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# EVOLVING EQUALITY: THE DEVELOPMENT OF THE INTERNATIONAL DEFENSE BAR

MICHAEL A. NEWTON\*

*Defense counsel in international criminal proceedings face difficult challenges that are intrinsic to the modern system of internationalized accountability; yet their professionalism and performance represent perhaps the most determinative dimension for evaluating the overall fairness of what the world terms “justice” for grievous atrocities. Defense teams labor against the tides of public opinion and the deeply felt pain of the victims of mass atrocities. Abandonment of appropriate defense efforts, whether the result of professional fecklessness or personal pressures, would transform international criminal law into an organized sham aimed at achieving a shadow of justice while undermining the rights of the individuals unlucky enough to face charges against the combined weight of political and judicial will. Since its genesis in the wake of World War II, the growth of a modern field termed international criminal law is necessarily paralleled by the development of a mature defense role that helps ensure that every defendant’s culpability or innocence is grounded in the soil of individual responsibility rather than irrational prejudice or irresponsible collective guilt. The developmental arc of the international defense bar in its organizational and systematic context has, however, been surprisingly underexplored.*

*This article discusses the jurisprudence associated with the precept of equality of arms between the prosecution and defense. Highlighting the key challenges encountered by the defense that impair perfect equality of arms, this article will describe the organizational responses in modern practice. This article documents the empirical indicators supporting the assertion that defendants receive assistance from an organized and mature defense bar, despite its imperfections and occasional inadequacies. The holistic system of international criminal justice provides rough procedural parity to the defense, despite the recurring ethical dilemmas highlighted herein. This article*

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\* Professor of the Practice of Law, Vanderbilt University Law School. For contact information see <http://law.vanderbilt.edu/newton>. The author would like to thank the following individuals whose comments and critiques improved the earlier draft of this article during the International Legal Studies Roundtable held at Vanderbilt University Law School: Michael J. Kelly, Fabrizio Marella, Jacob Cogan, Kristen Boon, Daniel Bradlow, Michael Scharf, Mark Ellis, David Gartner, William Aceves, Kenneth Anderson, Ingrid Wueth, and Gregory A. Fox. The inevitable errors, omissions, and oversights of this essay are solely my own responsibility. The Central Intelligence Agency provided research assistance to support this project.

*concludes, perhaps controversially, that while a perfect equality of arms is a structural impossibility in the modern system of international justice, the modern defense bar has evolved to provide its functional equivalent.*

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## I. INTRODUCTION

Defense counsel in international criminal proceedings face extremely difficult challenges that are intrinsic to the modern systems of internationalized accountability; yet their professionalism and performance represent perhaps the most determinative dimension for evaluating the overall fairness of what is commonly considered “justice” for grievous atrocities. Even a cursory glance at international criminal tribunal judgments of the past fifteen years illustrates the inherent factual and legal complexity of the cases at bar. Of course, academics and observers can never overlook the reality that the various prosecution teams always bear the responsibility for proving every element of the charged offenses beyond a reasonable doubt, including the modes of personal liability alleged and any facts indispensable to a conviction.<sup>1</sup> This is the very essence of the frequent refrain that “ending impunity” is a critical component for the future of a multilateral and integrated international system of justice. The developed system of internationalized justice exists to provide viable forums for achieving actual justice

<sup>1</sup> Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Trial Chamber Judgement, ¶ 30 (Dec. 2, 2008).

in lieu of the pretense of preordained process, and the defense is therefore an indispensable aspect of the modern system. The prosecutor bears the public challenge of presenting a transparent process that facilitates the widespread *perception* of justice that is integral to the “expressive value” of the trial, which is an altogether different task from the reality inside the courtroom.<sup>2</sup> Conversely, the defense bar is responsible for marshalling the materials and evidentiary challenges to ensure the integrity of the process in the face of often intimidating barriers.

In one sense, the casual reader might object to the title of this article with the pertinent observation that there is no monolithic defense bar as such in international practice or by extension in the hybrid and internationalized tribunals that operate within the domestic justice systems in post-conflict settings. The mixture of personalities, practices, and procedures does indeed vary from The Hague to Arusha to Phnom Penh and across accountability mechanisms. Nevertheless, this article postulates that there is indeed an identifiable body of modern practice and precedent that in the aggregate forms a modern defense bar that is comparable to the prosecution in terms of its overall capabilities. Phrased another way, the development of a modern professional ethos that suffuses through defense efforts in every extant tribunal, combined with the overarching body of norms and recognized organizational best practices that assist the defense, has led to a functional equality of arms. It is no accident that there is a core of defense attorneys that are highly skilled in the particularities of international criminal law that can float comfortably across continents and jurisdictions, even when their defense teams are integrated efforts with augmentation by local attorneys. The modern international defense bar is a mature and competent entity that can be expected to provide a vigorous defense anywhere in the world that seeks to establish an accountability mechanism for the foreseeable future. This is a remarkable evolution over the past six decades, and this article will describe the metrics that warrant this conclusion and the organizational innovations that demonstrate this developmental arc.

Defense teams often labor against the tides of public opinion and the deeply felt pain of the victims of mass atrocities.<sup>3</sup> If commentators candidly acknowledged the conversations in families around the world affected by mass atrocities, they would accept the truism that the scale of human suffering and societal devastation that fill the cases generates a virulent yearning for retribution, or even revenge, in its starkest form. However, thoughtful modernists are aware that a quest for revenge on a personal or societal level is unseemly and likely counterproductive to lasting peace. In the context of the domestic Tribunal established to prosecute the Ba’athist leaders responsible for widespread human degradation and two decades of atrocities in Iraq, a distinguished Iraqi jurist unconsciously echoed Justice Robert Jackson’s aspiration for the International Military Tribunal at Nuremberg (IMT) by indignantly noting “I am a judge, not a murderer.”<sup>4</sup> Our moral compass would be troubled if we readily accepted a degree

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<sup>2</sup> MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 179 (2007).

<sup>3</sup> See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925, 929 (2008) (noting the tension between emotive demands to seek redress for victims of widespread atrocity crimes and the due process rights of the defendants).

<sup>4</sup> Author’s personal notes from discussion with unnamed Iraqi judge, Baghdad Convention Center (Dec. 2002).

of pleasure from deliberate infliction of human suffering, even if we deemed it to be well-deserved. The process of an orderly and public trial can, however, help shape public opinion and moderate the desire for retribution, and the efforts of a professionalized and prepared defense bar are the irreplaceable component of an orderly system that avoids what one distinguished scholar termed “Potemkin Justice.”<sup>5</sup>

As the International Criminal Court (ICC) was taking form and coming into actuality in early 2003, the International Criminal Bar promulgated a sample Code of Conduct to inform the set of ethical standards for counsel that would be developed by the Court. The cornerstone of the ethical edifice was the clear recognition that the “system of international justice based on the Rule of Law rests on three pillars: an independent judiciary, an independent prosecutor and an independent legal profession.”<sup>6</sup> The independence, ethical excellence, and fearless representation of the defense lawyers must remain an indispensable element of authentic enforcement efforts. Indeed, the abandonment of appropriate efforts on behalf of defendants<sup>7</sup> facing trials in the international criminal justice system, whether the result of professional fecklessness or personal pressures, would transform those proceedings into an organized sham capable of achieving only a shadow of justice while undermining the core human rights of those who will face charges under its authority.<sup>8</sup>

When given a copy of his indictment before the IMT, Herman Göring penned the phrase “[t]he victor will always be the judge and the vanquished the

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<sup>5</sup> M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 703 (2003) (referring to the outwardly model illusion of a meaningless and hollow reality).

<sup>6</sup> CODE OF CONDUCT AND DISCIPLINARY PROCEDURE OF THE INTERNATIONAL CRIMINAL BAR, SUBCOMMITTEE ON ETHICS OF THE INTERNATIONAL CRIMINAL BAR (2003) [hereinafter INTERNATIONAL CRIMINAL BAR CODE] (copy on file with author).

<sup>7</sup> For the sake of consistency and ease, this article will use the term “defendant” rather than “alleged perpetrator” or “accused” or “charged individual.” There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms “perpetrator” or “accused.” Though some delegations were concerned that the term perpetrator would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that “the term ‘perpetrator’ is neutral as to guilt or innocence.” Rep. of the Prep. Comm’n for the Int’l Crim. Court, U.N. Doc. PCNICC/2000/INF/3/Add.2 (Nov. 2, 2000), in KNÜT DORMANN ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 14 (2002).

<sup>8</sup> While some readers may be surprised that there could be such divergent views about the fairness of the international criminal proceedings, it is important to keep in mind that every major war crimes trial in history has had both outspoken supporters and voracious critics. Indeed, at the conclusion of the Nuremberg trial, two U.S. Supreme Court Justices publicly castigated the proceedings “as a high grade lynching party,” and as a “retroactive jurisprudence that would surely be unconstitutional in an American court.” MICHAEL A. NEWTON AND MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 211 (2008). Ten days prior to the execution of the convicted Nazi leaders in Nuremberg, Senator Robert A. Taft caused a firestorm of public debate with a public address that became a flashpoint in the campaign for President. He opined that

About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hanging of the eleven men convicted will be a blot on the American record which we shall long regret. In these trials, we have accepted the Russian idea of the purpose of trials—government policy and not justice—with little relation to Anglo-Saxon heritage. By clothing policy in the form of legal procedure, we may discredit the whole idea of justice in Europe for years to come.

JOHN F. KENNEDY, PROFILES IN COURAGE, THE ILLUSTRATED EDITION 218-19 (1984).

accused” across its cover.<sup>9</sup> The Allied Nations suffered terribly during the war, but the Russian jurists represented a system that murdered millions of Stalinist opponents and hence had no greater moral authority than Nazi Germany itself.<sup>10</sup> Since allegations of so-called “victor’s justice” have haunted virtually every accountability process since Nuremberg,<sup>11</sup> there is a visceral power in their invocation that could corrode every facet of the trial. In purely legalistic terms, authentic justice must be the product of an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”<sup>12</sup> If the truth seeking process of trials is overcome by externally imposed limits on judicial independence or politically motivated revenge, the entire process would suffer from a crisis of perceived illegitimacy. Notwithstanding the interposition of an independent judiciary, defense attorneys stand between their clients and the raw political whims of powerful states that organize and fund the system of modern international criminal justice. They accordingly have an essential role in ensuring both the fairness of proceedings and the perception of that fairness.

Quite apart from its legal firsts,<sup>13</sup> the International Military Tribunal at Nuremberg presaged the inauguration of the holistic system of principles and practices that we today term “international criminal law.” Perhaps the most potent aspect of the Nuremberg legacy is the truism that authentic justice is not achieved on the wings of societal vengeance, innuendo, or external manipulation; rather, the very essence of a fair trial is a verdict based on regularized process and on the quantum of evidence against an individual defendant introduced in open court. The entire concept of what we now recognize as the field of “international criminal law” has been described as “the gradual transposition to the international level of rules and legal constructs proper to national criminal law or national trial proceedings.”<sup>14</sup> While the theoretical purpose of an international accountability mechanism is to reshape the historical narrative amongst the victims of the horrific crimes and the societies affected by those crimes, that macro objective cannot be met without the micro efforts of the defense bar to challenge the minutiae of evidence and viva voce testimony during the often tedious and lengthy days of trial. The growth of a

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<sup>9</sup> JOSEPH E. PERSICO, *INFAMY ON TRIAL* 83 (1994). For another articulation of this highly debatable proposition, see generally RICHARD H. MINEAR, *VICTOR’S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

<sup>10</sup> Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. OF INT’L CRIM. JUST. 830, 834 (2006).

<sup>11</sup> Richard May & Mariëka Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 764 (1999). The perception of victor’s justice was also a strong motivating factor in the movement to establish a permanent international criminal court. See, e.g., M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP L. REV. 1, 34 (1991).

(We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.)

<sup>12</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75 (4), June 8, 1977 [hereinafter Additional Protocol I].

<sup>13</sup> See generally Henry T. King, *Robert Jackson and the Triumph of Justice at Nuremberg*, 35 CASE WES. RES. J. INT’L L. 263 (2003). To be clear, the defense practices in the Tokyo Tribunals faced equally difficult hurdles in terms of the sheer enormity of collecting evidence and challenging the perception that the verdicts were a *fait accompli* even as opening statements began.

<sup>14</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 18 (2003).

systematic justice system is necessarily paralleled by the development of a mature defense bar that serves to ensure that every judgment is grounded in the soil of *individual* responsibility rather than irrational prejudice or irresponsible collective guilt. In a very real sense, the aspiration of the entire accountability enterprise as a constructive component of lasting peace relies on the efforts of the bar in making vigorous and viable efforts to protect the basic rights of defendants.

Against the realities noted above, this article will document the development of a modern defense bar in the context of international and internationalized prosecutions. Acquittal rates are easily identified,<sup>15</sup> but these figures do not reveal the true efforts and professionalism (or lack thereof) of the defense teams. The actual performance of the defense bar in international criminal trials has been underexplored in the literature. The developmental arc of the international defense bar has been all but ignored in the literature despite its centrality to the overall effort to achieve “justice” for egregious international offenses. This article will describe that maturation based upon a synergistic consideration of the current jurisprudence, the words of defense counsel, and the available literature. The next part of this article will discuss the jurisprudence associated with the basic right of defendants in the international justice system to equality of arms in the preparation and presentation of their defense. Parts III and IV respectively will explore some of the key challenges encountered by the defenses that impair the pursuit of perfect equality of arms and discuss the organizational responses to those challenges.

As the U.S. Supreme Court noted, we do not live in a perfect world, and a criminal “defendant is not entitled to a perfect trial, just a fair one.”<sup>16</sup> The system of international criminal justice has evolved significantly in the past decade to facilitate a zealous and independent defense bar and to discipline advocates who violate the established bounds of appropriate conduct. After discussing the challenges faced by the defense and the organizational improvements made by internationalized and ad hoc tribunals, this article will review the empirical evidence supporting the assertion that defendants in fact receive high quality defense efforts even in the face of complex legal theories and extraordinarily difficult factual contexts. The ad hoc international tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) necessarily provide the bulk of the empirical data because their case law is far more extensive and supported by an extensive and publicly available motions practice. The ad hoc tribunals also provided the baseline from which organizational responses to the maturing defense bar can be measured. However, the internationalized tribunals (the Special Court for Sierra Leone (SCSL), the Iraqi High Tribunal (IHT), Special Panels in East Timor, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) also provide important indicators of a mature defense bar because they represent a

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<sup>15</sup> For example, the Special Court for Sierra Leone has a 100% conviction rate at present, while the International Criminal Tribunal for Rwanda approximates an 85% rate, and has seen several convictions at the Trial level overturned on appeal. The Special Panels in the Dili District Court in East Timor acquitted only one defendant after a contested trial, although two others were found not guilty at trial as the charges were plainly based on insufficient evidence and even the prosecution sought to withdraw charges. U.N. Secretary-General, *End of the Mandate Report of the Secretary General of the United Nations Mission of Support in East Timor*, ¶ 20, U.N. Doc. S/2005/310 (May 12, 2005).

<sup>16</sup> *Bruton v. United States*, 391 U.S. 123, 135 (1968) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).



synthesis of international norms into a sui generis system. Phrased another way, arising from the almost overnight creation of the defense teams that challenged the Allied evidence at Nuremberg, the modern international criminal defense bar is now mature and effective, despite its imperfections and occasional inadequacies. This article will conclude, perhaps controversially, that while a perfect equality of arms is a structural impossibility in the current system of international justice, the modern defense bar has nevertheless evolved to provide defendants with trial procedures and organizational support necessary to fully preserve their due process rights.

## II. EQUALITY OF ARMS—THE ESTABLISHMENT AND ETHOS OF THE INTERNATIONAL JUSTICE SYSTEM

### *A. The Theory*

The right of every criminal defendant to adequate time and facilities in the preparation of a vigorous defense represents the quintessential expression of a systematic commitment to balance the ends of justice.<sup>17</sup> The orchestration of international political will and sustained funding to seek individual criminal accountability cannot in itself warrant convictions flowing from fundamentally tainted proceedings. In the Former Republic of Yugoslavia, for example, the Milošević regime exercised power over the Yugoslav judicial system sufficient to prevent any potential accountability for the widespread violations of international law committed under its auspices. Thus, the Secretary-General of the United Nations concluded that the “particular circumstances” of impunity in the former Yugoslavia warranted the creation of the international tribunal<sup>18</sup> and the ICTY was borne from this political mandate. The Secretary-General’s Report nevertheless made clear that it is “axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at *all stages of the proceedings*.”<sup>19</sup> In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International

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<sup>17</sup> Human Rights Comm., *Zwaan-de Vries v. the Netherlands*, Comm. No. 182/1984, U.N. Doc. CCPR/C/29/D/182/1984 (1987); *Ofner v. Austria*, App. No. 524/59, 6 Y.B. Eur. Conv. on H.R. 680 (Eur. Ct. H.R.) (“equality of arms”). As U.S. Supreme Court Justice George Sutherland observed in *Powell v. Alabama*:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

<sup>18</sup> U.N. Secretary-General, *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808*, ¶ 26, U.N. Doc. S/2-5704 (May 19, 1993). Similarly, Robert Jackson understood the iconic nature of the International Military Tribunal perhaps more clearly than any of his peers, but also believed that the prosecutions were a pragmatic necessity in defeating what he termed at the time “unregenerate and virulent” Nazism. ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT* 170-71 (John Q. Barrett ed., 2003).

<sup>19</sup> *Id.* ¶ 106 (emphasis added).

Covenant on Civil and Political Rights.”<sup>20</sup>

The indispensable right of each defendant to have adequate time and facilities for the preparation of the defense case and to communicate with counsel flows from the requirement of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) that a criminal trial be a “fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>21</sup> The right to a fair criminal trial that offers “the essential guarantees of independence and impartiality”<sup>22</sup> untainted by executive interference or external manipulation reflects the very essence of human rights norms and is replicated in the laws and customs of war addressing military prosecutions of civilians.<sup>23</sup> As a logical extension, the law applicable to international armed conflicts requires trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . . .”<sup>24</sup>

Judicial processes, derived from the political support and ample funding of the most powerful states in the world as a response to criminal activity for which there appeared no other salient solution, immediately raised the specter of victor’s justice that lay dormant for nearly fifty years following the IMT. Speaking early in the life of the ICTY and its companion tribunal for Rwanda, the internationally respected Prosecutor Richard Goldstone echoed Justice Robert Jackson’s warnings from the World War II era:

There is no question that history will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.<sup>25</sup>

Because the ICTY and International Criminal Tribunal for Rwanda (ICTR) drew their lifeblood from the political power of the UN Security Council, defense

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<sup>20</sup> *Id.*

<sup>21</sup> See International Covenant on Civil and Political Rights art. 14(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Human Rights Comm., *Ato del Avellanal v. Peru*, Comm. No. 202/1986, U.N. Doc. A/44/40 (1989) (Peruvian law allowing only husbands to represent matrimonial property before the courts violated the Article 14(1) of the ICCPR); Human Rights Comm., *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, ¶¶ 1, 6-7, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (Apr. 11, 1986) (“once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR] . . . . Aliens shall be equal before the courts and tribunals . . .”).

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(2), *adopted* June 8, 1977, 1125 U.N.T.S. 609, 612 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *reprinted in* 9 I.L.M. 673 (1970).

<sup>23</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (making the deprivation of fundamental fairness during trial a grave breach of the Convention subject to universal jurisdiction).

<sup>24</sup> Additional Protocol I, *supra* note 12, art. 75(4).

<sup>25</sup> Sara Siebert, *The Pull of Criminal Law and the Push of Human Rights: Challenges in the International Criminal Process*, 11 IRISH STUDENT L. REV. 29, 36 (2003) (quoting Richard J. Goldstone, Address before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (Oct. 2, 1996)).

attorneys immediately argued that no defendant could receive a fair trial in accordance with human rights norms. Given the political motivations for creating the ICTY and the ICTR, and the perceptions within the affected regions,<sup>26</sup> it was plausible that judges could rule in good faith that equality of arms was structurally impossible in an ad hoc tribunal as a per se matter. Such a presumption of an automatic “inequality of arms” would have permitted all defendants facing accountability to rely upon the still resident preconceptions of victor’s justice and political expediency as warranting full acquittal and release irrespective of the actual conduct of trial.

In fact, years prior to the formation of the ICTY and the ICTR, the United Nations Commission on Human Rights adopted a functional test for interpreting the human rights obligation of all courts to “genuinely afford the accused the full guarantees” before a judicial body “established by law.”<sup>27</sup> These issues swiftly surfaced during the first trial litigated at the ICTY. In the *Tadić* case, the ICTY had to determine whether the defendant’s human rights are automatically violated by prosecution before a court which was formed following the commission of the alleged crimes.<sup>28</sup> Noting that the ICCPR drafters rejected language specifying that only “pre-established” forums would provide sufficient human rights protections, the ICTY Appeals Chamber concluded that:

The important consideration in determining whether a tribunal has been “established by law” is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.<sup>29</sup>

The *Tadić* standard subsequently became the cornerstone for assessing

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<sup>26</sup> In this context it is also worth remembering that the Security Council vote to establish the International Criminal Tribunal for Rwanda using the Chapter VII authority granted by the U.N. Charter succeeded over the objections of the government of Rwanda, and it is clear that the intervening fifteen plus years have not fully alleviated the tensions between an ad hoc tribunal operating in Tanzania applying international jurisprudence and presumptions and the domestic government and justice officials in Rwanda.

<sup>27</sup> See Human Rights Comm., *CCPR General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (Art. 14), ¶ 4, U.N. Doc. A/43/40 (Apr. 13, 1984); Human Rights Comm., *CCPR General Comment No. 17: Right to Privacy*, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (Apr. 8, 1988). The Commission further commented on whether military courts constitute a court under “law,” stating that “the Covenant does not prohibit such categories of courts” while affirming and stressing that such courts, as any and all others, must afford the guarantees set forth in Article 14 of the ICCPR. *General Comment No. 13, supra*, ¶ 4. See also Human Rights Comm., *Cariboni v. Uruguay*, Comm. No. 159/1983, U.N. Doc. A/39/40 (1987). The Inter-American Commission has taken a similar approach. See, e.g., Inter-Am. Comm’n H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, (Mar. 14, 1973); Inter-Am. Comm’n H.R., Annual Report 1973, 2-4, OEA/Ser. P, AG/doc. 409/174 (Mar. 5, 1974).

