, like the ICTY, the practices of the ICC will place defense teams at a significant disadvantage. There are similar concerns surrounding the national trials at the IST. Without institutional support for a functioning and independent defense within international courts, the legitimacy of the international criminal justice system will erode. HRB

ENDNOTES: McGonigle

¹ *Statute for the International Criminal Tribunal for the Former Yugoslavia*, arts. 20(1), 21(1), May 25, 1993, <http://www.un.org/icty/basic/statut/statute.htm> (accessed Oct. 30, 2005).

² Conversations with Gregor Guy-Smith, Pres. of the ADC-ICTY (July 2005).

³ *Id.*

⁴ Richard Wilson, *Assigned defense counsel in domestic and international war crimes tribunals: The need for a structural approach*, 2 *Int. Crim. L. Rev.* 145, 177 (2002).

⁵ *ICTY Rules of Procedure and Evidence*, rev. 36, ru. 44(a)(iii), <http://www.un.org/icty/legaldoc-e/index.htm> (accessed Nov. 14, 2005).

⁶ In 2004 the Security Council of the United Nations unanimously adopted Resolution 1534, known as the completion strategies, which requires the ICTY and ICTR to review their caseloads and take steps to complete trial activities by 2008 and appellate activities by 2010.

⁷ Memorandum from ADC-ICTY, *List of issues affecting the work of Defense Counsels which need to be addressed by the Registrar of the ICTY* (Feb. 2, 2004); Memorandum from ADC-ICTY, *Issues Affecting the Work of Defense Counsels which need to be addressed by the Registrar of the ICTY* (Jan. 26, 2005).

⁸ Memorandum from ADC-ICTY, *Proposal in relation to the Initiative: ‘Transforming Norms into Institutions’ ‘The establishment of a Defense Legal Resource Center for practitioners in international criminal law’* (May 2005).

⁹ Should such a Center find funding, it would be of vital importance for the Defense Office of the ICC because the ADC-ICTY intends to provide the Defense Unit of the ICC with its work product.

¹⁰ Secretary General, *First performance report of the ICTY for the biennium 2004-2005: Report of the Secretary-General*, U.N. Doc. A/59/547 (Nov. 2, 2004).

¹¹ *The ICTY at a glance – General Information – Budget*, <http://www.un.org>

[/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm) (accessed Oct. 29, 2005).

¹² *Id.*

¹³ Sebastiaan Gottlieb, Radio Netherlands, *No Fair Trials at the Yugoslav Tribunal?* <http://www2.rnw.nl/rnw/en/currentaffairs/globaldevelopment/icty041201?view=Standard&version=1> (Dec. 1, 2004).

¹⁴ Secretary General, *First performance report of the ICTY for the biennium 2004-2005: Report of the Secretary-General*, U.N. Doc. A/59/547 (Nov. 2, 2004).

¹⁵ Memorandum from ADC-ICTY, *Issues Affecting the Work of Defense Counsels*.

¹⁶ *Statute for the ICTY* at art. 21.

¹⁷ Memorandum from ADC-ICTY Rules Committee, *ADC-ICTY Reaction to the Prosecutor’s Proposed Amendment to Rule 67(A) by memo of 16 December 2004* (Jan. 27, 2005).

¹⁸ Memorandum from ADC-ICTY, *List of issues*; Memorandum from ADC-ICTY, *Issues Affecting the Work of Defense Counsels*.

¹⁹ *International Criminal Court, Rules of Procedure and Evidence*, r. 20, http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf (Sept. 3-10, 2002).

²⁰ *Id.*

²¹ Sameer N. Yacoub, *Saddam to face only 12 charges at trial*, www.boston.com/news/world/middleeast/articles/2005/06/05/saddam_will_face_only_12_charges_at_trial?mode=PF (June 5, 2005).

²² *Fair Trials and the Role of International Criminal Defense*, 114 *Harv. L. Rev.* 1982, 2006 (2001).

²³ *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, ¶ 22 (Oct. 21, 2003).