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Legal aid and defence support at the ICTY

I. Introduction

In 1993, the United Nations Security Council, in response to the atrocities that engulfed the former Yugoslavia, decided to create the world's first truly international criminal court. Unlike the Post-World War II tribunals, this court would be open to membership from all over the globe and would draw on experiences from the different legal systems of the world.

This was a great experiment in accountability and a truly visionary step by the Security Council. For the first time, those most responsible for violations of the most heinous crimes known to the international community – war crimes, crimes against humanity and genocide - would be subject to the jurisdiction of an international criminal tribunal. The Security Council also mandated, through Articles 20 and 21 of the ICTY's Statute, that the accused shall be entitled to the highest standards of fair trial. Article 21(4)(d) entitles an accused to defend himself in person or through legal assistance of his own choosing and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it.

The same institution that was created to prosecute alleged perpetrators and hold them accountable for their misdeeds, was also tasked to ensure that the right to fair trial was fully respected and that indigent defendants had the means by which to defend themselves before the Tribunal.

Although the ICTY Statute affords an accused these basic rights, it neither listed the Defence as one of the organs of the Tribunal¹ nor provided any guidance on the organisation of Defence Counsel practicing before the Tribunal. It was left for the Tribunal to sort out these details.

Attending a court hearing at the ICTY leaves many visitors amazed at the diversity reflected in the courtroom. The accused are nationals of the States of the former Yugoslavia, the Judges and staff of the ICTY represent over 80 countries, and Prosecution and Defence lawyers come from various different legal systems. The proceedings are interpreted simultaneously into English, French, Bosnian/Croatian/Serbian, and in some cases Albanian or Macedonian. The rules of procedure and evidence represent an amalgam of the common and civil law legal systems, and are often very dissimilar to the rules applicable in national legal systems. This unique mix of legal cultures has been a source of both consternation and discovery at the Tribunal.

Amidst this multiplicity of legal systems and in order to give life to the right to a fair trial, it

¹ See Article 11 ICTY Statute: "The International Tribunal shall consist of the following organs: (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber; (b) the Prosecutor; and (c) a Registry, servicing both the Chambers and the Prosecutor."

was necessary for the ICTY to develop internal policies regulating the appearance of counsel before the Tribunal and the disbursement of legal aid. In particular, it was necessary to provide for a uniform set of rules regarding qualifications and professional conduct.

There was no precedent to seek guidance from, no international defence association to consult, no legal aid system to copy. It was a unique endeavour and one of the great achievements of the ICTY that it has created, for the first time in history, qualification standards for defence counsel practicing before an international court as well as an entire legal aid system to support this work. Whereas in some States, such as the United States of America, attorneys are limited to practicing law in the State in which they are admitted to the bar, the ICTY has not only eliminated boundaries within, but also between States.

This paper will discuss some of the rules and policies applicable to legal aid and defence support at the ICTY as well as their evolution and the challenges encountered along the way.

II. The institutional framework

1. Statute

Although the ICTY Statute refers to defence counsel,² it does not give guidance on the organisational framework within which such counsel shall operate. The responsibility for Defence Counsel was placed upon the Registry of the Tribunal, which formed within it a specific office to deal with these matters - the Office for Legal Aid and Detention Matters or “OLAD”. Over the past 15 years, the Registry has developed several directives and policies regulating defence counsel before the ICTY and the disbursement of legal aid.

2. Rules of Procedure and Evidence and Directive on the Assignment of Defence Counsel

a) Qualifications and other requirements

Rules 44 and 45 of the ICTY Rules of Procedure and Evidence provide the qualification requirements for counsel appearing before the Tribunal. Rule 44 sets out the basic requirements applicable to all counsel appearing before the Tribunal,³ whereas Rule 45 contains stricter

² Articles 18, 3 and 21, 4(d) ICTY Statute.

³ Rule 44 (A) ICTY Rules of Procedure and Evidence provides:

“Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:

(i) is admitted to the practice of law in a State, or is a university professor of law;

(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);

(iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar;

(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;

(v) has not been found guilty in relevant criminal proceedings;

(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and

(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.”

requirements for those counsel who wish to be assigned to an accused financed by the legal aid system. Although an accused has the right to counsel of his own choosing, this choice is not unlimited.⁴ It is restricted to those lawyers who fulfil the Rule 45 requirements.

Rule 45 provides that counsel must fulfil all requirements of Rule 44, and additionally possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law and possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings.