<sup>28</sup> See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 104–06 (1997).

<sup>29</sup> Prosecutor v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Oct. 2, 1995); see also CHRISTOPHER SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 87–88 (2001) (noting the disparity between the American Convention on Human Rights requirement that the criminal forum be established by legislative act prior to the commission of the crime at bar and the corresponding rejection of a request by Chile to include a similar provision in the International Covenant on Civil and Political Rights).

every future defense claim to equality of arms and its influence has permeated the jurisprudence of all the internationalized and ad hoc tribunals. Its residual power cannot be overstated. The inherent legitimacy of the system of international criminal trials depends upon the “requirements of procedural fairness.”<sup>30</sup> The very authority of the judicial system thus depends upon procedural parity between the defense and prosecution teams, which in turn requires the Trial Chambers to closely monitor every motion and every aspect of representation and advocacy at all phases of the trial proceedings.

Thus, despite the inherent advantages of the Prosecution in terms of resources, time, and investigative assets, there is no presumption of an inequality of arms. As a necessary corollary to that judicial finding, tribunal judges must respond to a blizzard of trial motions related to the defense quest for equality of arms. The *Tadić* finding in essence made the bench the arbiter of due process in the sense that judges have taken it upon themselves to compensate, at least partially, for the inherent inequality of resources by proactively protecting the due process rights of the accused. In that manner, the function of the current system of international justice has become much more closely aligned with an inquisitorial practice whereby judges are more involved in the assessment of evidence, the evaluation of charges, and the actual conduct of the trial proceedings.<sup>31</sup> A substantial body of practice has accordingly evolved across the entire field of international criminal justice as rulings respond to a variety of commonly raised themes. At both the ICTY and ICTR, for example, judges have repeatedly rejected plea agreements and guilty pleas as unsupported by the facts or inconsistent with the interests of justice.<sup>32</sup>

More importantly, the role of judges as the guarantors of the due process rights of defendants has had profound implications for the actual practice of international justice, as the following sub-part will illustrate.

### *B. Structural Concerns and the Judicial Responses*

Defense attorneys in international criminal trials confront an array of practical and legal difficulties in presenting effective representation for their clients. Anecdotal evidence indicates that many potential witnesses and international experts are reluctant to testify on behalf of the defense even when their testimony is both probative of the actual truth of the events in dispute and necessary for a proper legal interpretation of those events.<sup>33</sup> This may arise in part from the residual stigma attached in the popular mind to anyone associated with the horrendous acts at bar. Similarly, there are many anecdotal examples, particularly in relation to

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<sup>30</sup> Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Oct. 2, 1995).

<sup>31</sup> Michael Bohlander, *A Silly Question? Court Sanctions Against Defence Counsel for Trial Misconduct*, 10 CRIM. L.F. 467, 468–71 (1999). See, e.g., Prosecutor v. Orić, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, ¶ 9 (July 20, 2005) (“The question, then, is whether, taking into account the complexity of the remaining issues, the amount of time and the number of witnesses allocated to Orić’s defense are reasonably proportional to the Prosecution’s allocation and sufficient to permit Orić a fair opportunity to present his case.”) (hereinafter *Orić Decision on Length of Defence Case*).

<sup>32</sup> JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 234–35 (2009).

<sup>33</sup> Defense Attorney Interview No. 4 (Apr. 18, 2010) (notes on file with author, defense attorneys requested anonymity during interviews).

proceedings in the ICTR and SCSL, in which witnesses at trial readily responded to questions posed by the prosecution, but became uncommunicative and elusive on cross examination.<sup>34</sup> Witnesses in international tribunal practice are famously unresponsive and difficult to control, which may be in part due to external pressures and the clear undercurrent that witnesses do not wish to assist the acquittal of those charged with destroying the social and economic fabric of society. The cultural and communicative gaps between the witness and counsel can also contribute to this differentiation. Experienced litigators seeking a smooth and rapid flow of questions accompanied by the heat of cross examination and incisive critique of witness testimony are almost certain to be disabused of that perception. Further complicating the defense task, recent empirical evidence indicates that approximately 50% of the witnesses in the ICTR gave trial testimony that substantially varied from their pre-trial statements,<sup>35</sup> while more than 90% of the ICTR cases featured an alibi or other example of directly conflicting testimony between prosecution and defense witnesses.<sup>36</sup> These realities put a premium on skilled defense perspectives that can illuminate testimonial gaps with factual rebuttal to demonstrate bias, inaccuracy, or outright deception. This role is particularly important when the defense team highlights the evidentiary gaps in relation to the mode of personal liability by which the prosecutor alleges an individualized nexus between a particular perpetrator and the wholesale pattern of grievous crimes that are of sufficient gravity to merit accountability under international norms. In a truth seeking process, these functions are vital.

In some circumstances, members of the defense team will face open opposition or outright hostility from government officials as they attempt to represent the interests of their clients. An American defense attorney named Peter Erlinder was arrested by Rwandan authorities on charges that he committed a domestic crime by denying the 1994 genocide and threatening national security through his communications and writings. Rwandan officials insist that the work of the defense can “instigate riots” and “civil disturbances.”<sup>37</sup> The arrest had a ripple effect as eleven defense lawyers with pending ICTR appearances requested delays (one of which has already been denied at the time of this writing despite a finding that the Rwandan domestic charges “are partly related to his submissions before the Tribunal”).<sup>38</sup> Members of the trial teams defending in the ICTR quite logically expect to be able to travel in Rwanda, interview witnesses, and collect available exculpatory evidence. Similar to the petitions made by Iraqi lawyers to the Iraqi

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<sup>34</sup> See *ICTR/Zigiranyirazo—Bagaragaza Witness Gives the Defence a Hard Time*, HIRONDELLE NEWS AGENCY, June 15, 2006 (when questioned by the defense the witness “said as little as possible”).

<sup>35</sup> Nancy Combs, *Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials*, UCLA J. INT’L & FOREIGN AFF. 235, 251 (2010).

<sup>36</sup> *Id.* at 240.

<sup>37</sup> Josh Kron, *Lawyers Report Intimidation by Rwanda*, N.Y. TIMES, June 12, 2010, at A1.

<sup>38</sup> Prosecutor v. Nizeyimana, Case No. ICTR 00-55C-PT, Decision on Ildephonse Nizeyimana’s Motion to Suspend Trial Proceedings Rule 73 of the Rules of Procedure and Evidence, ¶ 7 (June 9, 2010). Erlinder’s subsequent motion for a permanent stay of proceedings in the case against Aloys Ntabakuze on the basis of the allegation that “the intimidation” by the Rwandan government made counsel “unable to fully discharge their professional duties” was denied, and the Appeals Chamber removed him from his role as lead counsel for Aloys Ntabakuze in the *Bagasora Case* based on his refusal to appear before the Court. Aloys Ntabakuze v. Prosecutor, Case No. ICTR 98-41A-A, Order Imposing Sanctions on Ntabakuze’s Lead Counsel (April 21, 2011), footnote 4.

High Tribunal (IHT),<sup>39</sup> a majority of defense lawyers appearing before the ICTR have signed a petition saying that they cannot continue to represent their clients unless the Registrar can guarantee their safety. Almost simultaneously, the *Gotovina* Trial Chamber granted a defense motion for an urgent petition to the ICTY Appeals Chamber related to the arrest and pending criminal trial in Croatian domestic courts of a key member of the defense.<sup>40</sup>

These incidents reveal lingering disparity between the obligation of states to cooperate with the ad hoc tribunals “in the investigation and prosecution of persons” and their actual treatment of defense attorneys and investigators.<sup>41</sup> Governments have legal obligations to assist the court in the ad hoc tribunals, and in the past prosecutors have been able to obtain assistance and political support from governments far more readily than the defense. The difference in access to international pressure/leverage arguably represents the most significant structural limitation on equality of arms in the system of international justice. As a normative matter, these examples illustrate that a broad statutory immunity granted to defense counsel may be an important domestic dimension to augment the professional ethos of the international defense bar. Every domestic accountability mechanism will be implemented within the structure of a domestic statutory scheme that provides jurisdictional authorities, appointment mechanisms for judges, funding channels, legal procedures, evidentiary issues, and a myriad of other matters. One best practice for the future may be to carve out criminal and civil immunity for any activities of defense teams related to the performance of their duties as indeed they are obligated to do under both the prevailing domestic code of ethics and the modern Codes of Professional Conduct that will be discussed below.

Defense counsel who eschew viva voce testimony and rely instead on documentary evidence face another and perhaps equally daunting challenge. In many post-conflict settings, an entire region constitutes the crime scene.<sup>42</sup> Military forces entering the area are uniquely situated to preserve evidence, begin forensics work at mass graves, and generate other highly probative evidence. The vast bulk of what may become admissible evidence is therefore in the hands of national authorities, who have established detailed mechanisms for providing that information to the prosecution teams, but have often been far less forthcoming to defense investigators. This structural imbalance in part began as the natural reluctance of military officials to simply turn over volumes of intelligence to attorneys who are often investigating allegations with not specific evidentiary goal in mind. Atrocity crimes cases are inherently complex and evidence intensive. A trained legal mind is an indispensable asset for discerning the legal value of information amongst the mass of data categorized as intelligence information in the wake of military success. Prosecutors at Nuremberg reviewed over 100,000 captured German documents, millions of feet of captured film, and over 25,000

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<sup>39</sup> See *ENEMY OF THE STATE*, *supra* note 8, at 114–15 (describing the circumstances under which two defense attorneys were murdered in Baghdad as the *Al-Dujail* trial began and the refusal of other defense attorneys to accept the security precautions offered by court officials).

<sup>40</sup> Prosecutor v. Gotovina, Case No. 06-90-T, Decision on Defense Request for Certification to Appeal the Trial Chamber Decision of 12 March 2010 (Apr. 21, 2010).

<sup>41</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia art. 29, May 25, 1993, 32 I.L.M. 1203 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 28, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

<sup>42</sup> Sebastian Junger, *The Forensics of War*, VANITY FAIR, Oct. 1999, at 138.

photographs prior to conducting a trial that consumed 216 days and produced a record of over 17,000 pages.<sup>43</sup> German defense attorneys concluded that the failure to institute procedures for defense examination of the documentary evidence in the control of the government severely hindered their ability to provide an effective defense for their clients.<sup>44</sup> This systematic disequilibrium prevented a full examination of exculpatory evidence during the military commissions in the aftermath of Nuremberg, and to a large extent this same imbalance persists to this day. One German defense attorney noted that:

The defenders could utilize this entire confiscated material only so far as the prosecuting authority decided, in the course of the processes, to submit it to the court as evidence. The defenders themselves had no possibility whatsoever to look through the archives in Washington and London for exonerating evidence. Because of these facts, valuable material for the defence has most certainly not been used.<sup>45</sup>

The fact that the ICTY has over six million documents in its database shows that the collection of evidence can be a massive job. The critical need for information management systems to be under the control of an interdisciplinary team that remains focused on a particular evidentiary set from investigation to appeal has proven to be one of the most potent lessons related to information accessibility and evidence management. The interdisciplinary team should optimally have a sophisticated system in place to take these cases through appeal. The lack of such an integrated system at the beginning of ICTY operations cost a great deal of money and effort as the years went on and the investigations piled up. In particular, the lack of adequate systems and personnel to comb through the vast volume of available material hinders the search for exculpatory evidence which the prosecution is obligated to disclose to the defense team under the rules of every extant tribunal.

Defense teams will generally be underfunded and operate with less time and with far fewer attorneys, investigators, and support staff, as compared to prosecution teams.<sup>46</sup> The prosecution will also enjoy much greater access to the

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<sup>43</sup> See REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 12, Publication 3080, Washington D.C., at 432-33 (1945) [hereinafter Robert Jackson Report], available at <http://avalon.law.yale.edu/imt/jack63.asp#1>.

<sup>44</sup> Otto Kranzbuhler, *Nuremberg: Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965), reprinted in PERSPECTIVES ON THE NUREMBERG TRIAL 433, 436 (Guénaël Mettraux, ed., 2008) [hereinafter PERSPECTIVES ON THE NUREMBERG TRIAL].

<sup>45</sup> Hans Latenser, *Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders*, 8 WHITTIER L. REV. 557, 561 (1987), reprinted in PERSPECTIVES ON THE NUREMBERG TRIAL, *supra* note 44, at 476. In modern practice the typical defense team is composed of a Lead Counsel, a Co-Counsel, two legal assistants, and one investigator per accused.

<sup>46</sup> See e.g. Callixte Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Appeals Chamber Judgment ¶ 36 (Oct. 20, 2010) (finding no violation of equality of arms despite the contrast between the "large team" of 35 investigators who worked from 1999 to 2008 on behalf of the prosecution and the two investigators available to the defense for a two and a half month period in 2008). David Wippman, *The Costs of International Prosecution*, 100 AM. J. INT'L L. 861, 872 (2006) (discussing the ICTY budget). The 1993 budget for the ICTY, for example, was \$276,000. That amount rose steadily to more than \$271 million before it reached a plateau. During 2004 and 2005, the combined tribunal budgets exceeded \$500 million, which represented one-sixth of the UN budget for that period.

entire range of potentially relevant documentation and other evidence. This truism in turn provides prosecutors a far freer hand in shaping the contours of the case. During trials, for example, the prosecution team will be able to revise its presentation of evidence as a tactical matter, while the defense must be prepared to respond to each and every allegation. For example, during the *Milošević* trial, of the 380 charged events, only 40–50% actually provided the basis for admitted evidence. Thus, the system of international justice may appear on the surface to be impermissibly and inalterably tilted towards the prosecution. Some practitioners have concluded that the balance of powers is fundamentally skewed.<sup>47</sup> This is not to imply, of course, that prosecution teams always have complete freedom to collect evidence, as there have been instances of active governmental or organized local resistance to ICTY and ICTR investigations within their respective regions;<sup>48</sup> this trend has continued in the ICC context as government officials in situation countries have hindered investigative efforts on occasion.<sup>49</sup>

Against the backdrop of an inherently uneven system, the Trial Chambers have an inescapable duty to ensure the equality of arms that is the sine qua non of a fundamentally fair judicial process. The modern reality is that the judges have become the guarantors of procedural parity, examining several structural imperatives in virtually every case. For example, the bench actively arbitrates defense requests for additional time and resources. Indeed, in almost every trial, defense requests for additional preparation time or resources are considered carefully and are virtually always granted in some form. There is, however, a strong judicial imperative to seek efficiency in the overall presentation of evidence, which in turn has compelled judges to limit witness lists of both the prosecution and defense and to manage the time available to each side to present its case. As a result, a high percentage of motions practice involves the efforts by defense attorneys or prosecution teams to gain greater latitude from the bench in the timing of the case or the presentation of witnesses; if anything, the efforts of judges to preserve the fairness to the extent feasible has the paradoxical effect of creating the lengthy delays and recurring motions that can lead to perceptions of illegitimacy and unfairness in the minds of the regional population.

The language of the ICTY Appeals Chamber in the *Orić* case perfectly captures the legal imperative and accompanying practice that has become one of the most actively litigated aspects of international trials:

The Appeals Chamber has long recognized that “the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the

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<sup>47</sup> See, e.g., Gabrielle McIntyre, *Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT’L L. 269 (2003).

<sup>48</sup> See CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 53, 56–57 (2008) (describing the active resistance of Yugoslav officials).

<sup>49</sup> The local chief in Gulu, Uganda, for example, went on the radio to announce the license plate of the vehicle carrying ICC investigators (CD-121) and ask citizens to drive them out of town due to local hostility towards the court and its alleged bribery of witnesses. Sudanese officials have reportedly detained persons suspected of cooperating with ICC prosecutors. Int’l Fed’n for Human Rights, *Serious Concerns About Harassment Faced by Persons Suspected of Supporting or Cooperating with the International Criminal Court in Sudan* (Feb. 2, 2009), available at <http://www.unhcr.org/refworld/docid/49885789c.html>.



heart of the fair trial guarantee.” At a minimum, “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case,” certainly in terms of procedural equity. This is not to say, however, that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution’s case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.

In addition, it should be noted that although Rule 73*ter* gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute of the International Tribunal be respected. Thus, in addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.<sup>50</sup>

The conduct of extensive pre-trial hearings to set out judicial expectations, impose guidelines, and generate the deadlines and criteria that in the aggregate result in an efficient trial has become an accepted best practice in the international criminal system.<sup>51</sup>

For example, taking his cue from the widespread perception of disorder and unruliness during the *Al-Dujail* trial involving Saddam Hussein and his co-defendants, the presiding IHT judge in the much more complex Anfal genocide case held an extensive pre-trial conference with all of the prosecutors and defense counsel that ensured a smooth and orderly process even though Saddam Hussein was also one of the co-accused in the Anfal case. In other Tribunals, Trial Chambers have also monitored the composition of the defense team, and have gone so far on occasion as overturning the decisions of the Registry, which is responsible for administering the various Directives on Assignment of Defense Counsel.

In accordance with their role as the guardians of procedural parity,<sup>52</sup>

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<sup>50</sup> *Orić Decision on Length of Defence Case*, *supra* note 31, ¶¶ 7–8. See also *Prosecutor v. Prlić*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against “*Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge*,” ¶¶ 16, 19, 39 (July 1, 2008), <http://www.icty.org/x/cases/prlic/acdec/en/080701.pdf>.

<sup>51</sup> See Rome Statute of the International Criminal Court art. 64(8)(b), July 17, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute]; ICC R. P. & EVID. R. 140 [hereinafter ICC RPE].

<sup>52</sup> This expanded role has also generated some criticism from practitioners who argue that the Rules injecting an inquisitorial flavor into current tribunals “invite the judiciary to take over the job of prosecuting.” GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL*

international judges have also actively monitored the right of the defendant to adequate facilities for the preparation of the defense based on a totality of the circumstances test.<sup>53</sup> Some Appeals Chambers have granted additional representation to defendants in circumstances that in the Court's view would otherwise erode equality of arms and the correlative right to a fair and expeditious trial,<sup>54</sup> and have implemented an extensive system for ensuring that all defendants are represented by counsel, as will be examined in more detail below. The experience of the ICTY indicates that this will be a major expense associated with the ICC, as the provision of gratis counsel consumed some ten percent of the ICTY budget, to the tune of some ten to thirteen million dollars per year.<sup>55</sup>

Finally, and perhaps most importantly from the perspective of due process rights, as well as the interests of the states that support and fund the international tribunals, virtually every Trial Chamber in every jurisdiction surveyed has aggressively managed the flow of information to the defense teams. The judicial recognition of the necessity for managing the flow of information to the defense is a relatively recent phenomenon in practice. Defense motions for access to information have become the most pervasive aspect of motions practice. Such evidentiary motions are especially critical when the defense seeks access to exculpatory information,<sup>56</sup> or where the Court is confronted with the need to order disclosure of such exculpatory information. In practice, the ICTY has operationalized a two-tier screening process during the investigative phases of its work, segregating document collection into low security and high security evidence. This process facilitates disclosure of evidence to the defense as it is far easier to give the defense team blanket access to evidence that does not implicate the security interests of states. This is especially true early in an investigation when the ultimate relevance of a particular piece of evidence may be unknown because specific charges against specific defendants have not yet been framed. An ancillary benefit of such segregation is that the smaller database of high value evidence is much more likely to contain any exculpatory evidence which in turn aids the process of identifying and disclosing such evidence pursuant to the specific disclosure obligations.<sup>57</sup> Defense attorneys can search the majority of collections

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JUSTICE 377 (2d ed. 2002).

<sup>53</sup> See e.g., Prosecutor v. Prlić, Case No. IT-4-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, ¶ 26 (Sept. 4, 2008), <http://www.icty.org/x/cases/prlic/acdec/en/080904.pdf>.

<sup>54</sup> Prosecutor v. Popović, Case No. IT-05-88-T, Decision on Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić (Feb. 20, 2007), <http://www.icty.org/x/cases/popovic/idec/en/070220.pdf>.

<sup>55</sup> U.S. Institute of Peace, *Special Report 122, Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice* 7 (2004), available at <http://www.usip.org/pubs/specialreports/sr122.html> [hereinafter Special Report 122].

<sup>56</sup> Rome Statute, *supra* note 51, art. 67(2); ICC RPE, *supra* note 51, R. 83. See e.g., Prosecutor v. Augustin Ndirabware, Case No. ICTR-99-54-T, Decision on Defence Motion For Disclosure of Additional Exculpatory and Other Relevant Material Pursuant to Defence Oral Motion Presented on 24 November 2010, ¶ 26 (Apr. 1, 2011) (noting that the Prosecution obligation to disclose exculpatory evidence is to be construed broadly to require disclosure of any evidence that is potentially exculpatory rather than requiring a showing that the evidence is actually exculpatory).

<sup>57</sup> For example, the Rome Statute expressly obligates the ICC to supervise the prosecutor's performance of the duty to provide the defense with any information indicating the innocence of the accused (which includes evidence mitigating guilt), as well as anything in its possession "which may affect the credibility of prosecution evidence." Rome Statute, *supra* note 51, art. 67(2).

themselves and look for items that might be useful to them or support their theory of the case. This practice has spread to other tribunals as a way of increasing efficiency by minimizing the grounds for defense delays during trial. However, the information system in use at the ICTR is cumbersome and only available to the defense from within the Tribunal building.