The Registrar maintains a “Rule 45 list” of lawyers satisfying these requirements. In order to be admitted to this list, counsel must undergo a thorough vetting process. Originals of documents, such as diplomas, are requested, as well as the names of two referees. A candidate may be required to take a language test and be interviewed by a panel to evaluate his or her competence.⁵

Often, the assignment of counsel of an accused’s own choosing presents significant challenges in balancing an accused’s preference with the Registrar’s responsibility to protect the accused’s interests and the interests of justice, and to ensure that the Tribunal’s rules and regulations are respected. For example, an accused may select counsel on the basis of personal considerations rather than on the basis of their formal qualifications. When making his choice, an accused may also not be aware of a possible conflict of interest and the impact such conflict could have on the quality of representation. Sometimes, therefore, the Registrar is placed in the difficult and unenviable position of denying an accused representation by a particular counsel. This is but an example of the many challenges faced in the assignment of counsel.

b) Indigency determination and Decision of the Registrar

When applying for legal aid, the accused has the burden of proving that he lacks the means to remunerate counsel and must cooperate with the Registry’s inquiries into his financial means.⁶ When deciding upon the assignment of a specific counsel to an indigent accused, the Registrar must exercise his discretion in assessing whether that counsel has a conflict of interest by virtue of his representation of another accused or by virtue of the crimes alleged in the indictment, or whether there is any other impediment to the assignment of that counsel.⁷

3. Payment policies

The Registry, in consultation with the Association of Defence Counsel, has adopted payment policies for the pre-trial, trial and appeals stages of proceedings.⁸ One of the major achievements of the last several years has been the replacement of the hourly payment scheme with a lump-sum payment scheme. Under this system, defence counsel are paid a specified sum for

⁴ The Prosecutor v. Radovan Karadžić, case number IT-95-5/18-T, Decision on the Accused’s motion to vacate appointment of Richard Harvey, 23 December 2009, para. 27; *Prosecutor v. Nahimana et al.*, case no. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s motion contesting the decision of the President refusing to review and reverse the decision of the Registrar relating to the withdrawal of counsel, 23 November 2006, para. 10; *Prosecutor v. Vidoje Blagojević*, case no. IT-02-60-AR.73.4, Public and redacted reason for decision on appeal by Vidoje Blagojević to replace his Defence team, 7 November 2004, para. 22.

⁵ Article 15 of the Directive on the assignment of defence counsel, as amended on 29 June 2006 (“Directive”).

⁶ Articles 7 to 10 of the Directive.

⁷ Article 11 (D) of the Directive, Article 14 of the Code of professional conduct for counsel appearing before the International Tribunal (“Code of Conduct”).

⁸ Defence counsel - Pre-trial legal aid policy, as amended on 1 May 2006, Defence counsel - Trial legal aid policy, as amended on 1 November 2009 and Legal aid payment practice of 1 January 2001.

each phase of the case, depending upon the complexity of the case, as well as certain expenses, such as those for travel. The lump-sum scheme has proven to be less bureaucratic and burdensome both on defence counsel and the Registry than the previous hourly payment scheme, whilst maintaining the necessary checks and balances. Moreover, it requires defence counsel to efficiently plan their work well in advance and has increased transparency by requiring counsel to submit detailed work plans and end-of-stage reports.

4. Code of Conduct

It is axiomatic that a good defence is a zealous defence. However, over zealousness without professionalism can be the downfall of a defence strategy. It is these principles that the Code of Conduct, first adopted in 1997, strives to balance.

As mentioned above, lawyers practicing before ICTY originate from all parts of the world. It was therefore necessary to implement a uniform Code of Conduct for all counsel, so that the same standards and disciplinary regime would apply to all.

Various national Codes of Conduct and the standards provided by the International Bar Association were used as reference points. The Tribunal developed a number of proposals that were then reviewed by, amongst others, the International Bar Association and the Union Européenne d'Avocats.

The ICTY has adapted the Code of Conduct over the years to meet the practical challenges of litigation before the Tribunal. The Code of Conduct was for example amended in 2002 to introduce a disciplinary regime, which includes a Disciplinary Panel and Disciplinary Board to investigate complaints against counsel and has the power to take remedial measures against counsel in appropriate circumstances.

III. Past challenges

1. Qualification requirements

The ICTY has had to overcome major obstacles in its endeavour to provide accused persons with effective assistance. In its formative years, it became apparent that the complexity of the cases and the law being applied at the Tribunal demanded that defence counsel appearing before the ICTY have specific qualifications and specialised experience. Understandably, some accused would choose their counsel on the basis of a pre-existing relationship. Although competent to practice law in a national setting, the chosen counsel may not necessarily be trained in the ways of the more adversarial procedure that drives the proceedings at the ICTY or experienced in its specialised case-law. Some counsel were not familiar with the art of cross-examination, others faced language barriers by not being proficient in one of the two working languages of the Tribunal – English and French.