Management of the flow of information by the bench will, of course, always function against the bedrock boundary of the relevant Rules of Procedure for each Tribunal that permit states and organizations to maintain the confidentiality and limitations on subsequent use of sensitive information, even in the context of litigation.<sup>58</sup> Defense motions related to information that is the proprietary property of a state or other organization are today perhaps the most hotly contested issues in the motions practice of the tribunals. On this issue, as in other areas, the pursuit of equality of arms requires judges to balance the rights of the defendant against ever-present economic and political realities facing the tribunals. As ICTY Judge David Hunt noted (in dissent) in the context of the *Milošević* trial:

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 [referring to the Security Council mandated closure of the ad hoc tribunals] which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a *spreading stain* on this Tribunal's reputation.<sup>59</sup>

In a similar vein, though it had earlier issued a contempt ruling against the defendant and sentenced him to fifteen months in prison for his disruptive and obstructionist tactics, Trial Chamber III of the ICTY declined to impose counsel on Vojislav Šešelj against his wishes despite recognizing the arguments that denying him the right to self-representation would make the proceedings "more efficient" and "less disruptive" in light of the ICTY Completion Strategy.<sup>60</sup>

Thus, the role of the judiciary as the guardian of equity in the proceedings has been well established, even when it raises conceptual conflicts with other goals of the accountability process. However, it is clear that the need to ensure equality of arms in no way gives the defense team an unwarranted power over the court. Holding that the Trial Chamber did not abuse its discretion in setting limits on the defense team in the *Krajišnik* case, the ICTY Appeals Chamber observed that the defense had "considerable discretion" when planning its "preparation and on presentation of evidence, as long as the Defence case closed on a certain date (which date was pushed back several times to accommodate the Defence)."<sup>61</sup> It was

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<sup>58</sup> See *infra* Part V(A).

<sup>59</sup> Prosecutor v. Slobodan Milošević, 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 (Majority Decision given 30 September 2003), ¶ 22 (Oct. 21, 2003), [http://www.icty.org/x/cases/slobodan\\_milosevic/acdec/en/031021diss.htm](http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/031021diss.htm).

<sup>60</sup> Prosecutor v. Šešelj, Case No. IT-03-67-T, D37-1/45214BIS, Public Version of the "Consolidated Decision on Assignment of Counsel, Adjournment, and Prosecution Motion for Additional Time With Separate Opinion of Presiding Judge Antonetti in Annex," ¶ 80 (Nov. 24, 2009), <http://www.icty.org/x/cases/seselj/tdec/en/091124.pdf>.

<sup>61</sup> Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeals Chamber Judgement, ¶ 108 (Mar. 17,

up to the Defense to “organize [sic] its case within the time limits imposed.”<sup>62</sup> Thus, although judges may monitor the case and facilitate equality of arms, the ethical and professional imperative of the defense team is to properly manage available resources on behalf of the criminal defendant.

### III. ETHICAL AND PROCEDURAL CHALLENGES FACING THE DEFENSE

An assessment of the evolution of the international defense bar requires consideration of past defense practices and the perceived poor performances of counsel. The diligence and professionalism that is commonplace in the daily grind of trial preparation far from the headlines and accolades of professional peers goes unreported and is unremarkable. The *gründnorm* in practice is that a very, very high percentage of defense counsel are dedicated professionals who serve the ends of justice and their clients to the best of their ability, often at great professional hardship<sup>63</sup> and occasional personal risk. There have been, nevertheless, some notable professional lapses that in turn spawned significant organizational and jurisprudential responses.

For example, the first ICTY case, *Prosecutor v. Tadić*, also included the first contempt proceedings against a defense counsel at the ICTY. Milan Vujin performed pro bono work for the defense team. Following the *Tadić* conviction, he became counsel for the appellate phase of the proceedings.<sup>64</sup> Between September 1997 and April 1998, Milan Vujin instructed witnesses preparing to make statements to his co-counsel to lie, nodded his head to indicate to witnesses during their interviews when to say yes and when to say no, intimidated witnesses in a manner that dissuaded them from telling the truth, knowingly instructed a witness to make false statements to the Tribunal, and actually paid a witness who provided a statement. This pattern of conduct resulted in the first clear expression of the Tribunal’s inherent judicial authority to punish defense counsel it finds guilty of contempt. The Appeals Chamber found Vujin in contempt, because he “put forward a case . . . that he knew to be false in material respects,” and he “manipulated Witnesses A and B by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadić had been convicted.”<sup>65</sup> The Appeals Chamber held the contempt to be serious because Vujin’s conduct was “against the interests of his client,” and therefore “str[uck] at the very heart of the criminal justice system.”<sup>66</sup> The Chamber justified its holding with the observation that “tribunals necessarily rely very substantially upon the honesty and propriety of counsel in the conduct of litigation. Counsel are permitted important privileges by the law which are justified

2009), <http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf>.

<sup>62</sup> *Id.*

<sup>63</sup> Defense attorneys in the context of the Iraqi High Tribunal refused the offers of the Tribunal and the Regime Crimes Liaison Office for personal protection and the relocation of their families because they argued that they would in essence sacrifice the remainder of the legal practice by ignoring other cases and clients to focus solely on the work of the internationalized tribunal.

<sup>64</sup> See *Prosecutor v. Tadić*, Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt against Prior Counsel, ¶ 2 (Jan. 31, 2000), <http://www.icty.org/x/cases/tadic/acjug/en/vuj-aj000131e.pdf>.

<sup>65</sup> *Id.* ¶ 160.

<sup>66</sup> *Id.* ¶ 167.

only upon the basis that they can be trusted not to abuse them.”<sup>67</sup> The Judgment accordingly ordered Vujin to pay a fine to the Registry of the Tribunal and directed the Registrar “to consider striking” his name “off the list of assigned counsel” and report “his conduct . . . to the professional body to which he belongs.” Vujin in turn appealed this judgment, and, in 2001, the Appeals Chamber dismissed his appeal and affirmed the prior rulings. The Registrar ordered Vujin’s name to be withdrawn from the list of assigned counsel, and the Appeals Chamber in turn upheld his removal from the list of authorized counsel on September 11, 2001.

Milan Vujin’s misconduct established the principle that the recognized right of a defendant to choose counsel can be limited in the interests of justice where the counsel’s own conduct comes into question. Furthermore, the Registrar’s power to remove assigned counsel also extends to private counsel. In an important decision extending this line of reasoning, the Court ruled in *Prosecutor v. Kovač* as follows:

The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by the [Tribunal] Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct, which interferes with its administration of justice . . . such an inherent power includes the power to refuse audience to counsel.<sup>68</sup>

Some cynics would assume that the conduct of Milan Vujin typifies the unprofessional intimidation and evidence manipulation of ICTY defense counsel. In fact, the Vujin contempt conviction remains the only one of its kind in all of the Tribunal’s jurisprudence. There have been only two other contempt cases brought against defense counsel in the ICTY (arising from the same circumstances in the same case), and both resulted in full acquittals because the evidence of defense misconduct was flimsy and unsubstantiated.<sup>69</sup>

The famous fee splitting scandals also mark an inescapable watershed in the ethical and procedural evolution of the tribunals. In the early years of the ICTY

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<sup>67</sup> *Id.* ¶ 168.

<sup>68</sup> *Prosecutor v. Kovač*, Case No. IT-96-23-T, Decision on the Request of the Accused Radomir Kovač to allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, ¶ 9 (Mar. 14, 2000), <http://www.icty.org/x/cases/kunarac/tdec/en/00314DS212571.htm>. See also *Prosecutor v. Tadić*, *supra* note 64, at ¶ 28 (noting that the inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation, and the existence of that power does not depend upon a reference being made to it in the Rules of Procedure and Evidence); *Prosecutor v. Milošević*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal against Kosta Bulatović (May 13, 2005), [http://www.icty.org/x/cases/slobodan\\_milosevic/tjug/en/bulatovic.pdf](http://www.icty.org/x/cases/slobodan_milosevic/tjug/en/bulatovic.pdf).

<sup>69</sup> *Prosecutor v. Avramović & Simić*, Case No. IT-95-9-R77, Judgement (Mar. 29, 2000) (issuing not guilty findings on allegations of bribery, suborning, perjury, and witness intimidation as the Trial Chamber noted that the witness against counsel embellished noticeably as the potential for personal gain became more apparent); *Prosecutor v. Aleksovski*, Case No. IT 95-14/1-AR77, Judgement on Appeal by Anto Nobile against Finding of Contempt (May 20, 2001), <http://www.icty.org/x/cases/aleksovski/acjug/en/nob-aj010530e.pdf> (acquitting defendant of the allegation of intentionally disclosing the identity of a protected witness because the evidence indicated that he did not knowingly do so).

and ICTR, defense counsel would often agree to share a portion of the funds paid by the Registrar with the defendant or the defendant's family members, a practice that became known as "fee splitting."<sup>70</sup> This practice was effectuated either through a regular apportionment of a percentage of the counsel's fee to the defendant or through the provision of gifts and other indirect support and maintenance to the defendant and his relatives.<sup>71</sup> Given the disparate financial resources allotted to the defense and prosecution teams and the widespread criticism over the spiraling costs of the ad hoc tribunals, the fee splitting scandal had a visceral power that would in time create a frozen perception of defense dysfunction in the minds of many observers and pundits. Fee splitting became emblematic of a profligate and out of control international bureaucracy seemingly manipulated by a corrupt bar in pursuit of personal enrichment while engaged in the façade of justice. At the time, counsel had no incentive for procedural efficiency<sup>72</sup> during trials because they were simply paid on an hourly basis according to a set fee schedule. Neither the ICTY nor ICTR had an established mechanism to control the spiraling costs, which in turn created a gravy train mentality among some counsel who became accustomed to the much higher pay available doing the international criminal work than that available in their domestic system.

In perhaps the most egregious documented example, fees to the appointed counsel of one indigent ICTY defendant exceeded \$1.4 million over a four-year period, of which some \$175,000 went to the defendant's family to purchase various properties and costly merchandise.<sup>73</sup> One oft-ignored reality in this context is that the problem of employing family members of the accused as members of the defense team, which really represented a subterfuge for diverting tribunal resources to aid the defendant, was initially facilitated by the ICTY Registry through a "liberal attitude" and a "very tolerant approach" regarding the choice of counsel.<sup>74</sup> Indeed, in the early years of the ad hoc tribunals, fee splitting arrangements were arguably permissible under the ICTY and ICTR Statutes and Rules.

These scandals predictably prompted wide-ranging reforms that developed the system of uniform checks and balances within which the defense bar operates today on a basis of predictability and ethical equivalence. The Registrar almost immediately amended the Directive on the Assignment of Counsel to prohibit the employment of family members on the defense team,<sup>75</sup> and implemented a system

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<sup>70</sup> U.N. Secretary-General, *Secretary-General's Comprehensive Report on the Progress Made by the International Criminal Tribunal for the Former Yugoslavia in Reforming Its Legal Aid System*, ¶ 42, U.N. Doc. A/58/288 (Aug. 12, 2003) [hereinafter Comprehensive ICTY Report].

<sup>71</sup> See Office of Internal Oversight Services, *Report of the Office of Internal Oversight Services on the Investigation Into Possible Fee-Splitting Arrangements Between Defense Counsel and Indigent Detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia*, ¶ 13, U.N. Doc. A/55/759 (Feb. 1, 2001).

<sup>72</sup> *Id.* ¶ 11.

<sup>73</sup> Mark Ellis, *Defense Counsel Appearing Before International Tribunals: Past Experiences and Future Challenges*, 4 J. HUM. RIGHTS. 491, 496 n.59 (2005) (citing Judith Armatta, *Crackdown on War Profiteering at Tribunals: Court Acts to Eliminate Extortion of Fees from Appointed Counsel*, July 19, 2002 (www.cij.org)).

<sup>74</sup> RODNEY DIXON & KARIM KHAN, *ARCHBOLD INTERNATIONAL CRIMINAL COURTS—PRACTICE, PROCEDURE, & EVIDENCE* ¶¶ 20-104-105 (2d ed. 2005).

<sup>75</sup> Comprehensive ICTY Report, *supra* note 70. Article 16 of the Directive on the Assignment of Defense Counsel reads: "Members of the family or close friends of suspects, accused and counsel are not eligible for an assignment under this directive as counsel, expert, legal assistant, investigator, translator or interpreter unless the Registrar determines that the assignment is in the interest of justice."

of three judges to work with the Registrar on other assignment related issues, including the selection of poorly qualified or trained lawyers by a defendant as well as lawyers whose ethical standards “raise questions.”<sup>76</sup> In a parallel improvement, the Registrar amended the Code of Professional Conduct for Defence Counsel to ban fee splitting as of August 2002,<sup>77</sup> and implicitly linked fee splitting to the underlying obligation “[n]ever to be influenced by improper or patently dishonest behaviour on the part of a client”<sup>78</sup> by imposing an explicit duty to report any effort by a defendant to establish an illicit scheme for skimming tribunal funding away from its intended purposes.<sup>79</sup>

Apart from the ethical reforms, the fee splitting scandals prompted two other developments that have had lasting import for the maturation of the defense bar. First, the ICTY instituted a lump sum payment system for the defense that was intended to accomplish the following objectives:

- (a) To provide defence teams with greater flexibility and incentive to manage their resources and time in the most efficient manner;
- (b) To distinguish between the level of difficulty of various cases by providing more resources to extremely complex cases;
- (c) To streamline procedure by allowing defence to submit more standardized invoices, which are reviewed before payment can be authorized;
- (d) To facilitate responsible budgeting of the Tribunal’s legal aid resources, by establishing a system that is less open to abuse and that allows for more reliable projections of cost.<sup>80</sup>

The lump sum system was based on a complex formula derived from a multi-factor evaluative framework based on the complexity of the case (relevant to the projected costs of investigation and litigation) and its projected length. Its intent was to quantify otherwise subjective assessments and to incentivize defense counsel to complete the stages of criminal cases as efficiently as possible. Funds were paid out at specified intervals and percentages of the total estimated costs of the defense. The SCSL operates under a similar system, while the ICTR adopted a

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Int’l Crim. Trib. for the Former Yugoslavia, *Directive on the Assignment of Defense Counsel*, art. 16(F), U.N. Doc. IT/73/Rev.11 (July 11, 2006).

<sup>76</sup> Comprehensive ICTY Report, *supra* note 70, ¶ 54.

<sup>77</sup> Int’l Crim. Trib. for Rwanda, Code of Professional Conduct for Defense Counsel, art. 5bis, available at <http://www.unictr.org/Portals/0/English/Legal/Defence%20Counsel/English/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf> (last visited July 15, 2010) [hereinafter ICTR Code of Conduct]; Comprehensive ICTY Report, *supra* note 70, ¶ 42. *But see* Ellis, *supra* note 73, at 496 (noting that anecdotal evidence indicates that some measure of fee splitting may still occur).

<sup>78</sup> ICTR Code of Conduct, *supra* note 77, art. 5(c).

<sup>79</sup> *Id.* art. 5bis(2). *See also* Int. Crim. Trib. for the Former Yugoslavia, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, art.18, U.N. Doc. IT/125/Rev.1, (July 12, 2002) [hereinafter ICTY Code of Conduct].

<sup>80</sup> Comprehensive ICTY Report, *supra* note 70, ¶ 24; DIXON & KHAN, *supra* note 74, ¶¶ 20-151-69 (nicely summarizing the development and details of the current funding mechanisms).

monthly maximum on the number of defense hours that could be compensated by the Court. Instituting its own lump sum formulas for what became accepted as a best practice, the ICC Assembly of States Parties estimated that the average length of a case (from pre-trial to the appeals phase) will be fifty-one months, and that the cost of mounting a defense during that period is €1,259,496 (\$1,979,835 using the contemporaneous exchange rate).<sup>81</sup> The allocations for defense counsel are intended to defray the total costs of investigation, salaries, travel, and incidental expenses during each period of pre-trial, trial, and appeal. Not surprisingly, these calculations have resulted in extensive litigation.

Secondly, in a closely related development of perhaps more lasting import, the ICTY implemented a strict set of guidelines to determine the indigency of a particular defendant as a precursor to receiving legal aid from the Court. Through 2000, a defendant was either entitled to full financial assistance or none at all. As Mark Ellis points out, nearly every defendant who appeared before the ICTY and the ICTR in their early years was declared indigent and subsequently assigned counsel, which of course entailed a substantial financial commitment by the tribunals.<sup>82</sup> Of perhaps more overarching significance, the right of an indigent defendant to assigned counsel, without costs, is a fundamental tenet of international law.<sup>83</sup> The strengthened system post-2002 recognized either partial indigency based upon established formulas, or in some cases a conditional indigency whereby a defendant would receive aid conditioned upon the recovery of future known or suspected personal assets. The ICTY buttressed the legal aid system by appointing a financial investigator in March 2002 to assess whether the defendant could fund an adequate defense that would meet equality of arms standards.<sup>84</sup> In practice, the

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<sup>81</sup> Assembly of States Parties, Report on the Principles and Criteria for the Determination of Indigence for the Purposes of Legal Aid Annex, ICC-ASP/6/INF.1 (May 31, 2007), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-6-INF.1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-6-INF.1_English.pdf). By way of comparison, according to the U.N.'s assessment of the costs at the ICTY issued in 1999, a defense team in the ICTY at the pre-trial stage then cost the tribunal (on average) \$22,000 (€13,994) to \$25,000 (€15,903) per month, which increased to about \$45,000 (€28,625) during the trial. See Mark S. Ellis, *The Evolution of Defence Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949, 953 (2003).

<sup>82</sup> Ellis, *supra* note 73, at 491 (observing that the costs of indigent defense consumed some ten percent of the entire ICTY budget, for example).

<sup>83</sup> The Universal Declaration of Human Rights provides that: "Everyone charged with a penal offence has the right to all . . . the guarantees necessary for his defense." Universal Declaration of Human Rights, G.A. Res. 217 (III)A, UN Doc. A/RES/217(III), art. 11(1) (Dec. 10, 1948). The International Covenant on Civil and Political Rights ensures that every person charged with a criminal offence has the right to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." ICCPR, *supra* note 21, art. 14(3)(d). The U.N. Principles on the Role of Lawyers state that governments "shall ensure the provision of sufficient funding and other resources for legal services to the poor." Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, art. 3, U.N. Doc. A/CONF.144/28/Rev.1 (1990). Other international conventions that guarantee the right to legal assistance include the American Convention on Human Rights, which provides the accused the right "to be assisted by legal counsel of his own choosing" and to "be assisted by counsel provided by the state . . ." Organization of American States, American Convention on Human Rights, art. 8(2)(d-e), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The African Charter on Human and Peoples' Rights provides the accused "the right to defense, including the right to be defended by counsel of his choice." African Charter on Human and Peoples' Rights art. 7(1)(c), June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58, 60.

<sup>84</sup> Comprehensive ICTY Report, *supra* note 70, ¶ 40.



Registrar became involved in the determination of eligibility for legal aid,<sup>85</sup> which prompted attorneys to represent defendants pro bono in the hopes of becoming selected as counsel. The Registrar selects the counsel from the list of qualified counsel and is the sole decision-maker regarding the assignment of counsel, which in turn prompts extended litigation from defendants who argue that their due process rights have been trampled in the process. The process of creating and sustaining a list of qualified counsel has also led to some manipulation of the requirements for inclusion. For instance, the ICTY initially only required the defense lawyer to be fluent in one of the working languages of the court (English or French) and to be admitted to the bar in his country. This language requirement has been ignored on occasion, prompting criticism. The ICTR sets forth another requirement—before being admitted, the lawyer must have seven years of practice,<sup>86</sup> while the ICTY Registrar reserves the power to unilaterally strike counsel off the list in particular cases based on the subjective assessment that they possess “insufficient experience” to properly handle the demands of the case.<sup>87</sup> Though less than thirty percent of the lawyers before the ICTY are chosen from the Registry,<sup>88</sup> some defendants vehemently protest the restrictions imposed by the Registrar’s list. In the *Karadžić* case, the Registrar eliminated all but five of the more than 150 potential counsel on the list before submitting five possibilities to the accused for his selection, in some instances by imposing standards beyond those contained in Article 44 of the Rules of Procedure and Evidence. Of those five, none came from the Balkans, four had previously defended clients who had fought against Serbs, and one was a former ICTY prosecutor. Thus, it should come as no surprise that Karadžić resisted assignment of those counsel.

The overall ethical climate of the defense bar operates against the context of a complex procedural posture. The sui generis blend of procedures and practices among the extant tribunals in itself generates a recurring series of ethical dilemmas for defense counsel. International tribunal practice involves a complex intermingling of rules, practices, and presumptions that make the task of effective defense significantly more difficult due to procedural imprecision and unpredictability. Following his eighteen months of labor alongside lawyers from other legal systems, Justice Jackson observed that “trial methods and techniques are very dissimilar, but as we proved at Nuremberg, the differences are not insuperable.”<sup>89</sup> German lawyers at the International Military Tribunal grappled with the details of cross-examination grounded in the practice of common law systems.<sup>90</sup> In the more recent past, the legal standards for guilty pleas have provided fertile

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<sup>85</sup> See, e.g., Prosecutor v. Milutinović, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, ¶¶ 36–41 (Nov. 13, 2003) (Hunt, J., dissenting) (decrying the erection of “impossible barriers” by the Registrar and the supervision of the system by legal officers whose “obvious purpose is to make the administration of the legal aid system easier for the junior legal officers with no apparent experience in trials”).

<sup>86</sup> ICTR R. P. & EVID. R. 45(A) [hereinafter ICTR RPE].

<sup>87</sup> Björn Elberling, *Some Observations on Defence Aspects of the Karadžić Case—And a Plea for “Hybrid”*

*Representation in International Criminal Law*, The Hague Justice Portal, (Mar. 1, 2010), <http://www.haguejusticeportal.net/eCache/DEF/11/496.html>.

<sup>88</sup> *Id.* (discussing the circumstances surrounding the choice of counsel by the Registry).

<sup>89</sup> Robert H. Jackson, *Lawyers Today: The Legal Profession in a World of Paradox*, 33 A.B.A. J. 24, 89 (Jan. 1947).

<sup>90</sup> See WHITNEY R. HARRIS, *MURDER BY THE MILLIONS: RUDOLF HOESS AT AUSCHWITZ* (2005).

grounds for appeals, as the common practice in adversarial legal systems has been introduced into the inquisitorial international systems to increase efficiency and minimize costs.<sup>91</sup> The International Military Tribunal set the lasting precedent for simplifying evidentiary requirements in favor of a full airing of available facts before a panel of judges. Justice Jackson noted that “peculiar and technical rules of evidence developed under the common-law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science,” and accordingly accepted that rules of evidence at Nuremberg should put the premium on the probative value of the evidence.<sup>92</sup> Although dispensing with rigid rules of evidence gave the International Military Tribunal “a large and somewhat unpredictable discretion,” it also permitted both the prosecution and defense to select evidence on the basis of “what it was worth as proof rather than whether it complied with some technical requirement.”<sup>93</sup> The *Delalić* Trial Chamber recognized this reality by noting that current rules of evidence and practice “may have a common law or civilian origin but the final product may be an amalgam of both . . . so as to render it *sui generis*.”<sup>94</sup>

Since 1945, rather than operating under restrictive rules of evidence, all of the tribunals applying international humanitarian law have permitted evidence so long as it is “relevant and necessary for the determination of the truth.”<sup>95</sup> Unconsciously echoing the standard of the Rome Statute that permits evidence “necessary for the determination of the truth,”<sup>96</sup> one Iraqi investigative judge working in the IHT insisted that, “in our system, only the evidence speaks.”<sup>97</sup> Rather than developing a straitjacket set of rules related to the introduction of evidence, the international and internationalized tribunals today have a broader mandate to “apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.”<sup>98</sup>

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<sup>91</sup> See, e.g., Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, ¶ 7 (Mar. 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf> (discussing the ethical implications of a defense counsel who apparently did not fully understand the implications of or procedures for implementing a guilty plea on behalf of his client which cast doubt on the effectiveness of representation).

<sup>92</sup> ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, (1947), available at [http://avalon.law.yale.edu/imt/jack\\_preface.asp](http://avalon.law.yale.edu/imt/jack_preface.asp). Interestingly, as a matter of historical record, the teams of international prosecutors at Nuremberg did not develop detailed elements of crimes that have become an accepted feature of every subsequent international process.

<sup>93</sup> *Id.* This statement is true, though not without the notable caveat that Justice Jackson simply assumed that the defense teams had adequate access to all available information suitable to select the evidence needed and to form the defense theories of the cases.

<sup>94</sup> Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, ¶ 15 (May 1, 1997), <http://www.icty.org/x/cases/mucic/tdec/en/70501DE2.htm>.

<sup>95</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–July 17, 1998, *Report of the Committee of the Whole*, art. 69(3), U.N. Doc. A/CONF.183/8 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998), available at [http://untreaty.un.org/cod/diplomaticconferences/icc-1998/vol/english/vol\\_III\\_e.pdf](http://untreaty.un.org/cod/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf).

<sup>96</sup> Rome Statute, *supra* note 51, art. 69(3).

<sup>97</sup> Interview with Judge Ra’id Juhi, Chief Investigative Judge, Iraqi High Criminal Court (Aug. 2, 2006).

<sup>98</sup> Iraqi Special Tribunal R. P. & Evid. 59. This provision is adjacent to the common sense caveat that in accordance with the well established best practices of other tribunals, the Trial Chamber should

This evidentiary freedom in theory puts the premium on the educative and ameliorative function of the trial process. Evidentiary freedom, in turn raises the image of the attentive international judge who is ever present and ever vigilant to serve as the independent guardian of the due process rights of the defendant. In practice, the mixed nature of tribunal processes has occasionally posed challenging representational quandaries. Counsel cannot rely solely on the judiciary to protect the rights of the accused and must therefore assume a more zealous and vigilant posture than might ordinarily be the case in an inquisitorial domestic system. Defense work in the context of the tribunals necessarily involves immersion in an insular system in which appeals and evidentiary motions are resolved by the judges' colleagues, and in which the conduct of counsel could quite conceivably impair the defense efforts in other cases. During the *Čelebići* case at the ICTY, for instance, the presiding judge repeatedly slept through proceedings in open court, which in turn prompted defense counsel to raise the issue to the senior legal officer of the Trial Chamber, the Registrar (who allegedly convinced counsel to withdraw a motion for mistrial and a request for withdrawal of representation), and the President of the Court, Judge Cassese at the time. Counsel approached this "sensitive issue in the most delicate way possible"<sup>99</sup> because she felt that the judge lacked "judicial temperament, self-restraint and common decency."<sup>100</sup> Rather than vigorously filing motions, which would have been the ethical expectation in an adversarial system, counsel tip-toed around the concern that one of the fact-finders was inattentive based on the belief that raising a direct complaint to the Trial Chamber during trial "would have been inappropriate and futile" and "would necessarily have alienated one of the three triers of fact, causing potentially irreparable harm" to the defense case.<sup>101</sup> The defense later appealed the conviction on grounds, *inter alia*, that the presiding judge "denied appellants the right to the full and competent judicial decision of questions of law, fact, and evidence and improperly denied appellants a fair trial, and the appearance of a fair trial."<sup>102</sup> The *Čelebići* defense was caught between the ethical duty to serve the best interests of the defendant and the pragmatic need to solve the problem in good faith as an officer of the court.

Counsel relied on the assurance of Judge Cassese that he "would attend to the matter," but the Appeals Chamber later disallowed her efforts to gather testimony from the court officials with whom she spoke. The Appeals Chamber ultimately denied this ground for appeal in the absence of any showing of "actual prejudice"<sup>103</sup> on the basis that "[n]o attempt was made to raise the issue formally before the Trial Chamber."<sup>104</sup> The signal sent to defense counsel by this strand of

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"exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

<sup>99</sup> Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 642 (Feb. 20, 2001) [hereinafter *Čelebići Appeals Judgement*].

<sup>100</sup> *Id.* ¶ 648.

<sup>101</sup> *Id.* ¶ 644.

<sup>102</sup> *Id.* ¶ 620.

<sup>103</sup> *Id.* ¶ 650.

<sup>104</sup> *Id.* ¶ 642. See also Prosecutor v. Augustin Ngiirabatware, Case No. ICTR-99-54-AR15B, Decision on Augustin Ngiirabatware's Appeal of the Bureau's Decision of 25 January 2011 on Disqualification (Apr. 18, 2011).

the *Čelebići* appeal and its replication in ICTR jurisprudence does not on its surface bolster confidence in the independence and diligence of judges in protecting the due process rights of the defendant, which in turn may explain the veritable explosion in defense evidentiary motions and procedural challenges in the past six or seven years. The decline in defense recusal motions mirrors the rise in evidentiary and procedural challenges during trial. In the ICTR, there has been a corresponding relative decline in defense motions to disqualify judges.<sup>105</sup> While this decline “may attest to a distinct lack of enthusiasm defence counsel may feel at the prospect of challenging a judge’s impartiality”<sup>106</sup> it also signals the emergence of a defense bar prepared to raise and litigate a much wider range of procedural and evidentiary motions. In this manner, the aggressive and proactive litigation of defense motions more closely approximates an adversarial model of challenging evidence and continually advocating defense perspectives on the record to establish grounds for subsequent appeal if needed.

Nevertheless, the varying procedures, and, it must be noted, inter-jurisdictional inconsistencies, for the introduction of evidence continue to raise serious ethical issues for diligent defense counsel. For example, widely respected former ICTY (and U.S. federal appeals court judge) Patricia Wald, noted that in the early years of the Tribunal:

[T]he bulk of defense counsel are Balkan-trained lawyers and are typically not experienced at cross-examination. Some are quick learners, but others are painfully awkward and unfocused on just what they are trying to accomplish. They sometimes argue with or even criticize the witnesses. They also go off on tangents that are not always relevant to their case. The Tribunal is now operating training courses for appointed lawyers, but, candidly, it is not easy to acculturate lawyers in a wholly new legal system in a few days of lectures or even simulated exercises. As an American judge, I frankly find many ICTY defense cross-examinations painfully unhelpful to my own judgement. I have noticed how often the witnesses seem to resent the cross-examinations and pull back into a litany of “don’t remembers.” They see the defense counsel allied with their nemeses in the docks. Several witnesses have at the end of their testimony addressed concluding remarks to the defense counsel rather than the accused: “How can you stand there and defend these men who have taken everything away from us, our families, our health, our homeland?” In sum, I came away from the two lengthy trials in which I have participated thinking that the potential of cross-examination by defense counsel in the search for truth

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<sup>105</sup> Between 1996 and 1998, there were six cases in which defense counsel sought the disqualification of ICTR judges. It does not appear that counsel raised this issue in any other cases before or since in the ICTR. It should also be noted that nearly all of those instances between 1996 and 1998 involved multiple defendants that were tried together. Cases in which ICTR defense counsel sought the disqualification of judges include: Prosecutor v. Bagosora, Case No. ICTR 96-7; Prosecutor v. Karemera, Case No. ICTR 97-24; Prosecutor v. Ngirumpatse, Case No. ICTR 97-28; Prosecutor v. Ntabakuze, Case No. ICTR 97-30; Prosecutor v. Nzirorera, Case No. ICTR 98-38 (numerous requests for judicial disqualification); and Prosecutor v. Rwamakuba, Case No. ICTR 98-44C.

<sup>106</sup> Michael Bohlander, *The International Criminal Judiciary—The Problems of Judicial Selection, Independence and Ethics*, in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 325, 383 (Michael Bohlander ed., 2007).

has not been realized.<sup>107</sup>

David Tolbert also observed that:

[D]efense counsel from the region are generally unfamiliar with the adversarial system on which the ICTY's procedures are modeled and have thus had difficulty with cross-examination and other aspects of advocacy. Not only has this led to poor representation in certain cases but also to delays in the proceedings, as these lawyers have struggled in an unfamiliar system.<sup>108</sup>

As noted by Judge Wald, the processes for training defense counsel in the substantive content of humanitarian law cannot be an afterthought. The advent of an organized defense bar has largely addressed this concern. Moreover, there is a growing pool of younger Defence lawyers who have worked as Legal Assistants and, due to an amendment in the ICTR Rules, can qualify as Defence Counsel after 7 years at the bar. These younger lawyers have had experience in the field, and increasingly been able to earn advanced degrees specializing in international criminal norms that simply were not offered to their predecessors. As will be described in more detail below, the provisions for training and assisting defense counsel have become an integral aspect of modern practice.

In addition, the study and dissemination of evidentiary jurisprudence has become an indispensable dimension of defense practice. Counsel must balance the ethical obligation to be "respectful and courteous"<sup>109</sup> towards the bench with the overarching professional duty to present available evidence in pursuit of a fair trial. The inherent imprecision of previous evidentiary rulings by Chambers taking decisions in widely varying factual circumstances and disparate geographical and cultural contexts presents the defense with an increasing obligation to aggressively litigate these issues. This, of course, includes the correlative duty to challenge prosecutorial evidence as appropriate. As only one of many possible examples<sup>110</sup> of the sophisticated evidentiary inconsistencies that the defense teams now litigate, the practice in the ICTY has held that the prosecution may tender "fresh evidence"<sup>111</sup> during the cross-examination of defense witnesses, even when that evidence is

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<sup>107</sup> Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day to Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 104-05 (2001).

<sup>108</sup> David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975, 979 (2003).

<sup>109</sup> ICC Code of Professional Conduct for Counsel, UN Doc. ICC-ASP/4/Res.1, art. 7(1) (Dec. 2, 2005) [hereinafter ICC Code of Conduct], [http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf).

<sup>110</sup> See, e.g., *Prosecutor v. Karadžić*, Case No. IT-95-5/18-I, Motion for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts (Mar. 4, 2010) (discussing conflicting trends in the jurisprudence related to adjudicated facts, especially following the *Tolimir* decision in the ICTY).

<sup>111</sup> "Fresh evidence" is defined as "material that was not included in the Prosecution Rule 65ter list and not admitted during the Prosecution's case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses." *Prosecutor v. Prlić*, Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, ¶ 15 (Feb. 26, 2009), <http://www.icty.org/x/cases/prlic/acdec/en/090226.pdf> [hereinafter *Prlić Appeal*].

inculpatory in nature and was not introduced during the prosecution's case-in-chief.

In order to introduce such "fresh evidence," the prosecution must demonstrate that such flexibility is "in the interests of justice."<sup>112</sup> In theory, the effort of the bench to aid an orderly disclosure to the defense and presentation of evidence helps the defense to prepare for its own case in chief with a greater confidence that an entirely new line of prosecutorial evidence will not materialize during trial. In this regard, it must be noted that ICTY case law suggests a higher burden for tendering inculpatory fresh evidence than for tendering fresh evidence used solely for impeachment purposes.<sup>113</sup> The ICTY Appeals Chamber in *Prlić* did stress that such assessments must still be made on a case-by-case basis, "taking into account both the probative value of that evidence and the need to ensure a fair trial."<sup>114</sup> ICTY jurisprudence on the admission of inculpatory fresh evidence requires balancing the probative value of the evidence against the fair trial rights of the accused.<sup>115</sup> In *Delić*, the Appeals Chamber held that the Trial Chamber erred in not specifying the purpose for which the fresh evidence was admitted, and not addressing how prejudice caused to the defense, if any, could be redressed. On remand, the *Delić* Trial Chamber reversed its decision to admit the fresh evidence and expunged the exhibits from the record.<sup>116</sup> The Trial Chamber concluded that admission of the fresh evidence for the purpose of establishing the guilt of the accused resulted in prejudice to the fair trial rights of the accused where the exhibits were not disclosed to the defense until shortly before beginning cross-examination of the witness.

According to the *Prlić* Appeals Chamber, factors the Trial Chamber should consider with regard to admitting inculpatory fresh evidence include the importance of the document, the source of the document and when it was obtained, when the document was disclosed to the defense, and why the document is being offered after the conclusion of the prosecution's case.<sup>117</sup> The Appeals Chamber went on to explain that Trial Chambers should balance the decision to admit fresh evidence against the fair trial rights of the accused by considering the mode of disclosure of the documents, the purpose of admission, the time elapsed between disclosure and examination of the witness, languages known to counsel and the accused, any other relevant factual considerations, and available measures to address any prejudice to the defense.<sup>118</sup>

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<sup>112</sup> Int'l Crim. Trib. for the Former Yugoslavia R. P. & EVID. 85(A) [hereinafter ICTY RPE]; *Prlić* Appeal, *supra* note 111, ¶ 23.

<sup>113</sup> E.g., *Prlić* Appeal, *supra* note 111, ¶ 27; ("[T]he risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as compared to fresh evidence admitted with the sole purpose of impeaching the witness.") (citing to Prosecutor v. *Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim *Delić*'s Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, ¶ 22 (Apr. 15, 2008)); Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski, ¶ 21 (May 17, 2005), [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/050517-3.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/050517-3.htm) (admitting fresh evidence where the document was used for the "purpose of impeaching the credibility of the witness").

<sup>114</sup> *Prlić* Appeal, *supra* note 111, ¶ 23.

<sup>115</sup> Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Chamber Judgement, ¶ 222 (Dec. 17, 2004), [http://www.icty.org/x/cases/kordic\\_cerkez/acjug/en/cer-aj041217e.pdf](http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf).

<sup>116</sup> *Delić*, *supra* note 113, ¶ 6.

<sup>117</sup> *Prlić* Appeal, *supra* note 111, ¶ 24.

<sup>118</sup> *Id.* ¶ 25.

ICTR jurisprudence on the issue of fresh evidence is mixed,<sup>119</sup> despite the fact that the permissible scope of cross-examination is identical to the standards found in the ICTY Rules of Procedure.<sup>120</sup> The SCSL has merged precedents from the ICTY and ICTR to fashion a wholly new threshold by requiring the prosecutor to establish “exceptional circumstances” warranting the admission of documents offered only after the close of the prosecution’s case.<sup>121</sup>

This line of cases shows the uncertainty and imprecision that defense counsel face in making sometimes on the fly decisions whether to object, how to preserve issues for appeal, and how best to balance the best interests of the defendant with the obligation to serve as officers of the court while still preserving personal relations with other counsel. Alert and professional defense counsel cannot rely solely on an engaged and attentive bench to intercede when necessary to ensure the rights of the defendant, hence counsel have adapted their conduct and motions practice to the parameters of the mixed system that has developed today. Observation of current evidentiary practice indicates that counsel are litigating aggressively and expanding the jurisprudence in ways that benefit their clients.

As the discussion above shows, the impetus created by the fee splitting scandals prompted significant organizational evolution. At present, the ad hoc tribunal Registrars can refer a defense attorney seeking admission to the list of counsel for interviews by a panel composed of judges, members of the Advisory Board, and/or other qualified counsel.<sup>122</sup> In hindsight, the organizational developments prompted by the perception of defense mismanagement during the era of fee splitting in conjunction with the increasingly complex nature of the procedural norms mark the maturation of the international defense bar. Indeed, at the time of this writing, counsel are vigorously litigating evidentiary issues in sophisticated ways that were not approximated in scale or tenacity a decade ago. The surge in evidentiary activism became noticeably more intense in the 2002–03 period, which roughly coincides with what can be regarded as the as the turning point in the emergence of a mature international defense bar. The 2002–03 window approximates the halfway point of the life cycle of the ICTY and ICTR at the time of this writing. It also represents the statistical peak in the number of ICTR cases in which motions were made alleging defense noncompliance with court orders,<sup>123</sup> as

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<sup>119</sup> Compare Prosecutor v. Bagosora et. al., Case No. ICTR 98-41-T, Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda, ¶ 2 (Sept. 11, 2006), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CBagosora%5CTrail%20and%20Appeal%5C110906b.pdf>, with Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Admission of Documents Used in Cross-Examination of Édouard Karemera and Witness 6 (“Karemera Decision”), ¶ 4 (Nov. 11, 2009), <http://www.unictr.org/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C091111.pdf>.

<sup>120</sup> ICTY Rule of Procedure 90(H)(i) mirrors ICTR Rule 90(G)(i) by allowing questions related to the subject-matter of the evidence-in-chief, credibility, and the subject-matter of the cross-examining party’s case.

<sup>121</sup> Prosecution v. Taylor, Case No. SCSL-03-1-T, Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents By the Prosecution During Cross-Examination, ¶ 27 (Nov. 30, 2009), <http://www.scs-l.org/LinkClick.aspx?fileticket=qP12Cbm80TA=&tabid=159>.

<sup>122</sup> DIXON & KHAN, *supra* note 74, § 20–73.

<sup>123</sup> Prior to 2000, such motions were made in eight of fifty-six cases, representing a rate of 14.3%. Subsequent to 2000, such allegations have been made in only one of twenty-three cases, for a rate of 4.3% (listing of the cases analyzed on file with author).

well as those related to the replacement of counsel.<sup>124</sup> Juxtaposed against this watershed period for organizational innovation, the following part will describe the formation of the professional associations created to support defense counsel, as well as the normative outlines of the current Code of Conduct for Defense Counsel and the correlative creation of formal Defense Offices within the extant tribunals.

#### IV. ORGANIZATIONAL INNOVATIONS TO SUPPORT THE DEFENSE

Nothing in the London Charter specifically provided for the right to defense counsel or anticipated the requirements that would necessarily inhere towards counsel tasked with representing the defeated Nazi leaders. Foreshadowing the sparse prescriptions regarding the defense teams in the ad hoc tribunals that would follow some half-century later, the Charter provided merely that each defendant should get a “fair trial” and thus would be entitled to conduct “his own defense before the Tribunal or to have the assistance of counsel.”<sup>125</sup> For all of the international attention and importance attached to the IMT, the provisions for the defense displayed a remarkable lack of urgency. It was almost as if the defense team was seen as ignoble and inconvenient, despite its central importance to the fairness and perception of the overall proceedings. The German counsel were given copies of the prosecution materials only five days prior to the start of trial, and they spent the bulk of the proceedings crowded into a common area where there were not even enough desks for each counsel and only one telephone line capable of making long distance calls.<sup>126</sup> They each did their best to offer credible defense lines of argument, all the while knowing that the indicted Nazi leaders faced the combined political and legal weight of the victorious Allies. The prosecution team provided support only grudgingly and after much delay and deliberation.

In many ways, the development of the international defense bar remained frozen in time until the gradual accumulation of expertise and personal contacts began to take root in the early days of the ICTY. By 2002, as noted above, there had been a number of trials in each of the ad hoc tribunals, but inconsistent organizational development towards supporting a maturing and rapidly coalescing international defense bar. The shock of the fee splitting scandals highlighted the

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<sup>124</sup> Prior to 2000, such motions were made in nineteen of fifty-six cases, representing a rate of 34%. Subsequent to 2000, such allegations have been made in none of twenty-three cases, for a rate of 0% (listing of the cases analyzed on file with author).

<sup>125</sup> Charter of the International Military Tribunal art. 16, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp#art16>. The Charter provides:

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

- (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial.
- (b) During any preliminary examination or trial of a Defendant he will have the right to give any explanation relevant to the charges made against him.
- (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
- (d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.
- (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

<sup>126</sup> Laternser, *supra* note 45, at 476.



need for a coordinated organizational response that would galvanize the rhetoric of equality of arms and fundamental fairness into a lasting reality. Though the sophistication and trial techniques of the defense bar had improved dramatically in the days since Nuremberg, the sense of many observers remained that defense counsel were freelancing intermeddlers.

The organizational innovations in 2002 and 2003 mark a definitive turning point in these attitudes (which to be fair were far from universally felt). The organizational innovations described in this part established the system within which the defense bar consolidated its vital role in the system of international criminal justice. In effect, the formation of professional associations, which could advise and evaluate the performance of counsel against the standard of Professional Codes of Conduct, solidified the role of the defense teams as a coequal component of the system. Similarly, the creation of Defense Offices within the tribunals became the gold standard for supporting the work of the defense and sustaining its efforts to investigate and develop defense perspectives. As a result of these changes, the defense bar enjoyed a reframed and refocused status within the organizational structures of the emerging international system for criminal accountability. The defense should never again be stereotyped as an ignoble and inconvenient afterthought; rather the organizational structure supported a functional and flexible defense bar that was rightly viewed as indispensable for the proper administration of justice.

#### *A. The Association of International Defense Counsel*

In September 2002, the Association of Defense Counsel (ADC) was officially formed in The Hague for the stated purpose of, inter alia, supporting the “function, efficiency and independence of Defense Counsel” practicing before the ICTY.<sup>127</sup> Prior to this time, there were “well documented cases of institutional hostility,” and some of the limitations imposed upon the defense undermined “the idea of any level playing field as between the defense and prosecution and strike at the heart of professional effective representation.”<sup>128</sup> The role and formation of the ADC grew out of the judges’ plenary session held in July 2002.<sup>129</sup> It represented another effort by judges to help ensure equality of arms through an active engagement with and support to organized and effective defense efforts.