With increasing complexity and maturity in the caseload of the Tribunal, its Judges recognised the need for stringent qualification criteria to prevent counsel being assigned that lacked sufficient expertise and experience, or in some rare cases ethics that could lead to an abuse of the legal aid system itself. Therefore in 2003, a working group of ICTY Judges was established and tasked with amending the qualification requirements for counsel. This working group was particularly concerned with developing stricter criteria for admission to the Rule 45 list, as well as ensuring a vigorous vetting procedure. On 28 July 2004, Rules 44 and 45 of ICTY Rules of Procedure and Evidence were amended as described above to ensure a higher minimum qualification level for counsel – always with the ultimate aim of ensuring that the interests of the accused and the interests of justice were best served.

In addition, regular mandatory training sessions for defence counsel have been implemented in cooperation with the Association of Defence Counsel Practicing before the ICTY (ADC). The topics covered include the latest Tribunal jurisprudence, advocacy skills, professional conduct and ethics, and conflicts of interest.

2. Fee-splitting

Another challenge during the ICTY's initial years was a concern of "fee-splitting". That is, that an accused person should not be able to choose counsel on the condition, unbeknownst to the Tribunal, that the counsel share the fees received from the Tribunal with the accused person or that the counsel would employ one of the accused's family members as part of the defence team and pay them part of the fees. The Tribunal responded to this by amending the Directive and Code of Conduct to specifically prohibit this practice⁹ and by hiring an experienced investigator in order to look into the disbursement of public funds. These solutions have proven to be effective.

IV. Current challenges

One of the major, current challenges faced by the Tribunal in recent years has been to reconcile the right to represent oneself with the need to ensure fair and expeditious trials. Although only three accused have so far chosen to represent themselves during the trial phase, their choices have presented significant challenges.

Among a host of issues related to self-representation, only the ones pertaining to legal aid will be touched upon.

The Tribunal's experience of self-represented accused first began with the Milošević trial. However, it is interesting to see that, although Milošević insisted on representing himself and the Trial Chamber recognised his right to do so, Milošević never requested any remuneration either for himself or for any of the many legal representatives who assisted him in his defence.

The issue of whether a "self-represented" accused may receive funds from the Tribunal first arose in the Krajišnik appeal. In that case, the Appeals Chamber of the ICTY held that an accused who chooses to self-represent is not entitled to legal assistance and therefore is not entitled to the subsidiary right mentioned in Article 21(4)(d) of the ICTY Statute, that is, to have legal assistance paid for by the Tribunal if he is indigent.¹⁰ Having said this, however, the Appeals Chamber recognised that under Article 21(4)(b) of the ICTY Statute¹¹ an indigent self-represented accused has the right to receive some funding for legal associates to assist him in the preparation of his defence.¹² This funding does not however equal legal aid. Therefore, the Registry in 2007 adopted the Remuneration Scheme for self-represented accused in order to reflect the jurisprudence of the Appeals Chamber in the Krajišnik Decision.¹³

It is interesting to note a related decision which was recently issued by the Appeals Chamber when deciding on Karadžić's appeal of a decision appointing stand-by counsel without his

⁹ Articles 18 of the Code of Conduct and 16 (F) of the Directive.

¹⁰ *The Prosecutor v. Momčilo Krajišnik*, case number IT-00-39-A, Decision on Krajišnik request and on Prosecution motion, 11 September 2007 ("Krajišnik Decision"), para. 40.

¹¹ Article 21(4)(b) ICTY Statute: In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

¹² Krajišnik Decision, para. 42.

¹³ Remuneration Scheme for persons assisting indigent self-represented accused, amended on 24 July 2009.

approval. The Appeals Chamber reiterated that Article 21(4)(d) of the ICTY Statute does not provide an accused with the minimum guarantee of both the right to self-represent and the right to counsel of his own choosing. It only provides the right to one or the other. It found that Karadžić had elected to remain self-represented and thus did not enjoy any rights that are derived from choosing to be represented by legal counsel.¹⁴

Arising in part from the challenges created by self-represented accused are the funding challenges faced by the legal aid system of the Tribunal. As an institution which is currently in its winding down phase, it has endeavoured to reduce budgetary expenditures in line with the trial schedule workload wherever possible. This of course is done in advance based on projections. The budget for legal aid at the Tribunal has reduced by nearly half since the 2008/2009 biennium based on these projections. Yet many unique and unforeseen issues that are arising with respect to self-represented accused increase the workload in addition to the sheer number of accused. This is true across all areas of the Tribunal, not just in relation to the legal aid system. Each of the unique set of circumstances brings with it what is rapidly becoming an exponential increase in time and effort, not only in addressing and responding to the issues, but in developing unique solutions in line with the demands of a vigorous defence, and in light of the fiduciary obligations and budgetary limitations. Simply put – the Tribunal must meet the challenges that self-represented accused create, notwithstanding its financial limitations, if justice is to be served.

V. Support to defence counsel

In addition to legal aid, ICTY has come to provide defence counsel with a range of facilities and services.