Unlike their counterparts in the ICTR, the judges amended the ICTY Rules of Procedure to require membership in the ADC for any counsel who would appear before the court.<sup>130</sup> The ICTR organization is similar in design and purpose, but more informal and hence less well funded. It is noteworthy that neither

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<sup>127</sup> Press Release, Int’l Crim. Trib. for the Former Yugoslavia, Association of Defense Counsel Formally Recognized by the ICTY (Dec. 1, 2002) (on file with author); see also Association of Defense Counsel, <http://www.adcioty.org> (last visited May 30, 2011) (documenting the establishment of the ADC effective Sept. 20, 2002).

<sup>128</sup> Howard Morrison, *Practice at the Ad Hoc Tribunals for the former Yugoslavia and Rwanda*, in THE POSITION OF THE DEFENCE AT THE INTERNATIONAL CRIMINAL COURT AND THE ROLE OF THE NETHERLANDS AS THE HOST STATE 39, 45 (Martine Hallers et al. eds., 2002).

<sup>129</sup> Comprehensive ICTY Report, *supra* note 70, ¶ 44.

<sup>130</sup> ICTY RPE, *supra* note 112, R. 44(A). Of course, in the context of internationalized tribunals at the domestic level, counsel will always be members of the domestic professional organization and subject to the professional codes of that local bar.

organization derives any funding from the Tribunal, which is a perfectly logical solution to avoid any appearance of undue influence or conflicts of interest. The ICTR counterpart was actually established prior to the ADC, in March 2002, and is known as the "Association des Avocats de la Defense" (ADAD).<sup>131</sup> Both defense organizations created disciplinary councils to assist in self-policing the professionalism of the Defense ranks. In its first months, the ADC removed one counsel on ethical grounds, thereby removing that lawyer's ability to practice before the ICTY.<sup>132</sup> In contrast, the ADAD has itself been dogged by allegations of ethical improprieties and has been strikingly unsuccessful in representing Defense Counsel in fee disputes with the Registry. Though the ADAD has been less effective in practice than its ICTY equivalent, both organizations share the common goal of promoting the efforts of the defense by buttressing members' advocacy skills, knowledge of international criminal law, and ability to take advantage of available resources and jurisprudential collections.

Significantly, both organizations have met with Tribunal officials on occasion to help resolve the problems encountered by the defense in the performance of its functions. As an integral aspect of the organizational model, the monitoring and enforcement of the Codes of Conduct for Defense Counsel have been among the most important actions of these organizations. If nothing else, they provide a reliable and ready resource to educate and inform defense counsel, particularly those from the affected region or those who have minimal experience in the international criminal justice system. These functions were performed only on an informal and scattershot basis prior to 2002.

Finally, the defense organizations have been an anchor point for a maturing defense bar in part because they helped to stiffen the ethical spine of counsel through the oversight of peers and a functioning disciplinary council. Of perhaps more lasting import, they serve as a clearing house and support center for counsel. They are the repository for the emerging best practices which in turn aids the process of transmitting the lessons learned from experience and the hard knocks of litigation to a new generation of practitioners. The defense organizations provide an indispensable resource for opinions, perspectives, and model motions and briefs. By extension, the defense organizations provide the readily identifiable portal through which pro bono assistance, training support, and relevant expertise flows to trial teams as needed. In short, they have dramatically facilitated the process of ensuring that the defense bar incorporates the broader pattern of jurisprudential developments in a systematic way across trials and jurisdictions.

### *B. The Codes of Professional Conduct for Counsel*

The detailed Codes of Professional Conduct for Counsel provide the ethical compass for the international criminal defense bar. Every extant tribunal has adopted such a Code. Close and comparative examination of the codes reveals a complex potpourri of procedure and presumption that makes the disciplinary codes truly *lex specialis*. The *lex specialis* nature of the ethical system applicable to the

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<sup>131</sup> See ASSOCIATION DES AVOCATS DES LA DEFENCE DEVANT LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA, <http://www.adadict.org> (last visited May 30, 2011).

<sup>132</sup> Comprehensive ICTY Report, *supra* note 70, ¶ 45.

conduct of counsel is, of course, entirely consistent with the sui generis nature of the evidentiary standards and procedural practices in the modern accountability system.<sup>133</sup> As a consequence, it is wholly unsurprising that the best practice for counsel requires counsel to “maintain a high level of competence in the law applicable” to these complex cases and to participate in ongoing training to “maintain such competence.”<sup>134</sup> Detailed explication of each provision of the Codes of Conduct in relation to each other and the broader fabric of the Rules of Procedure and Evidence that operate in conjunction with each Code is beyond the scope of this article, and would be duplicative of other scholarship in any event.<sup>135</sup> When evaluating the evolution of the defense bar, the important point is that the Codes of Conduct apply to all counsel practicing before the bench. The ICC Code of Conduct for Counsel, for example, defines the term “counsel” to include “defence counsel, counsel acting for States, *amici curiae*, and counsel or legal representatives for victims and witnesses practicing before the International Criminal Court.”<sup>136</sup> A mature defense bar is therefore bound together with all other counsel as an integrated and indispensable element of the whole. This development represents the pinnacle of systematized integration in that it signals that the defense is not an inconvenient afterthought.

The Codes of Conduct—the hallmark of professional growth and systematic integration—are supported both by the enforcement power of the bench and the oversight authority of the professional organizations noted above. However, as Jenia Turner has noted:

[i]n international criminal trials, attorneys face new and potentially more complex ethical dilemmas. The goals of international trials are broader and more political than those of ordinary domestic trials, and the applicable procedures are a unique hybrid of the inquisitorial and adversarial traditions. Yet existing Codes of Conduct fail to take into account these special features of the international criminal justice system and often fail to offer adequate guidance to attorneys.<sup>137</sup>

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<sup>133</sup> See *supra* notes 77–109 and accompanying text.

<sup>134</sup> ICC Code of Conduct, *supra* note 109, art. 7(2).

<sup>135</sup> See, e.g., Claus Kress, *The Procedural Law of the International Criminal Law in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603 (2003); Judith A. McMorow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139 (2007); Alphons Orie, *Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in Proceedings Before the ICC, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1439 (Cassese et al. eds., 2d ed. 2008); Daniel Nsereko, *Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client*, 12 CRIM. L.F. 487, 501 (2001); JARINDE TUINSTR, DEFENCE COUNSEL IN INTERNATIONAL CRIMINAL LAW (2009).

<sup>136</sup> ICC Code of Conduct, *supra* note 109, art. 1; see also International Criminal Bar Code, *supra* note 6, arts. 3–5 (emphasizing independence, honesty and integrity, and competence rather than zealous advocacy); *id.* art. 28 (“In rendering advice [to the client], counsel may refer not only to law but to other considerations such as moral, reputational, economic, social, and political factors that may be relevant to the client’s situation”); *id.* art. 49(2) (taking an inquisitorial tack by specifying that counsel “may refuse to offer evidence that counsel reasonably believes is false, irrelevant, or lacks probative value”).

<sup>137</sup> Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 686 (2010).

Over time, the guidance of the various judicial chambers in the growing body of jurisprudence and the oversight of the professional organizations have begun to guide the expectations and practices of experienced counsel. For example, rather than requiring attorneys to act zealously or aggressively in serving the best interests of the client, the ICC Code of Conduct adopts language that would be expected in a typical inquisitorial system by requiring only that attorneys take a “solemn undertaking” that they will perform their duties with “integrity and diligence, honourably, freely, independently, expeditiously, and conscientiously.”<sup>138</sup> Nevertheless, as the *Čelebići* Appeals Judgment (and many others) demonstrate, counsel must be aggressive to recognize and respond to events during trial that threaten to erode the rights of the defendant rather than relying on the Trial Chamber to intervene. In practice, defense attorneys must take more of an adversarial approach to their work in court than the Code might require on its face. Even so, there are many anecdotal instances in which collegiality and cooperation in open court is the norm between counsel. In the *Los Palos* case in the Special Panels, for example, the Timorese defense attorney helpfully explained a local cultural tradition to defuse a frustrating and prolonged exchange between the prosecution and a witness who refused to admit that the victim was on a bus “because of a cultural tradition where you cannot mention dead people.”<sup>139</sup>

Therefore, in the realm of ethical constraints and obligations intertwined within the practice of international criminal law, one truism is stark and unavoidable: The inquisitorial or adversarial roots of a particular rule have long since approached irrelevance because the system is designed from the ground up as a unique structure. Phrased another way, the procedural rules and the accompanying Code of Conduct applicable to modern international criminal practice refer to themes that are designed to operate smoothly within a defined jurisprudential context. As a result, though there is anecdotal evidence from Rwanda, Sierra Leone, and East Timor that the primary concern of victims was to see trials move quickly, that goal is subordinated to the procedural and ethical constraints on counsel. Likewise, the larger aspiration to fully documenting the history of each conflict and situation for the benefit of scholars and a complete historical record is normally held hostage to the principles and practices of the Code as it is implemented in practice before real judges applying real law. From this perspective, the Codes of Conduct for Defense Counsel represent the pinnacle of professional maturity because they represent a “truly mixed procedure [that] requires prosecutors, defense counsel, and judges who have the knowledge of both common and civil law and are able to look beyond their own legal systems.”<sup>140</sup> The exercise of professional competence in such a holistic and integrated system is thus the sine qua non of a mature and competent international defense bar.

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<sup>138</sup> ICC Code of Conduct, *supra* note 109, art 5.

<sup>139</sup> Combs, *supra* note 35, at 253 (citing Judicial System Monitoring Programme, *Los Palos* Case Notes, at 33, July 18, 2001).

<sup>140</sup> Kai Ambos, *The Structure of International Criminal Procedure: 'Adversarial,' 'Inquisitorial' or Mixed?*, in *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 429 (Michael Bohlander ed., 2007).

### C. The Creation of the Defense Office—Its Roles and Responsibilities

The establishment of Defense Offices as a co-equal component of the organizational structure of modern tribunals represents the most visible organizational innovation marking the maturation of the international criminal defense bar. During the early years of the ad hoc tribunals, the Office of the Prosecutor was closely aligned with the other formal branches simply by virtue of the organizational structure. At the IMT, the provisions for supporting the efforts of defense attorneys were barely adequate as defense attorneys were crammed into one noisy room with too few desks, and the provisions for even modest payments were made only after great effort and time had passed.<sup>141</sup> Decades later, just as the London Charter had been silent regarding a formal structure for supporting defense efforts, the Security Council did not include such a provision in establishing the ICTY and ICTR. In the words of David Tolbert, the very physical layout of the ICTY in its infancy “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.”<sup>142</sup> One of the collateral benefits of the shift towards a lump sum payment system for defense was to permit teams to rent space nearby to the ICTY.

However, the continuing necessity for an established organizational support structure supporting the work of defense teams on myriad issues led to the establishment of what was termed the Defence Counsel Unit, which was renamed as the Office of Legal Aid and Detention Matters (OLAD) in 2002.<sup>143</sup> Though OLAD reports to the Deputy Registrar of the Tribunal, OLAD and the ADC quickly became important partners on behalf of defense trial teams coordinating suitable office space, research facilities, document storage areas, and working space inside the Court.<sup>144</sup> Today, defense counsel have access to private areas within the court that can be used during recesses and for meetings, and they have full access to the other organs of the court with whom coordination is required. The ICTY Manual on Developed Practices recognizes that the access of defense teams within the physical court space helps to “increase efficiency and help integrate the defence who were kept at a distance and isolated during the earlier years.”<sup>145</sup> Though it services more than 500 defense team members per year in cases in pretrial, trial and appellate proceedings, OLAD has been conflicted in its work by its dual responsibility to aid the defense while also administering the financial aspects of assessing indigence, assigning counsel to indigent defendants, and providing payments to counsel representing defendants.<sup>146</sup> The duality of responsibilities has

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<sup>141</sup> ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 215–17 (1985).

<sup>142</sup> Tolbert, *supra* note 108, at 976.

<sup>143</sup> See Int’l Crim. Trib. for the Former Yugoslavia, *Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the former Yugoslavia since 1991*, ¶ 229, U.N. Doc. A/55/273-S/2000/777 (July 26, 2000).

<sup>144</sup> DIXON & KHAN, *supra* note 74, §20-24.

<sup>145</sup> ICTY-UNICRI, *ICTY Manual on Developed Practices* 211 (2009), [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf).

<sup>146</sup> See Int’l Crim. Trib. for the Former Yugoslavia, *Sixteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International*

created tensions between OLAD and defense counsel, while creating clouds of suspicion among attorneys that OLAD is not an unbiased source of assistance.<sup>147</sup>

In the ICTR context, the Defence Counsel and Detention Management Section (DCMS) was established as early as 1997 under the Registry. Just as in the ICTY, the DCMS was charged with supervising the administrative and logistical tasks of supporting defense teams; just as in the ICTY, the professional organization (ADAD described above) evolved as a gap-filler to provide concrete support and technical assistance alongside the institutional work of the DCMS. In contrast, the SCSL corollary was created with a substantive role on the model of the public defenders in domestic systems. Its responsibility is to provide advice, assistance and representation to suspects and accused, and the role of the Principal Defender was intended to act independently despite its technical subordination to the Registrar.<sup>148</sup> In fact, the First Annual SCSL Report described the Office as the “fourth pillar” of the Court and specified the aspiration that the Office would in time “become as fully independent as the OTP [Office of the Prosecutor].”<sup>149</sup> Thus, the relevant SCSL Rule of Procedure<sup>150</sup> obligates the Public Defender to provide, inter alia,

- (i) initial legal advice and assistance by duty counsel who shall be situated within a reasonable proximity to the Detention Facility and the seat of the Special Court and shall be available as far as practicable to attend the Detention Facility in the event of being summoned;
- (ii) legal assistance as ordered by the Special Court in accordance with Rule 61, if the accused does not have sufficient means to pay for it, as the interests of justice may so require;
- (iii) adequate facilities for counsel in the preparation of the defence.

The posture of independence led counsel to view the office as a partner and source of valuable assistance at critical junctures of the proceedings rather than an administrative extension of the Registrar with an untenable mandate and potentially shifting loyalties.<sup>151</sup> On the other hand, the very innovation of the SCSL Defence Office created the likelihood of serious conflicts of interest among staff attorneys working on the prototypical tribunal case; i.e., one with multiple defendants whose interests overlap and often collide as they confront inherently interrelated charges

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*Humanitarian Law Committed on the Territory of the former Yugoslavia since 1991*, p. 4, U.N. Doc. A/64/205-S/2009/394 (July 26, 2000).

<sup>147</sup> Guénaél Mettraux & A. Cengic, *The Role of A Defence Office—Some Lessons From Recent and not so Recent War Crimes Precedents*, in *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 391, 402 (Michael Bohlander ed., 2007).

<sup>148</sup> WILLIAM SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 615 (2006).

<sup>149</sup> Special Court for Sierra Leone President, *First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002–1 December 2003*, p. 16 (2003), <http://www.sc-sl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176> (last visited May 30, 2011).

<sup>150</sup> Special Court for Sierra Leone R. P. & EVID., R. 45B.

<sup>151</sup> Mettraux, *supra* note 147, at 421.

arising from the same set of complex events amidst shifting theories of individual liability. In practice, duty counsel at the SCSL became careful to avoid being made privy to “any attorney-client confidences or, indeed, to any information about the defence(s) that will be raised by an accused at trial.”<sup>152</sup>

At the ICC, the Office of Public Counsel for the Defence (OPCD) represents the pinnacle of organizational evolution designed to support rather than supplant the work of a mature international defense bar. The Registrar is specifically obligated to ensure that the Office fulfills its functions in such a manner as to “ensure the professional independence of defence counsel”<sup>153</sup> and encouraged to solicit advice and assistance as appropriate from “any independent representative body of counsel or legal associations.”<sup>154</sup> Given the imperative of providing a fair trial in the ICC, the OPCD is charged with facilitating the protection of confidentiality while working to provide “support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence.”<sup>155</sup> Just as in other tribunals, the OPCD will assist arrested persons in obtaining the assistance of legal counsel, will provide counsel with necessary facilities, and (uniquely among extant tribunals) will facilitate “dissemination of information and case law of the Court to defence counsel” and “cooperate with national defence and bar associations or any independent representative body of counsel and legal associations . . . to promote the specialization and training of lawyers in the law of the Statute and the Rules.”<sup>156</sup> The very early indicators are that the OPCD has filled a vital gap in the practice of the ICC. Indeed, because the OPCD is active in “representing and protecting the rights of the Defence during the initial stages of an investigation” Pre-Trial Chamber I emphatically rejected assertions by the ad hoc counsel appointed in the *Darfur* case that he was obligated by the Code of Professional Conduct to challenge the admissibility of the case.<sup>157</sup> On the other hand, the organizational innovation of the OPCD is not a panacea as the culture of the ICC has in some ways reverted to the Nuremberg era as the Defence offices are located in a separate building on Saturnestraat, away from the main Arc building that houses the majority of the Court and, more significantly, the courtrooms. This has literally led to situations of Defence teams running through the snow back to the Defence office during court breaks in order to use photocopiers (to which they have no access in the Arc building) or access their files.

In the modern system of international criminal law, the role of the defense

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<sup>152</sup> John Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2 J. INT’L CRIM. JUST. 211, 214 (2004).

<sup>153</sup> ICC RPE, *supra* note 51, R. 20(2).

<sup>154</sup> ICC RPE, *supra* note 51, R. 20(3).

<sup>155</sup> ICC RPE, *supra* note 51, R. 20(1).

<sup>156</sup> *Id.*

<sup>157</sup> Situation in Darfur, Sudan, Decision on the Ad hoc Counsel for the Defence’s Request for leave to Appeal the Decision of 2 February 2007, (Feb. 21, 2007) (characterizing the ad hoc counsel’s arguments as a “flagrant disregard” of the relevant ICC authorities); *see also*, Situation in Darfur, Sudan, URGENT Decision on Request for leave to appeal the Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Doc. No. ICC-02/05-118 (Jan. 23, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc412098.PDF> (last visited May 30, 2011).

office as an independent organ of the Court is the necessary organizational companion to a fully mature international defense bar. The failures of the Defense Lawyer's Unit in the Special Panels demonstrate that the creation of a bureaucratic office cannot preserve equality of arms without sufficient funding, staff support, and substantive expertise.<sup>158</sup> If nothing else, the organizational innovation of the defense office erodes the cultural gap and psychological division between the defense team and the court (meaning the prosecutors, registry, and chambers). From another perspective, the holistic development of a modern structure coincides with the maturation of a modern defense bar that is fully capable of advocating in the modern milieu. The part that follows will document the empirical indications supporting the assertion that defendants receive assistance from a mature international defense bar that, despite its imperfections and occasional inadequacies, provides rough procedural parity with the prosecution.

## V. EMPIRICAL EVIDENCE OF A MATURING DEFENSE BAR

The significant organizational innovations discussed above since the World War II era in conjunction with the increased focus of an activist judiciary in managing the performance of the defense and the reasonably proportionate use of available courtroom time suggest the emergence of a functional, if imperfect, equality of arms. However, theoretical equality would mean little if the actual practice of courts and counsel did not evidence an accompanying professional maturation. Closer examination of the thickets of motions and rulings by tribunals over the past decade demonstrates strong empirical indicators that defendants in fact receive high quality defense efforts even in the face of complex legal theories and extraordinarily difficult factual contexts. In other words, despite the inherent challenges faced by the defense, the modern defense teams operate within the organizational confines of the internationalized and ad hoc tribunals to produce a rough but resilient equality of arms.

### A. *The Evidentiary Battles*

Access to information in the preparation of the defense case is an essential element of equality of arms. On occasion, the lack of fair and timely access to information may even represent the single most troubling aspect of the international criminal justice system. Defense efforts to obtain information held by sovereign states, non-governmental entities, or international organizations have proven to be one of the most enduring challenges confronted since the IMT.<sup>159</sup> Nevertheless, the maturation of the defense bar is easily recognizable in the tactics and tenacity displayed in developing a substantial body of jurisprudence relevant to access to evidence. The fierce litigation over access to available evidence provides potent

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<sup>158</sup> Jarinde Temminck Tuinstra, *Defending the Defenders: The Role of Defence Counsel in International Criminal Tribunals*, 8 J. INT'L CRIM. JUST. 463, 484 (2010) (discussing the dysfunction of the Defence Lawyer's Unit in East Timor due in part to a lack of resources for investigations, legal research, and necessary expertise).

<sup>159</sup> See, e.g., Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 131 (2002).



illustration of the overall competence of the organized defense teams in the extant tribunals.

The statutes of the ICTY and ICTR permit the tribunals to issue orders of cooperation to states because the tribunals were established pursuant to Chapter VII of the U.N. Charter.<sup>160</sup> However, there are many reasons why a state or other entity may decline to voluntarily cooperate with defendants on a timely basis. In some instances, a key political leader may have personal motives for seeking the conviction of a particular defendant. In others, domestic officials may seek to avoid the appearance of assisting (alleged) war criminals to appease domestic constituencies. The *Blaskic* trial provided the prototypical example following his conviction and 40 year sentence handed down on March 3, 2000. After the death of the Croatian president, the government announced that it would turn potentially exculpatory information over to the Blaskic defense. Blaskic filed over 8,000 pages of additional evidence with the ICTY Appeals Chamber, which in turn reduced his sentence to nine years.<sup>161</sup> The battles over access to evidence demonstrate the maturity and tenacity of defense teams more than any other dimension of current practice. Ultimately, if a state truly wishes to withhold information—as in the *Blaskic* case—there is little the tribunals can do because they lack true coercive power over states. The ad hoc tribunals can merely report non-compliance to the Security Council and hope that it will act.<sup>162</sup>

Most states under most circumstances are willing to help both the prosecution and the defense. At the same time, states have legitimate national security concerns and labyrinthine security infrastructures that must be addressed appropriately. Many international organizations seek protections for their personnel in the field who may be asked to appear as witnesses. In particular, one of the essential premises of the international criminal justice system is that the need for access to information by both the prosecution and defense must be constrained at times by the imperative to protect the safety of human sources and the confidentiality of sensitive information such as data collection capabilities.<sup>163</sup> Moreover, states and organizations often have limited human and bureaucratic resources, and simply cannot respond to every information request from the tribunals. To diminish security concerns, the tribunals have adopted safeguards such as the use of in camera and ex parte proceedings.<sup>164</sup> To minimize both security concerns and the practical burden on states, there are various threshold requirements that must be met before a tribunal will issue a formal order of cooperation. These requirements are the main subject of this sub-part.

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<sup>160</sup> ICTY Statute, *supra* note 41, art. 29; ICTR Statute, *supra* note 41, art. 28; *see also* Prosecutor v. Simba, Case No. ICTR 01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, ¶ 9 (Nov. 1, 2004).

<sup>161</sup> Gregory Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 677–79 (2007).

<sup>162</sup> Prosecutor v. Blaskic, Case No. IT-95-14-PT, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 33 (Oct. 29, 1997); *see also* Prosecutor v. Nizeyimana, *supra* note 38, ¶ 7 (“it appears from the available information that the charges against Peter Erlinder are partly related to his submissions before the Tribunal during the *Military I* case. The issue whether to bring the matter before the Security Council with reference to Articles 28 and 29(4) of the Statute is presently being considered by the President of the Tribunal.”).

<sup>163</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶¶ 7, 9 (Nov. 17, 2005).

<sup>164</sup> Prosecutor v. Blaskic, *supra* note 162, ¶ 67.

Many information requests are submitted to and fulfilled by states independent of any court process,<sup>165</sup> but frequently states and intergovernmental organizations such as NATO either cannot or will not comply. The defense may then request the trial chamber to issue a binding order of cooperation to the uncooperative state. This sub-part analyzes the details of and trends surrounding such motions. For this analysis, seventy-three decisions on motions for orders of cooperation from the ICTY, ICTR, and ICC were surveyed. Of these, thirty-three motions were granted in full,<sup>166</sup> twelve motions were granted in part and denied in part, and twenty-three motions were denied in full. Four motions were either withdrawn or complied with willingly by the state.<sup>167</sup>

Table 1 below describes the reasons for denial and the number of motions denied for each (note that some motions are denied for multiple reasons):

Table 1:

Reason for Denial	Number of Motions
Insufficient showing of relevance (information sought deemed irrelevant)	12 (3)
Insufficient showing of prior efforts to obtain information independently or prior efforts not shown to be unsuccessful	12
Insufficiently specific request	7
Subpoena deemed unnecessary; order requesting cooperation issued instead	2
Defense failed to make a proper request for a deposition	1
Information could be obtained	1

<sup>165</sup> McIntyre, *supra* note 47, at 277.

<sup>166</sup> See Information Sharing Annex, Appendix A, for a complete listing of the citations for these decisions. Note that two countries, Belgium and Austria, generally require a court order to comply with a request for cooperation because of domestic law (or because of state policy in relation to requests for interviews with military officers), which has a sort of artificial inflation effect on the number of motions granted. See Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Decision on the Accused's Application for Binding Order Pursuant to Rule 54bis (Austria), ¶ 3 (Oct. 15, 2009); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute, ¶ 4 (Apr. 21, 2006) (motion by Nsengiyumva); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, ¶ 9 (Feb. 7, 2005) (motion by Bagosora referring to state policy about interviews with military officers).

<sup>167</sup> Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Lukić Defence Motions for Admission of Documents from Bar Table, ¶¶ 105–14 (June 11, 2008) (motion by Lukic); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Order for Dismissal of Motion for Cooperation of Rwanda—Statements of Witness ANU (Nov. 7, 2007) (motion by Nzirorera); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Order confirming Ojdanić withdrawal of request for rule 54bis order to government of United Kingdom (Feb. 9, 2007) (motion by Ojdanić).

through other means	
Insufficient grounds to recall the witness	1
No reasons for denial given	1
Production of material might endanger a witness	1
Request made to wrong country/organization	1
Requested state not a member of the United Nations	1

The first three reasons for denial listed in the table merit close attention because of their recurring nature. The last eight reasons for denial will not be discussed because there are no demonstrable trends that would undermine confidence in the ability of the defense bar. In other words, mistakes happen, such as assuming a particular country has certain documents when they are held elsewhere. The next sub-parts will examine the jurisprudential prerequisites for the issuance of orders of cooperation.

### *1. Prerequisites for Issuance of Orders of Cooperation*

In the ICTY and ICTR, there are three prerequisites to obtain a binding order of cooperation. First, the request for information must be sufficiently specific to allow the requested country to identify the material sought. Second, the requesting party must show that the requested material is relevant to at least one issue in the trial, and that the material is necessary for a fair determination of the matter. Finally, the requesting party must show the court that it has acted with due diligence by attempting to secure the State's cooperation independently of court process.<sup>168</sup>

The first prerequisite is that a party requesting an order of cooperation must show that its request is sufficiently specific to allow the requested government to identify the material sought. The *Blaskic* Appeals Chamber specified that a request "must identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number."<sup>169</sup> Because of fairness concerns, where the party cannot provide specific details such as names, dates, and places, it may omit them provided it explains the reasons for such omissions. However, the requesting party must still provide sufficient information for the requested state to be able to identify the material to be able to disclose it to the requesting party.<sup>170</sup>

Of the seventy-three decisions surveyed, seven were denied in part or in

<sup>168</sup> ICTY RPE, *supra* note 112, R. 54bis(A); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, ¶ 7 (Feb. 13, 2006); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis (Nov. 17, 2005) (motion by Ojdanić); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47, Decision on Defence Motion for Access to EUMM Archives, ¶ 6 (Dec. 15, 2003) (motion by Hadžihasanović).

<sup>169</sup> Prosecutor v. Blaskic, *supra* note 162, ¶ 32.

<sup>170</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶ 8 (Mar. 23, 2005) (motion by Ojdanić).

full because the defense failed to specifically identify the requested materials.<sup>171</sup> In this context, there are two common mistakes made by defense counsel. The first, and most obvious but easily remedied, is the use of overly broad categories lacking sufficient identifying information such as dates, names, places, etc. The requests also tend to lack a sufficient explanation for the failure to provide the necessary identifying information.

Two consecutive decisions in the *Ojdanić* case provide an excellent illustration of this mistake. Counsel for Ojdanić initially asked the court to issue an order of cooperation to NATO, its member states, and six other states for documentation and recordings of intercepted communications involving General Ojdanić. Part A of the initial request read as follows:

(A) All recordings, summaries, notes, or text of any intercepted communications (electronic, oral, or written) during the period 1 January through 20 June 1999, to which General Dragoljub Ojdanić was a party;<sup>172</sup>

The trial chamber ordered the defense to reformulate the request because it failed to specify the date and place of the communications, and did not specifically describe the relevance of the communications to Ojdanić's criminal responsibility or any other issues in the trial.<sup>173</sup>

The request excerpted above is an excellent illustration of why the tribunals impose the specificity requirement. Requiring an organization like NATO (not to mention the requested states) to find all documentation of intercepted communications that involved Ojdanić within a six month period would likely impose a heavy burden. It is conceivable that an organization like NATO might have hundreds or thousands of relevant items mentioning or referring to Ojdanić within the specified period, given its involvement in Kosovo. Even if it had only a limited number of relevant materials, sorting through six months' worth of materials derived from a variety of collection techniques and scattered across an array of units and bureaucratic cubbyholes would be an unduly onerous task. Moreover, the disclosure of such a broad category of materials might also endanger the security of the requested party and its officials and sources. At a minimum,

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<sup>171</sup> Prosecutor v. Bizimungu, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi, ¶ 8 (Oct. 30, 2008) (motion by Mugiraneza); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, ¶ 5 (Mar. 10, 2004) (motion by Bagosora); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47, Decision on Defence Access to EUMM Archives p. 2 (Sept. 12, 2003) (motion by Hadžihasanović); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, p. 6 (Mar. 23, 2005) (motion by Ojdanić); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, ¶ 8 (Feb. 13, 2006) (motion by Nzirorera); Prosecutor v. Nzirorera, Case No. ICTR 98-44-I, Decision on the Request to the Governments of the United States of America, Belgium, France, and Germany for Cooperation, p. 2 (Sept. 4, 2003); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, ¶ 11 (Nov. 27, 2006) (motion by Nzirorera) (second of three Nov. 27, 2006, decisions).

<sup>172</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, p. 2 (Mar. 23, 2005).

<sup>173</sup> *Id.* at 7–8.

defense counsel should realize that the mobilization of bureaucratic resources and political will to locate and provide available information is not inexhaustible. The reformulated defense request read as follows:

(A) Copies of all recordings, summaries, notes or text of any intercepted communications (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanić was a party and which:

(1) General Ojdanić participated in the communication from Belgrade, Federal Republic of Yugoslavia;

(2) the communication was with one of the persons listed in Attachment 'A' [a list of 23 people attached to the Second Application];

(3) may be relevant to one of the following issues in the case:

(a) General Ojdanić's knowledge or participation in the intended or actual deportation of Albanians from Kosovo or lack thereof;

(b) General Ojdanić's knowledge or participation in the intended or actual killing of civilians in Kosovo or lack thereof;

(c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government;

(d) General Ojdanić's efforts to prevent and punish war crimes in Kosovo or lack thereof.<sup>174</sup>

The trial chamber deemed this part of the reformulated request sufficiently specific because it was limited (1) in time, (2) to communications to which Ojdanić was a party, and (3) to communications that involved a list of twenty-three people. Although the defense did not identify the exact dates and places of specific communications, the court found the parameters reasonable because of the lapse of time since the communications had transpired and the likelihood that Ojdanić's memory of specific times and places had faded.

In addition to giving as many specifics as possible, defense counsel should use precise language. The *Nzirorera* Trial Chamber echoed many other judicial rulings by rejecting overly broad defense motions and admonishing counsel that the defense "appear[ed] to be engaged in a fishing expedition."<sup>175</sup> In the *Mugiraneza* case at the ICTR, the trial chamber narrowed an information request because the defense requested documents showing the arrival of persons in a certain

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<sup>174</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶ 1 (Nov. 17, 2005).

<sup>175</sup> Prosecutor v. Nzirorera, Case No. ICTR 98-44-I, Decision on the Request to the Governments of the United States of America, Belgium, France, and Germany for Cooperation (Sept. 4, 2003).

city “on or about 12 April 1994,” instead of specifying a specific date or date range (i.e., April 10–15). Though the defense had identified the category of requested documents with enough specificity, the trial chamber felt that the “on or about” language was vague and that “reasonable minds could differ” on the exact date range to which the request referred. While not denying the request outright, the chamber limited it to documents showing arrivals on April 12 only.<sup>176</sup>

A variant of the failure to provide sufficient specificity arose in two cases where, instead of attempting to identify specific material or narrow categories of material, defense attorneys requested general, unfettered access to the archives of a state or international organization so the attorneys themselves could locate and obtain the desired documents. In the *Bagosora* case, the court said: “Previous requests for broad categories of documents from the archives of a State have been rejected by this Tribunal . . . . Requests to inspect archives are equally inappropriate and over-broad, particularly absent any showing that inspections are necessary to obtain the documents.”<sup>177</sup> Though it might address the underlying imbalance of access that has existed since the IMT, permitting outside individuals to have unlimited access to archives could well compromise an array of sensitive information necessary to the effective operation of the state or organization and the security of its officials, personnel, and sources.<sup>178</sup> The *Bagosora* Trial Chamber decided to construe the defense request for general access as a request to the Rwandan government to locate and disclose the documents listed in the request. Yet the previous problem, an overly broad categorical request, still prevented the court from granting the motion in full.<sup>179</sup>

A failure to demonstrate the relevance of the requested information to the trial is the second main reason for denial of orders of cooperation. When there is some question of relevance the courts split the requirement into two elements. The exact wording of the elements varies, but essentially the defense must show that the requested information is (1) “relevant to any matter [at] issue before [the court]” and (2) “necessary for a fair determination” of those questions.<sup>180</sup>

Although “[a] generalized claim of relevance is insufficient to justify the issuance of an order under Article 28,”<sup>181</sup> this does not mean that the defense must know the exact content of the requested materials. In response to a motion made by counsel for Joseph Nzirorera, the Trial Chamber said, in connection with the relevance of the requested information,

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<sup>176</sup> Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza’s Motion Regarding Cooperation with the Republic of Burundi, ¶ 8 (Oct. 30, 2008).

<sup>177</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, ¶ 5 (March 10, 2004).

<sup>178</sup> See Prosecutor v. Hadžihanović & Kubura, Case No. IT-01-47, Decision on Defence Access to EUMM Archives (Sept. 12, 2003).

<sup>179</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, ¶ 5 (March 10, 2004).

<sup>180</sup> Prosecutor v. Karemera, Case No. ICTR 98-44-PT, Decision on Joseph Nzirorera’s Motion for a Request for Governmental Cooperation, ¶ 8 (Apr. 19, 2005).

<sup>181</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with One of its Officials, ¶ 8 (Oct. 6, 2006) (second motion by Ntabakuze decided on Oct. 6, 2006).

that even though [the defense] does not know [the] contents [of the documents], the documents could be relevant to the assessment of the credibility of the Prosecution witness in question, without making any pronouncement as to the effects of the documents on the outcome of the trial or on its admissibility as evidence.<sup>182</sup>

Providing a plausible connection to at least one issue and showing that the information is necessary for a fair determination of the issue should be sufficient to fulfill this requirement.

In at least fifteen decisions, trial chambers denied motions for orders of cooperation on relevance grounds. In twelve of these, the trial chamber stated that the defense failed *to show* the relevancy of the requested information.<sup>183</sup> In the other three, the chamber expressly deemed the requested information irrelevant.<sup>184</sup> A common trend in these decisions is that of defense attorneys requesting information contained in documents, or known by persons, about events that are physically or temporally distant from the events at issue in the trial. Various decisions involved requests for interviews with high-level UN officials, a Belgian professor, and a French military officer who were unlikely to have had specific knowledge about the criminal responsibility of the defendants.<sup>185</sup> In the *Ntabakuze*

<sup>182</sup> Prosecutor v. Karemera, Case No. ICTR 98-44-PT, Decision on Joseph Nzirorera's Motion to Request the Cooperation of the Government of a State, ¶ 5 (Feb. 23, 2005).

<sup>183</sup> Prosecutor v. Bizimungu, Case No. ICTR 99-50-T, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguiere Report and the Cooperation of France, ¶¶ 25-27 (Sept. 25, 2006); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request for Cooperation of the Government of France, ¶ 6 (Oct. 6, 2006) (first motion by Ntabakuze decided on Oct. 6, 2006); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with One of its Officials (Oct. 6, 2006) (second motion by Ntabakuze decided on Oct. 6, 2006); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request for Subpoenas of United Nations Officials, ¶ 8 (Oct. 6, 2006) (third motion by Ntabakuze decided on Oct. 6, 2006); Prosecutor v. Nzabonimana, Case No. ICTR 98-44D-PT, Decision on Callixte Nzabonimana's Request for Subpoena to Professor Philip Verwimp and cooperation from the Kingdom of Belgium, ¶ 6 (Sept. 28, 2009); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Cooperation of Rwanda to Obtain Statement of Prosecution Witnesses ALG, GK and UB, ¶ 13 (Mar. 22, 2007); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for cooperation from Government of Rwanda, ¶ 14 (Nov. 27, 2006) (first motion by Nzirorera decided on Nov. 27, 2006); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, ¶ 15 (Nov. 27, 2006) (second motion by Nzirorera decided on Nov. 27, 2006); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, p. 5 (Mar. 23, 2005); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶¶ 28-30 (Nov. 17, 2005) (motion by Ojdanić); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, ¶ 11 (March 10, 2004); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47, Decision on Defence Access to EUMM Archives, p. 3 (Sept. 12, 2003).

<sup>184</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on the Bagosora Request for the Government of France to Authorize the Appearance of a Witness, ¶ 5 (Oct. 20, 2006); Prosecutor v. Karemera, Case No. ICTR 98-44-PT, Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation, ¶ 9 (Apr. 19, 2005); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Joseph Nzirorera's Motion for Binding Order to the United States of America and Motion for Request for Cooperation to Government of Switzerland, ¶ 2 (Nov. 21, 2008).

<sup>185</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request for Subpoenas of United Nations Officials, ¶ 6 (Oct. 6, 2006) (third of three motions by Ntabakuze decided on Oct. 6, 2006); Prosecutor v. Nzabonimana, Case No. ICTR 98-44D-PT, Decision on Callixte Nzabonimana's Request for Subpoena to Professor Philip Verwimp and cooperation from the Kingdom of Belgium, ¶¶

case at the ICTR, the trial chamber denied a defense motion requesting a meeting with an official at the United Nations High Commissioner for Refugees (UNHCR). The defense wanted to interview him with an eye towards having him testify about his knowledge of massacres in Rwanda. The defense claimed his testimony might help its trial argument that the massacres were a result of the RPF war strategy and as a result the defendant's liability should be diminished. The Trial Chamber denied the request, saying that the UNHCR official was not present in Rwanda before August 1994 and only had knowledge about refugees and their treatment as they returned to their homes post-conflict. The trial chamber found that his knowledge of events in Rwanda was unlikely to relate in any direct manner to Ntabakuze's criminal responsibility.<sup>186</sup>

Another version of this problem occurs when defense attorneys request materials about events that are not only physically or temporally distant from the events at issue in the trial, but are also extremely controversial. In two cases at the ICTR, the defense requested a controversial report, known as the "Bruguiere report," which allegedly blamed the assassination of the Rwandan president on the Rwandan Patriotic Front. The defense attorneys requested the report to bolster their argument that the assassination pushed the situation in Rwanda out of control and thus mitigated the defendants' responsibility. The Trial Chambers denied the motions saying that details regarding the exact individuals responsible for shooting down the former president's plane were not necessary to make such an argument.<sup>187</sup>

The third and final requirement to obtain an order of cooperation is that the requesting party must show the court it has independently attempted to secure the state's voluntary cooperation,<sup>188</sup> and that its efforts were unsuccessful.<sup>189</sup> The requesting party must take "reasonable steps" to acquire the materials from the state or international organization,<sup>190</sup> but is not required to exhaust every available option before motioning the court for an order.<sup>191</sup> A party may not escape this requirement by requesting the materials from the prosecution, even if the prosecution has possession of the materials. Except for exculpatory information in the actual

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5-6 (Sept. 28, 2009); *Prosecutor v. Bagosora*, Case No. ICTR 98-41-T, Decision on the Bagosora Request for the Government of France to Authorize the Appearance of a Witness, ¶ 4 (Oct. 20, 2006).

<sup>186</sup> *Prosecutor v. Bagosora*, Case No. ICTR 98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with One of Its Officials, ¶ 8 (Oct. 6, 2006) (second motion by Ntabakuze).

<sup>187</sup> *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguiere Report and the Cooperation of France, ¶¶ 25-27 (Sept. 25, 2006); *Prosecutor v. Bagosora*, Case No. ICTR 98-41-T, Decision on Request for Cooperation of the Government of France, ¶¶ 4, 6 (Oct. 6, 2006).

<sup>188</sup> *Prosecutor v. Karemera*, Case No. ICTR 98-44, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, ¶ 7 (Feb. 13, 2006); *Prosecutor v. Milutinović*, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis (Nov. 17, 2005); *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47, Decision on Defence Motion for Access to EUMM Archives, ¶ 6 (Dec. 15, 2003).

<sup>189</sup> *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi, ¶ 14 (Oct. 30, 2008) (motion by Mugiraneza).

<sup>190</sup> ICTY RPE, R. 54bis(B)(ii) (1995) (adopted Nov. 17, 1999).

<sup>191</sup> *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Appellant's Motion for the Extension for the Time-limit and Admission of Additional Evidence, ¶ 47 (Oct. 15, 1998); *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi, ¶ 14 (Oct. 30, 2008) (motion by Mugiraneza).



possession of the prosecution,<sup>192</sup> the defense has the responsibility to obtain all the information it wishes to use in its case.<sup>193</sup> ICC judges have already demonstrated that they will strictly interpret and enforce the prosecutorial obligation to disclose exculpatory evidence,<sup>194</sup> and it logically follows that the defense teams will be expected to demonstrate due diligence and professionalism in their quest for admissible and relevant evidence. An important exception to this trend is that the defense will still be considered to have made sufficient prior efforts despite refusing to accept a prior offer of information from a state if the state requires that the materials be accepted pursuant to a conditional offer of confidentiality.<sup>195</sup>

## 2. Analysis of Current Trends

There are two reasons for enforcing the prior efforts requirement, in addition to the reasons, such as state security, previously discussed. The *Karadžić* Trial Chamber has stated a preference for information requests to be dealt with on a voluntary basis because of the potential for lengthy rule 54*bis* litigation. In the *Milošević* case, for example, the Prosecution commenced rule 54*bis* litigation with the (then) Federal Republic of Yugoslavia in 2002, which had not been resolved by the time the case came to an end in 2006.<sup>196</sup> The second reason, stated by the trial chamber in the *Simba* case, is that because of the seriousness of the tribunal's authority to issue orders to states, which arises from Chapter VII of the U.N. Charter, orders for cooperation should not be issued lightly. Enforcing a prior efforts requirement ensures this authority is used sparingly, and in fact logically flows from the overarching defense duty to exercise due diligence in the investigation and preparation of the defense case.<sup>197</sup>

Nine of the surveyed decisions were denied (in full or in part) because the

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<sup>192</sup> See Rome Statute, *supra* note 51, art. 54(1) (obligating the prosecutor to "investigate incriminating and exonerating circumstances equally"). In the ICC, the prosecution must turn over such exculpatory materials "as soon as practicable" and the Pre-Trial Chambers have concluded that this is a continuing obligation that begins prior to the confirmation of charges. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, ¶¶ 125–29 (May 15, 2006); Prosecutor v. Katanga, Case No. ICC-01/04–01/07-60, Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest Against Germain Katanga, ¶¶ 8–9 (Nov. 5, 2007). The ICC has enforced the prosecution's disclosure duties quite strictly. It was prepared to terminate its first case and release a defendant from custody as a remedy for disclosure violations by the prosecution.

<sup>193</sup> Prosecutor v. Simba, Case No. ICTR 01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, ¶ 9 (Nov. 1, 2004) ("Furthermore, the Defence is not relieved of its obligation because the Prosecution has not yet been successful. In view of the threshold requirement under Article 28 the Chamber cannot, based on the information presently provided by the Defence, issue an order under that provision.").

<sup>194</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo, ¶ 1 (July 2, 2008).

<sup>195</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*, ¶ 24 (Nov. 17, 2005).

<sup>196</sup> Prosecutor v. Karadžić, Case No. IT-95-5/18-I, Decision on the Accused's Application for Binding Order Pursuant to Rule 54*bis* (United States of America), ¶ 12 n. 21 (Oct. 12, 2009).

<sup>197</sup> Prosecutor v. Simba, Case No. ICTR 01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, ¶ 9 (Nov. 1, 2004); see also Prosecutor v. Blaskić, Case No. IT-95-14-PT, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 31 (Oct. 29, 1997).

defense failed to show sufficient prior efforts.<sup>198</sup> Another three were denied because the defense made prior efforts, but failed to show that the efforts were in fact unsuccessful.<sup>199</sup> Among the twelve decisions, various problems appear in the defense motions.

A decision from the *Ojdanić* case at the ICTY and a decision from the *Bagosora* case at the ICTR involve requests for large amounts of materials. It appears either that the defense lost track of which requests had been previously submitted to particular states and which had not, or that the defense intentionally inserted a few small requests which had not previously been sent to the relevant states into a larger group of requests that had previously been sent.<sup>200</sup> Assuming the innocence of the defense teams, they should keep better track of the requests that have been submitted to states and those that have not. If the inclusion of the requests was intentional, then it is advisable for the defense to avoid this tactic. There is, however, no empirical basis for assuming that defense teams use this tactic successfully in many motions but happened to get caught in these situations.

The next problem is a lack of specificity, not in the sense of specifically identifying documents but in the sense of dividing up multiple requests that appear to be one. In *Bagosora*, the defense made a motion for an order of cooperation to obtain an interview with a Belgian military officer and custody of his personal notes. The court granted the motion for the interview, but denied it for the personal notes of the officer because the original defense request to Belgium only requested an interview and failed to mention the production of documents.<sup>201</sup>

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<sup>198</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (Mar. 10, 2004) (motion by all four defendants; listed as motion by Bagosora in appendices and attachments); Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, ¶ 9 (Feb. 7, 2005); Prosecutor v. Ngeze, Case No. ICTR 97-27-I, Decision on the Defense Motion to Have the Court Request a Subpoena Duces Tecum for the Production of the Defendant's Arrest and Certified Court Records, p. 4 (May 10, 2000); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on the Ex Parte Defence Motion for Order to United Nations Department of Peace-Keeping [sic] Operations for Production of Documents, ¶ 22 (Mar. 9, 2004); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda, ¶ 10 (Nov. 27, 2006) (first of three motions by Nzirorera decided on Nov. 27, 2006); Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, ¶ 14 (Nov. 27, 2006) (second of three motions by Nzirorera decided on Nov. 27, 2006); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶¶ 28-30 (Nov. 17, 2005); Prosecutor v. Simba, Case No. ICTR 01-76-T, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, ¶ 5 (Oct. 28, 2004); Prosecutor v. Brdadin & Talić, Case No. IT-99-36/1, Public Version of the Confidential Decision on The Alleged Illegality of Rule 70 of 6 May 2001, ¶ 1 (May 23, 2002).

<sup>199</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute (May 27, 2005); Prosecutor v. Semanza, Case No. ICTR 97-20-T, Decision on Defence Extremely Urgent Motion for Extension of Time and for an Order of Cooperation of the Government of Rwanda (Dec. 13, 2001); Prosecutor v. Karadžić, Case No. IT-95-5/18-I, Decision on the Accused's Application for Binding Order Pursuant to Rule 54bis (United States of America), ¶ 12 n.21 (Oct. 12, 2009).

<sup>200</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (Mar. 10, 2004) (motion by all four defendants; listed as motion by Bagosora in appendices and attachments); Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54bis, ¶ 27 (Nov. 17, 2005).

<sup>201</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, ¶ 9 (Feb. 7, 2005).

A similar problem—the defense failing to give sufficient support to its assertions of prior efforts—occurred in the *Nzirorera* case where the defense motioned for an order for the production of documents by the U.N. Department of Peacekeeping Operations, stating that it had sent two letters requesting the documents. The trial chamber denied the request on prior efforts grounds because the defense had failed to give any details regarding the letters, such as when or how they were sent, and did not say whether any response had been received.<sup>202</sup>

Defense attorneys also make obviously premature motions on occasion. In the *Ntabakuze* case, the defense motioned the court before the requested state had responded to the request for information.<sup>203</sup> Likewise, defense counsel for Semanza motioned the court for an order of cooperation before it was evident that any problems would arise. The defense asked the court to ensure that there would be no “diplomatic bottlenecks” in connection with a proposed defense visit to Rwanda to interview expert witnesses. The *Semanza* Trial Chamber flatly denied the request because Rwanda had not demonstrated an unwillingness to cooperate in any way.<sup>204</sup> In the *Karadžić* case, the defense motioned the court for an order of cooperation to the United States even while its motion seeking approval of a Rule 70 confidentiality agreement related to the same request was pending before the tribunal.<sup>205</sup>

The last problem with defense motions, which is manifest in two decisions in the *Nzirorera* case, is when the defense motions the court without making prior efforts, even after it clearly had a previous opportunity to obtain the documents. In one decision, the *Nzirorera* trial chamber said: “the Defence does not explain why it has not met with other witnesses at the appropriate time, nor does it claim that the witnesses refused to be interviewed . . . . Again, the Defence does not explain why it did not meet the witness earlier in order to obtain the requested documents which appear to be in the witness’ possession, in a timely fashion.”<sup>206</sup>

This sampling of cases is representative of the rich diversity of motions practice and the extensive efforts made by the defense to obtain relevant information from a variety of sources and agencies. While some defense efforts were flawed, on the whole the battles over access to evidence demonstrate the maturity and tenacity of defense teams more than any other dimension of current practice.

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<sup>202</sup> Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on the Ex Parte Defence Motion for Order to United Nations Department of Peace-Keepig [sic] Operations for Production of Documents, ¶ 22 (Mar. 9, 2004).

<sup>203</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute, ¶ 2 (May 27, 2005). However, note that it is unknown what amount of time passed between the submission of the defense request to France and the filing of the motion with the court. *See id.*

<sup>204</sup> Prosecutor v. Semanza, Case No. ICTR 97-20-T, Decision on Defence Extremely Urgent Motion for Extension of Time and for an Order of Cooperation of the Government of Rwanda, ¶ 9 (Dec. 13, 2001).

<sup>205</sup> Prosecutor v. Karadžić, Case No. IT-95-5/18-I, Decision on the Accused’s Application for Binding Order Pursuant to Rule 54bis (United States of America), ¶ 12 n.21 (Oct. 12, 2009).

<sup>206</sup> Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, ¶ 14 (Nov. 27, 2006) (second of three Nov. 27, 2006 decisions); *see also* Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Defence Motion for Exclusion of Witness GK’s Testimony or for Request for cooperation from Government of Rwanda (Nov. 27, 2006) (motion by Nzirorera (first of three Nov. 27, 2006 decisions)).

### *B. Reforming the Right to Representation*

Despite lingering popular mistrust of defense counsel who are vigilant in advocating for the rights of those accused of the world's worst atrocities, available evidence indicates that modern defense counsel are an indispensable element of efficient proceedings. The rigorous vetting standards and the increasing degree of specialized knowledge required for defense counsel today make them highly engaged and effective on behalf of their clients. In fact, the disruptive behavior of defendants in the absence of representation by counsel highlights the crucial ability of defense attorneys to facilitate fair and efficient proceedings. Furthermore, the predominant strategy of judges to appoint standby counsel in the event of such disruptive behavior demonstrates the faith that judges place in defense counsel to alleviate difficulties presented by uncooperative defendants.

As recently illustrated in the *Karadžić* and *Taylor* cases in the ICTY and SCSL respectively, tribunals continue to face situations where defendants refuse to make mandatory court appearances.<sup>207</sup> Boycotts can bring proceedings to a standstill, leaving judges to make difficult decisions on whether to stay the proceedings or continue in the absence of the accused. Perhaps more importantly, boycotts undermine the perception of a fair and orderly administration of justice, which in fact may often be the defendant's goal. Judge Wald points out correctly that most disruptive behavior originates with the defendants themselves and not their counsel.<sup>208</sup> Refusal to attend open court represents a defendant's attempt to delegitimize proceedings rather than engage with the bench in a good faith effort to achieve justice. Despite the multiplicity of forums, no tribunal should permit counsel to engage in a deliberate pattern of conduct to disrupt or otherwise interfere with the dignity, order, and decorum of the proceedings. In the modern era, universalized substantive norms and the uniformity of ethical expectations incumbent on the defense hinders any effort to forum shop for a tribunal that will protect such disruptive conduct from ethical sanctions.

It goes without saying that no responsible defense attorney can ethically pursue that goal. In making the decision whether to proceed in the absence of counsel or without the defendant in open court, tribunals must balance important values and concerns—namely the defendant's right to a fair trial and the court's interest in seeking justice in a timely manner. Furthermore, the prospect of boycotting counsel or defendants represents perhaps the most pointed test for the utility and professional preparation of the Defense Office and the private bar organizations seeking to aid defense attorneys.

As discussed below, defendants' justifications for boycotting often implicate core trial equity concerns—specifically that the accused has not had the necessary time and resources to adequately prepare for trial. Motivated by concerns

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<sup>207</sup> See, e.g., Ian Traynor, *Radovan Karadžić Boycotts Opening of War Crimes Trial*, GUARDIAN, Oct. 26, 2009, <http://www.guardian.co.uk/world/2009/oct/26/radovan-karadzic-war-crimes-trial> (“Radovan Karadzic, the Bosnian Serb leader charged with genocide for the worst mass murders in Europe since the Nazis, called the bluff of the special UN war crimes tribunal today by boycotting the opening of his trial.”); Alexandra Hudson, *Liberia's Taylor Boycotts War Crime Trial*, REUTERS, Jun. 4, 2007, [http://uk.reuters.com/article/2007/06/04/idUSL044608.CH\\_2400](http://uk.reuters.com/article/2007/06/04/idUSL044608.CH_2400) (“Former Liberian President Charles Taylor boycotted the start of his war crimes trial on Monday, saying he would not get a fair hearing at the U.N.-backed court where he is accused of atrocities in Sierra Leone.”).

<sup>208</sup> PATRICIA WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 28 (2009).

that limiting the defendant's ability to shape defense strategy could warrant questions of fairness, tribunals have generally been amenable to providing some leeway, such as postponing proceedings to allow the accused additional preparation time. Yet, as the tribunals' jurisprudence in this area continues to develop, it is becoming clear that the ad hoc courts are becoming less tolerant in accepting defendants' attempts to prolong trials by not showing up to court. Rather, current jurisprudence applies a range of options such as appointing amicus curiae or standby legal representation to counterbalance boycotts and ensure minimal trial disruption.

Boycotting defendants proffer several reasons for why they choose not to attend mandatory court appearances. They include (a) challenges to the legality of their indictment and arrest;<sup>209</sup> (b) doubts of the tribunals' integrity and ability to provide a fair trial;<sup>210</sup> (c) claims of health concerns, either being physically or mentally unfit to attend proceedings;<sup>211</sup> (d) dissatisfaction with the work of their counsel;<sup>212</sup> or (e) beliefs that they or their attorneys have not had adequate time and/or resources to review and prepare their case.<sup>213</sup>

For example, at the start of his trial in 2000 in the ICTR, Jean-Bosco Barayagwiza informed the trial chamber via his counsel that he would not attend court proceedings because he doubted the ICTR's ability to give him a "just and fair" trial.<sup>214</sup> Not once during the proceedings did he personally appear in court. In 2007, former Liberian president Charles Taylor sent his court-appointed attorney to the SCSL trial chamber with a letter stating that he would not attend proceedings because he believed he could not receive a fair trial nor had he been given "adequate time and facilities" to prepare his defense.<sup>215</sup> Taylor also fired his

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<sup>209</sup> See, e.g., Charles Taylor, who claimed he had immunity from indictment and trial under the Head of State doctrine in his capacity as former President of Liberia, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004). On the first day of his trial in an Iraqi domestic court organized to incorporate international precedents, Saddam Hussein famously demanded of the presiding judge: "Who are you? What does this court want?" Saddam Hussein al-Tikriti, deposed President of Iraq added: "I don't answer this so-called court, with all due respect, and I reserve my constitutional rights as the president of the country of Iraq. I don't acknowledge either the entity that authorizes you, nor the aggression, because everything based on a falsehood is a falsehood." ENEMY OF THE STATE, *supra* note 8, at 3.

<sup>210</sup> *Prosecutor v. Barayagwiza*, Case No. ICTR 97-19-T, Decision on Defense Counsel to Withdraw, ¶¶ 1 & 5 (Nov. 2, 2000).

<sup>211</sup> Jovica Stanišić's trial was postponed after a doctor submitted a report to the tribunal stating findings that Stanišić was not mentally fit to stand trial, and would not be for at least three months. The trial eventually was held in the absence of Stanišić in court. See *Prosecutor v. Stanišić & Simatović*, Reasons for Decision Denying the Stanišić Defence Request to Postpone the Court Proceedings and Decision Proceeding with the Court Session of 29 June 2009 in the Absence of the Accused (Jul. 22, 2009).

<sup>212</sup> For example, in 2001, Hassan Ngeze, on trial in the ICTR, said he would boycott proceedings because the tribunal refused to replace his counsel, whom it considered "traitors." *Prosecutor v. Ngeze*, Case No. ICTR 97-27-I, Decision on the Accused's Request for Withdrawal of His Counsel (Mar. 29, 2001).

<sup>213</sup> See, e.g., Transcript of Record, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T, Prosecution Opening Statement—10:30 a.m. (Jun. 4, 2007) [hereinafter Taylor Transcript].

<sup>214</sup> Barayagwiza, *supra* note 210.

<sup>215</sup> Through his counsel, Taylor stated to the tribunal: "I am driven to the conclusion that I will not receive a fair trial before the Special Court . . . I must decline to attend any further hearings in this case until adequate time and facilities are provided to my Defence team and until my other long-standing reasonable complaints are dealt with. It follows that I must terminate instructions to my legal representatives in this matter. Despite my complete confidence in their ability and competence, I must

attorney and elected for self-representation. More recently, in October 2009, Radovan Karadžić refused to make an appearance in the ICTY, claiming that he was not properly prepared to start.<sup>216</sup> Proceedings for Karadžić, who is representing himself, did not resume until March 2010.

A common thread weaves throughout the cases and tribunals with regard to the use of boycotts and other extremely disruptive behaviors—almost all incidents involve defendants who have fired their counsel and chosen self-representation.<sup>217</sup> In doing so, the accused have dispensed with the expertise and sophistication needed to maneuver the trial process efficiently and effectively. Judges have been criticized for yielding to the spectacle of a boycotting defendant, some critics suggesting that the jurists are allowing (alleged) war criminals to set court agenda and manipulate the judicial process. Whether the defendants' reasons for refusing to show up are legitimate or veiled attempts to disrupt and hinder judicial proceedings, the accused has a clear right to hear the allegations against him in court.<sup>218</sup> At the same time, various Chambers have concluded that the right can also be waived. The waiver of a defendant's right to self-representation, along with the developed limits to that right, balances against the necessity for achieving optimal fairness to animate the searching debate over the best mechanisms for dealing with boycotts.

The typology of developed judicial responses to boycotts has included (1) forcing the defendant to attend;<sup>219</sup> (2) postponing the proceedings;<sup>220</sup> (3) conducting

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ask that they cease to represent me before the Special Court and instruct them accordingly." Taylor Transcript, *supra* note 213.

<sup>216</sup> See Transcript of Record, Prosecutor v. Karadžić, Case No. IT-95-5/18-I (Oct. 26, 2009) ("Mr. Karadžić filed a submission, stating that he would not appear for today's hearing on the basis that he's not fully prepared for the commencement of trial.").

<sup>217</sup> See e.g., Prosecutor v. Milošević, Case No. IT-02-54, Prosecutor v. Seselj, Case No. IT-03-67, Prosecutor v. Krasjnik, Case No. IT-00-39, and Prosecutor v. Karadžić, Case No. It-95-5/18-I; in the ICTR, Prosecutor v. Barayagwiza, Case No. ICTR 97-19-T; and in the SCSL, Prosecutor v. Taylor, Case No. SCSL-03-01. For a general overview of self-representation, see Nina Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711 (Oct. 2004).

<sup>218</sup> See e.g., ICTY Statute, *supra* note 41, art. 21(4)(d) ("[T]he accused shall be entitled . . . to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing . . ."); ICTR Statute, *supra* note 41, art. 20(4)(d) ("[T]he accused shall be entitled . . . [t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing.").

<sup>219</sup> The tribunals, for obvious reasons, have been reluctant to forcibly haul unwilling defendants into court. Such action could damage the integrity and legitimacy of the court and the trial itself. A survey of the various tribunals' rulings suggests that the option has really never been considered to be viable, even when the prosecution specifically requested compulsory attendance of defendants. ENEMY OF THE STATE, *supra* note 8, at 130–31.

<sup>220</sup> In most cases of boycotts, self-representing defendants claim unpreparedness and request additional time to ready their cases. After his boycott, Karadžić received an additional four months to assemble his case. On November 5, 2009, the court granted a stay until March and appointed Karadžić counsel. Decision on Appointment of Counsel and Order on Further Trial Proceedings, ¶¶ 25–26 (Nov. 5, 2009). The tribunals recognize that without skilled attorneys, defendant-lawyers may require additional time, but caution that this is a tradeoff when voluntarily choosing to dispense with legal representation. See Prosecutor v. Milošević, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation of the Defence Case, ¶ 19 (Jan. 20, 2004).

(There is no doubt that, by choosing to conduct his own defence, the Accused deprived himself of resources a well-equipped legal defence team could have provided. A defendant who decides to represent himself relinquishes many of the benefits associated with representation by counsel. The legal system's respect for a defendant's decision to forgo assistance of counsel must be reciprocated by

a trial in absentia;<sup>221</sup> (4) suspending the right to self-representation;<sup>222</sup> (5) imposing counsel on the defendant;<sup>223</sup> (6) appointment of counsel *amicus curiae*; and (7) appointment of standby counsel. There has been a noticeable trend over time for judges to shift from the previous practice of deferring proceedings in favor of defendants who refuse to show up in court, to considering the implementation of contingency measures such as “shadow” counsel (standby and *amicus curiae*). Such shadow counsel serve to minimize disruption to court proceedings, but also represent a tangible signal of the confidence that the Chambers place in the professionalism and preparation of the defense bar.

The Chamber’s decision to appoint counsel *amici curiae* was an innovative step taken in the *Milošević* case in response to the defendant’s self-representation. *Amici* counsel helped the tribunal to seek the proper disposition of the case in accordance with established jurisprudence and standards of justice; in hindsight, judges and *amici* worked together to help demonstrate to a skeptical public that the defendant received a fair trial based on available law and evidence rather than raw political pressure.<sup>224</sup> Unlike counsel that are imposed or on standby, *amicus curiae*

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the acceptance of responsibility for the disadvantages this choice may bring.)

Additionally, the tribunals remain cognizant that a defendant’s claims (and boycotts) are often tactics used to manipulate and prolong proceedings, a lesson learned in the *Milošević* trial in the ICTY. See *Prosecutor v. Milošević*, Order Terminating the Proceedings (Mar. 14, 2006).

<sup>221</sup> Both the ICTR and SCSL adopted rules in 2003 that allow the respective courts to hold proceedings in the absence of the defendant. See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 82*bis* (amended Mar. 14, 2008) [hereinafter ICTR Rules] and Rules of Procedure and Evidence of the Special Court for Sierra Leone, No. 60 (amended May 27, 2008). While the ICTY has not adopted a similar rule, in the *Simić* case the Trial Chamber continued with trial proceedings, even though *Simić* was not physically present in the courtroom. See *Prosecutor v. Simić*, Case No. IT-95-9/2-S, Sentencing Judgement, ¶ 8 (Oct. 17, 2002).

<sup>222</sup> See *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 12 (Nov. 1, 2004) (“While this right to self-representation is indisputable, jurisdictions around the world recognize that it is not categorically inviolable.”). See also *Prosecutor v. Norman*, Case No. SCSL-2004-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court ¶ 9 (Jun. 8, 2004) (“the right to self representation by an accused person is a qualified and not an absolute right”); *Prosecutor v. Šešelj*, Case No. IT-03-67-PT; *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, ¶ 21 (May 9, 2003) (“The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.”); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, ¶ 27 (Nov. 5, 2009) (“[I]f the Accused continue[s] to absent himself from the resumed trial proceedings in March, or should he engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he will forfeit his right to self-representation.”).

<sup>223</sup> For example, the ICTY Statute provides that the accused can “have legal assistance assigned to him, in any case where the interests of justice so require.” ICTY Statute, *supra* note 41, art. 21(4)(d).

<sup>224</sup> *Amicus Curiae* counsel would be responsible for assisting the chamber by:

- (a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial.

*Prosecutor v. Milošević*, Case No. IT-02-54, Order Inviting Designation of *Amicus Curiae* (Aug. 30, 2001). In 2002 and 2003, the Tribunal expanded the role of *Amici Curiae* to bring potential defenses before the court and monitor the health of *Milošević*. *Prosecutor v. Milošević*, Case No. IT-02-54, Order Concerning *Amici Curiae* (Jan. 11, 2002) and *Prosecutor v. Milošević*, Case No. IT-02-54, Order

counsel do not actually represent the defendant but instead serve as a failsafe mechanism for both the court and the accused. In principle, this duality prevents foreseeable conflicts of interest, though some judges would prefer to impose counsel directly or opt for standby counsel to avoid the appearance of ethical conflicts and competing loyalties altogether.<sup>225</sup> The primary function of an amicus counsel is to help ensure the overall effectiveness of the proceedings and remedy, in a sense, the potential problems that could occur when a defendant represents himself. In *Milošević*, the amici attorneys had access to all information and materials that Milošević had, and were responsible for bringing all evidence in favor of the defendant to the court's attention.

Similar to the amici curiae, standby attorneys are a failsafe mechanism for the courts. Standby counsel generally play a more passive role in proceedings, serving as observers to the process until they may be pressed into service by judicial order. However, at either the request of the Accused or the Trial Chamber, the standby counsel may step in to handle a specific part of the case.<sup>226</sup> In the most egregious of circumstances, standby counsel may be required to assume the case in its entirety from the defendant or from retained counsel who withdraw or themselves boycott proceedings.<sup>227</sup> Judge Gunawardana noted in *Barayagwiza* that a significant advantage of standby counsel is that they usually have some level of involvement in the case before assuming complete control over it.<sup>228</sup> When attorneys are imposed and come to the case later, they could have only a few months to review a torrent of case files and documents to prepare for trial. The recently issued Practice Direction by the Special Tribunal for Lebanon takes this truism to its logical extension by permitting the Head of Defence Office to

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of Further Instruction to the Amici Curiae (Oct. 6, 2003). See also *Prosecutor v. Milošević*, Case No. IT-02-54, Order Concerning the Provision of Documents to Amici Curiae (Sept. 19, 2001) (providing that amici curiae should have access to all materials, included confidential materials, that are provided to the accused).

<sup>225</sup> See *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to the Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, ¶¶ 80–81 (May 11, 2007) (separate opinion of Judge Schomburg) (arguing that the position of amicus curiae will create conflicts of interest for counsel and that it is better to impose counsel on the accused instead).

<sup>226</sup> See *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, ¶ 6 (Oct. 25, 2006) (providing list of responsibilities of standby counsel) and *Prosecutor v. Norman*, Case No. SCSL-2004-14-T, Order for Assignment of Standby Counsel for Samuel Hinga Norman (Jun. 15, 2004) (Norman assented to having standby counsel appointed after he fired his defense team and elected for self-representation). During the Al-Dujjal trial, at one point the retained counsel and lead defendants stormed out of the courtroom, prompting one of the lesser defendants to plead with the bench "We are subject to the court, we respect the court, but we need our lawyers." The presiding judge pointed to the standby counsel in the courtroom and replied, "The court [appointed] lawyers will defend you and your rights." *ENEMY OF THE STATE*, *supra* note 8, at 130.

<sup>227</sup> See, e.g., *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on the Appointment of Counsel and Order on Further Proceedings, ¶ 27 (Nov. 5, 2009) (noting that if Karadžić's conduct "obstructs the proper and expeditious conduct of the trial," he will no longer be entitled to self-representation or help from his legal associates, and the "appointed counsel will take over as an assigned counsel.").

<sup>228</sup> Judge Gunawardana noted,

It is to be observed that it is an advantage in the present case to require Ms Marchessault and/or Mr Danielson to be appointed as standby counsel, as they are already fully conversant with the facts of the case and, as is evident from the communication by the accused to the Court, enjoy the confidence of Mr Barayagwiza. Thus, such an appointment would avoid any delay that the appointment of new counsel may ensue.

*Barayagwiza*, *supra* note 210 (Gunawardana concurring).



intervene orally or in writing to the bench on a *proprio motu* basis if warranted by “the interests of justice.”<sup>229</sup>

The *Karadžić*, *Taylor*, and *Al-Dujail* trials all indicate that practice is shifting towards standby counsel as a viable solution to boycotts. Standby counsel best balance the need for efficiency and decorum with the defendant’s inherent rights in judicial proceedings. The tribunals’ most effective solution to boycotts lies in mitigating the effects of the disruptions to trial proceedings rather than attempting to tackle the underlying root causes that defendants say are the reasons for refusing to come to court. Boycotts are a method of expressing dissatisfaction, and if obdurate defendants have a disagreement with the court or want to hamper proceedings, boycotts may be inevitable. Instead of accepting such an outcome, with its attendant perceptual difficulties and the very real due process concerns, defendants should be dissuaded from engaging in the disruptive conduct. This outcome is best achieved by undermining the perceived benefits gained from boycotts, though of course there are a range of other conceivable manifestations of defendant displeasure.<sup>230</sup>

The trend towards appointment of standby counsel provides the ideal solution to minimizing boycotts’ deleterious effect. By having counsel available to immediately step in once a defendant’s conduct becomes untenable tribunals have a fallback that minimizes disruption to court proceedings. Secondly, unlike attorneys imposed on defendants *post hoc*, standby counsel ideally will have monitored the proceedings from the very beginning and therefore will be more effective from the very outset of their representation. Imposed counsel will generally have insufficient time to review voluminous court documents and testimony to prepare for trial, which likewise results in a significant postponement of proceedings. The option of imposing counsel after the initiation of proceedings therefore carries the incumbent risk for further trial delays and inefficiencies. Third, standby counsel will not have a direct role in the defendant’s case, unlike *amicus curiae*. As long as the defendant cooperates, he or she still has control over how the case is shaped without any outside interference. Given the development of professional organizations and Defense Offices that can serve as portals to assist with training and expedited trial preparation, and the concomitant creation of consistent ethical Codes, standby counsel can be rapidly integrated into the tempo of an ongoing trial. In addition, however, the Head of Defence Office should serve as a necessary augmentation to the efforts of standby counsel or amici when the interests of justice require. The

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<sup>229</sup> Special Tribunal for Lebanon, *Practice Direction on the Role of the Head of Office in Proceedings Before the Tribunal*, §2, ¶7 (Mar. 30, 2011), [http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/practice\\_directions/STL-PD-2011-04\\_Role\\_of\\_Head\\_of\\_Defence\\_Office\\_WEB\\_EN.PDF](http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/practice_directions/STL-PD-2011-04_Role_of_Head_of_Defence_Office_WEB_EN.PDF).

<sup>230</sup> The range of defendant misconduct takes at least five other potential variations: (1) “passive disrespect” (examples include Milošević referring to the judge as Mister, or Barzan al-Tikirit wearing his pajamas to court and sitting with his back to the bench—judges will typically ignore these manifestations); (2) “refusal to cooperate” (i.e., failure to submit to court orders or to comply with procedural requirements); (3) the “single obscenity or shout” (providing the judge an opportunity to quickly reestablish control and to revisit the pre-established ground rules for court decorum); (4) “repeated interruption of the judge, prosecutor, or witnesses” (judges may choose to shut down the defendant’s microphone or to isolate him in a glass enclosure or impose a requirement that communications with the court be in written form: egregious examples may result in removal from court or even contempt rulings as in the Šešelj case); (5) physical violence (warranting handcuffs, immediate contempt citations, or removal). NORMAN DORSEN AND LEON FRIEDMAN, *DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 111–18 (1973).

overarching framework of substantive law and evidentiary sophistication that is shared across continents and jurisdictions today also provides a pool of capable counsel that can become engaged in any particular case in very short order. An organized and mature defense bar is the necessary predicate for this salutary development.

### *C. The Dearth of Conclusive Contempt Findings*

#### *1. In General*

This article will conclude by dispensing with a widespread but demonstrably misplaced caution regarding the role of a mature international defense bar. Concerns about contempt of court strike at the very heart of the judicial process, yet the available evidence does not warrant the presumption that an aggressive and engaged defense bar will automatically result in disruptive and combative proceedings that warrant contempt findings. Conduct not in accord with the tribunals' rules and procedures<sup>231</sup> can lengthen proceedings, hamper a party's case, and obstruct the court's effective administration of justice.<sup>232</sup> A survey of contempt-related rulings in the tribunals—specifically the ICTR and ICTY—reveals that the vast majority of contempt-related proceedings involve improprieties related to witnesses. To be clear, the data set for this sub-part included all available contempt proceedings from the ICTY and ICTR. Specifically, parties file motions for contempt for three main reasons: (1) a party (or agent of the party) has violated court protective orders in regards to witnesses, usually by releasing identifying information; (2) a party has engaged in witness intimidation; or (3) a witness has refused to appear or answer questions before the court.<sup>233</sup> Interestingly, almost every contempt allegation predated the reforms of the 2002–03 timeframe, and almost always involved larger trials with groups of defense lawyers that were comparatively more active in filing motions.

Surprisingly few of the decisions reviewed resulted in counsel to the proceedings being held in contempt. In *Karemera*, the defense argued, “sanctions have been imposed against Defense Counsel in all major trials held at the Tribunal, while the Prosecutor has never been more than warned.” Defense counsel alleged that an uneven “application of the Rule . . . discourage[s] the Defence from bringing motions, and . . . affect[s] the right to a fair trial.”<sup>234</sup> Setting aside the potential

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<sup>231</sup> For a complete list of conduct punishable as contempt of court, see ICTY RPE, *supra* note 112, R. 77, Rome Statute, *supra* note 51, art. 70, and ICC RPE *supra* note 51, R. 162–72.

<sup>232</sup> See, e.g., Prosecutor v. Niyitegeka, Case No. ICTR 96-14-R, Decision on Third Request for Review, ¶ 10 (Jan. 23, 2008) (“[The] Appeals Chamber stresses that protective measures pursuant to Rule 75 of the rules are ordered to safeguard the privacy and security of victims of witnesses. Revealing closed session material without prior authorization vitiates the protective measures and consequently constitutes a grave interference with the Tribunal’s administration of justice.”).

<sup>233</sup> See, e.g., Prosecutor v. Kabashi, Case No. IT-04-84-R77, Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi (Jun. 5, 2007) (former Kosovo Liberation Army member charged with contempt of court for refusing to answer questions).

<sup>234</sup> Prosecutor v. Karemera, Case No. ICTR 98-44-PT, Decision on Motion to Vacate Sanctions, ¶ 2 (Feb. 23, 2005).

merits of the defense position in *Karemera* regarding the imposition of sanctions on counsel, the data indicate that the imposition of actual contempt of court findings is in practice rapidly disappearing, in part because of the increasing professionalism of the defense. Instead, the tribunals appear reluctant, requiring a high threshold of conduct to warrant admonishment.

## 2. Violation of Protective Orders

Article 21 of the ICTR Statute<sup>235</sup> and Article 22 of the ICTY Statute<sup>236</sup> provide for protective measures for witnesses and/or victims. The measures usually require that the parties conceal the identity of testifying witnesses. These provisions are utilized in every trial. As noted above, defense attorney Anto Nobile was acquitted in 2001 of allegations that he knowingly violated a protective order.<sup>237</sup> That 2001 case is the last reported instance in the ICTY. The ad hoc tribunals have applied a rather consistent analytical template to allegations of misconduct with the result that no defense counsel has been held in contempt on this basis. The movant has to make a case that the violator “knowingly and willfully” intended to disrupt the court’s administration of justice.<sup>238</sup>

It has been suggested, generally by defense counsel, that the tribunals increase limitations on opposing party’s access to witnesses by toughening the protective orders. Specifically, parties have asked either (1) that witness identities not be released to opposing counsel or (2) that parties be required to contact opposing counsel before contacting or conducting interviews. The tribunals have rejected such requests, finding that the limitations unduly constrain equality of arms and such limitations would impinge on the rights of a party to gather information necessary for the case.<sup>239</sup>

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<sup>235</sup> “The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.” ICTR Statute, *supra* note 41, art. 21.

<sup>236</sup> “The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.” ICTY Statute, *supra* note 41, art. 22.

<sup>237</sup> See *supra* note 69 and accompanying text.

<sup>238</sup> Rule 77 of both the ICTR Rules and ICTY Rules establishes the level of conduct and mens rea needed to be held in contempt of the respective tribunals. For cases establishing the level, *cf.* Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Decision on Kajelijeli’s Motion to Hold Members of the Office of Prosecutor in Contempt of the Tribunal (Nov. 15, 2002) (court finding that Defense failed to show that prosecution deliberately violated a witness protection order) with Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order (Mar. 1, 2004) (finding that not every knowing and willful violation results in a finding of contempt).

<sup>239</sup> For example, in *Nchamihigo*, the court rejected a defense request to vary protective orders, noting that protective orders are important to both protect witnesses and facilitate the prosecution in conducting its own investigation. Case No. ICTR 2001-63-T, Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses (Aug. 9, 2007). See also, Prosecutor v. Nyiramashuko, (Jul. 10, 2001), where the tribunal refused the prosecution’s request that members of the defense must submit a written request on reasonable notice to the prosecutor and trial chamber if intended to contact witnesses or members of their family.

### 3. *Witness intimidation and other witness improprieties*

Witness intimidation is a subset of contempt. Allegations of witness intimidation are commonly invoked both by the defense and the Prosecution. In the twenty-one such cases examined, spanning four different jurisdictions (ICTY, ICTR, ECCC and ICC), the argument was invoked roughly the same number of times by the defense and the prosecution (nine times each). However, all allegations against the Prosecution arose in ICTY litigation. A majority of the motions alleging intimidation of witnesses concerned conduct during the pre-trial phase (only one concerned the trial phase). Furthermore, in 100% of the cases analyzed, the approach of the Trial Chamber is extremely specific and fact-based. The jurisprudence illustrates a cascading approach that requires consideration of a succession of factors in order to warrant judicial enforcement of sanctions against counsel.

First, the evidence must demonstrate a specific threat targeted at a witness or, by extension, the family of a witness. Allegations have to be backed up with precise facts. In order for it to represent a justiciable threat, a certain threshold must be reached. The mere fact that the name of the witness has been disclosed and is thus known by the accused is not sufficient to constitute a threat.<sup>240</sup> For instance, a threat is characterized by interference caused by prison officials and prosecutors<sup>241</sup> or when the accused, formerly in a position of power, uses his influence.<sup>242</sup> The threat has to be focused at the witness and not a general side effect of a threatening or potentially coercive environment. Surprisingly, perhaps, the most convictions on this basis arose from the conduct of other witnesses rather than the actions of counsel.

In the *Lubanga* case, the ICC Trial Chamber I had the opportunity to clarify these standards even further.<sup>243</sup> Recalling that the test used to determine whether a situation constitutes a threat is eminently objective, the judges explained that the attitude of the witness has to be taken into account. A generalized attitude of fear by the witness, when not warranted by concrete facts, does not satisfy the test and is thus not considered as a threat. In the *Lubanga* circumstances, the witness was requesting from the judges an extended protection when there was no cognizable specific threat. Similarly, *Brahimaj* (ICTY) reiterated the requirement of a concrete danger and not just an abstract threat.<sup>244</sup>

Demonstration of a tangible threat is, in itself, insufficient.<sup>245</sup> The threat might trigger the application of a witness protection program, but in the context of a request for sanctions against counsel there must be a causal link between the threat

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<sup>240</sup> Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-PT, Decision on Provisional Release, ¶¶ 52–56 (May 26, 2008).

<sup>241</sup> Prosecutor v. Simba, Case No. ICTR 01-76-T, Judgement and Sentence, ¶¶ 41–53 (Dec. 13, 2005).

<sup>242</sup> Prosecutor v. Bošcoski & Tarčulovski, Case No. IT-04-82-PT, Decision on Defence Motion of Ljube Bošcoski for Provisional Release, ¶¶ 42–43 (July 18, 2005).

<sup>243</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Ex Parte Hearing—OTP and Victims & Witnesses Unit, p. 10–11 (Apr. 1, 2009).

<sup>244</sup> Prosecutor v. Brahimaj, Case No. IT-04-84-T, Decision on Motion of Lahi Brahimaj on Provisional Release, ¶ 16 (Dec. 14, 2007).

<sup>245</sup> In Prosecutor v. Lubanga, the ICC judges note that the ICTY has repeatedly decided in this direction.

and the counsel facing sanctions. Chambers will look at two elements in order to determine the substance of the link. In the first place, the prior behavior of the defendant is relevant. This factor was used in many cases before the ICTY and of particular note in *Bošcoski*<sup>246</sup> where the judges took into account the fact that the accused had formed a special police force whose members were involved in previous cases of witness intimidation. The facts indicated that he still exercised influence over those members. Although there was no proof that the accused would use his influence illegally, the Court thought that the risk of witness intimidation was too high and refused to grant provisional release.

Secondly, the courts have examined the potential and future behavior of the accused. Again, these hearings are very fact-specific. The judicial standards indicate that protection is in order only when the accused is expected to actually threaten the witness or victims. Chambers have taken into account the violent history of the accused for example. In this situation, the courts seem to lower the likelihood of a threat. Even though there is no specific proof adduced of a pending violent act, a likelihood of risk can be enough to prevent provisional release.<sup>247</sup> The simple existence of influence over the relevant personnel will be enough, even though said influence would not have been used illegally.<sup>248</sup>

Analysis of the available case law indicates that this species of motion is rarely successful. Of the most relevant motions, only three were wholly successful while one was partially granted. Roughly half of the cases do not result in contempt findings based on the failure to meet the cascading requirements laid out in the jurisprudence, while others are simply unsubstantiated. Though the evidentiary standards are high, some motions were simply discounted as being fanciful or speculative. Furthermore, it appears that a few specific groups of defense counsel—representing groups of defendants that were tried together, at least for a time, between 1996 and 2000—account for an inordinate number of motions.

In any event, the data in no way supports a stereotypical assumption that defense counsel intimidate witnesses during international criminal proceedings. In some instances, surrounding circumstances may be the definitive factor as judges refuse requests in which the defense team made no further effort to contact the witness in order to develop the facts surrounding the alleged intimidation.<sup>249</sup> Similarly, some Chambers have dismissed vague allegations raised by counsel that have previously made frivolous motions.<sup>250</sup> Thus, despite the frequency with which these allegations arise, and the sensitivity that they require, the empirical evidence does not support the conclusion that the international defense bar acts unprofessionally or unethically vis-à-vis witnesses or victims. As in other areas examined, the window from 2001-2003 appears to be the watershed that witnessed

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<sup>246</sup> Prosecutor v. Bošcoski & Tarčulovski, Case No. IT-04-82-PT, Decision on Defence Motion of Ljube Bošcoski for Provisional Release, ¶¶ 42–43 (July 18, 2005); see also Prosecutor v. Bošcoski & Tarčulovski, Case No. IT-04-82-PT, Decision Concerning Renewed Motion on Provisional Release of Johan Tarčulovski, ¶¶ 16–22 (Jan. 17, 2007).

<sup>247</sup> Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-PT, Decision on Provisional Release, ¶¶ 52–56 (May 26, 2008).

<sup>248</sup> *Id.*

<sup>249</sup> Prosecutor v. Bagosora, Case No. ICTR 98-41-T, Decision on Motion Concerning Alleged Witness Intimidation, ¶ 9 (Dec. 28, 2004).

<sup>250</sup> Prosecutor v. Ieng Sary, Case No. A363, Request for Information Concerning Complaints Made by Potential Witnesses (ECCC, Mar. 1, 2010).

the maturation of an organized and capable defense bar.

## VI. CONCLUSION

Franklin Delano Roosevelt told the American people and the assembled Congress at the beginning of World War II that “[t]he mighty action we are calling for cannot be based on a disregard of all things worth fighting for.”<sup>251</sup> In the context of international justice, that truism indicates that a system of “justice” that does not incorporate a full and vigorous defense represents only a façade of justice. The *Milošević* Trial Chamber made a similar point in recognizing that “fairness is thus the overarching requirement of criminal proceedings.”<sup>252</sup> Justice Jackson’s enduring observation that crimes are committed by men rather than abstract entities served as the precursor for the conception of individual criminal responsibility that has been embedded in every recent Tribunal statute. With the establishment of the ICC, the world has now witnessed a full institutionalization of the esoteric aspiration that Jackson voiced so eloquently during his months at Nuremberg. The legal precepts that were so novel at the end of World War II in Nuremberg and Tokyo are now enmeshed into an integrated and holistic legal system.

Similarly, the developmental arc of a seasoned and professionalized international defense bar today makes it an indispensable element of the search for international justice. Unlike the IMT era, the modern defense bar can never be accurately portrayed as an ignoble and inconvenient afterthought. The defense and prosecution teams continue to labor under an enduring and perhaps inevitable imbalance both in reputation and in resources. However, the defense bar today enjoys a reframed and enhanced status at the very center of the organizational structures of the emerging international accountability system. Indeed, there can be no doubt about the commitment of many defense counsel to their work; at the time of this writing, at least two ICTR defense attorneys have been killed, in part because of their advocacy on behalf of accused.<sup>253</sup> As the ICTY Appeals Chamber wrote in *Tadić*, while equality of arms requires both parties to have the “same access to the powers of the court and the same right to present their cases . . . the principle does not call for equalizing the material and practical circumstances of the two parties.”<sup>254</sup> While an absolute and objective equality of arms is perhaps a structural impossibility given the political and economic realities of our world, a mature and engaged international criminal defense bar has achieved its functional equivalent.

The growth of a systematic international justice system is necessarily paralleled by the development of a defense bar that serves to ensure that every judgment of a defendant’s culpability or innocence is grounded in the soil of

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<sup>251</sup> Franklin Delano Roosevelt, The Four Freedoms, Address Before the U.S. House of Representatives (Jan. 6, 1941), in GREAT AMERICAN SPEECHES 161, 164 (Gregory R. Shapiro ed., 1993).

<sup>252</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 29 (Sept. 22, 2004).

<sup>253</sup> Josh Kron, *Tanzania: Tribunal Lawyer Killed*, N.Y. TIMES, Jul. 15, 2010, at A6 (reporting that defense attorney Jwani Mwaikusa was shot in front of his Dar es Salaam home along with his nephew and neighbor and that documents were stolen from his car).

<sup>254</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 37 (15 Jul. 1999).

*individual* responsibility rather than irrational prejudice or irresponsible collective guilt. By extension, the micro efforts of the defense bar to challenge the minutiae of evidence and *vive voce* testimony during the often tedious and lengthy days of trial provide the necessary counterbalance to the relentless press of the media and the press to forget the past and move toward an unknown future. A mature and professionalized defense bar allows the world to know the individualized history of every defendant. The constellation of cases that fills the jurisprudential firmament would not exist without the dedication and diligence of the modern defense bar. Just as the individual cases only take on their full significance in relation to each other, so too does the work of the defense bar form and shape that of the Chambers and the prosecution.