In the early days of ICTY, support for defence counsel was rudimentary. The Statute did not foresee defence counsel as institutionally part of the Tribunal, and defence counsel were at times treated with mistrust. They were not allowed to freely access the ICTY building and had to be escorted to and from the courtrooms by security. Fortunately, these early misconceptions about the role and status of the Defence have been remedied, and the position of defence counsel has improved significantly over the past years.

1. Defence facilities at ICTY

The Registry has designated several offices on the Tribunal's premises for the exclusive use of Defence Counsel. Defence Counsel have access to all areas of the Tribunal apart from the Office of the Prosecutor, Chambers, and some sections of the Registry, such as the Victims and Witnesses Section.

The offices have all the necessary office equipment, including computers with internet connection and access to the Defence network and the Judicial Database.¹⁵ There are also printers, telephone, fax, and a TV set to view ongoing proceedings.

2. Logistical assistance to the defence teams

¹⁴ *The Prosecutor v. Radovan Karadžić*, case number IT-95-05/18-AR73.6, Decision on Radovan Karadžić's appeal from decision on motion to vacate appointment of Richard Harvey, 12 January 2010, para. 26.

¹⁵ The Judicial Database (JDB) is an electronic database containing the entire jurisprudence of the Tribunal, including judgements, judicial orders and decisions, as well as motions and replies submitted by the parties and transcripts of hearings. It has a sophisticated search tool which allows the Defence easy access to the entire collection of Tribunal documents relevant to their cases. The JDB is now accessible remotely from anywhere in the world.

OLAD handles all defence counsel-related matters. In addition to dealing with the assignment and the payment of counsel, OLAD provides assistance and information to defence counsel and their teams, which currently number over 500. Other assistance includes the facilitation of travel to and from the seat of the court, mission trips to interview potential witnesses and to inspect crime sites, privileged meetings with the accused at the United Nations Detention Unit (UNDU), and liaising with other sections of the Tribunal.

3. Information technology support

A Defence IT network provides defence teams with access to a safe IT environment where they can store and exchange information, which is only accessible to members of their team. The defence now possess the same IT resources as ICTY staff members. The defence counsel are able to access the Tribunal's intranet, the Judicial Database, the Electronic Disclosure System, and E-Court. The Defence have remote access to their network, so that these services can be used from anywhere in the world. The access to E-Court is of particular important in that the transcripts and exhibits from the proceedings are instantly available to defence counsel in a searchable format.

Other IT tools include the Translation Tracking System, which enables the Defence to submit their translation requests electronically (and remotely). It also provides defence teams with an automated log of requests, information on their status, and completed translations in electronic form.

4. Library

The Tribunal has a specialised library containing books, law journals, and other relevant literature on international humanitarian, criminal, and human rights law, as well as materials pertaining to the conflict in the former Yugoslavia. It is a modern reference and loan library, with a substantial number of internet and legal research services available to defence counsel.

5. Outreach

The Tribunal involves defence counsel in Tribunal outreach events in order to promote the role of the Defence in the Tribunal and to allow them to speak about the challenges they face. The Registry has also supported fundraising activities of the ADC.

6. ADC

In 2002, the Registrar supported the creation of and officially recognised the Association of Defence Counsel practicing before the ICTY as the official organisation representative of all counsel practicing before the Tribunal. The creation of the ADC was an effort to offset some of the disadvantages of the Defence not being institutionally represented. It was also intended to compensate for the absence of a bar association at the international level. The driving theme of the ADC was – and is – to create an organisation of legal professionals and peers to promote the highest standards of legal professionalism and ethics, whilst at the same time ensuring that the interests of all defence counsel were collectively represented by one body.¹⁶

Accordingly, the Rules of Procedure and Evidence were amended to require that all counsel be members in good standing of the ADC in order to be admitted to practice before the Tribu-

¹⁶ Constitution of the ADC, modified on 23 October 2004.

nal.¹⁷ The ADC vets a counsel's qualifications before admitting him or her as a member, in addition to the Tribunal's own screening process. Importantly, and in accordance with its Constitution, the ADC has the power to take disciplinary measures against its own members.

In recent years, the Registry has made a real effort to include the ADC in various aspects of the life of the Tribunal. It is very fair to say that the ADC is now the *de facto* fourth organ of the Tribunal. In particular, all major policies that affect the work of defence counsel or the rights of the accused are adopted in consultation with the ADC. For example, the ADC is a member of the Rules Committee, which is tasked with considering proposals for amendment of the ICTY's Rules of Procedure and Evidence, and representatives of the ADC are members of the Tribunal's disciplinary panel.¹⁸

VI. Conclusion

As can be seen, the legal aid policies and procedures of the ICTY have been a continuing effort to wed principles to practice – all with the overriding goal of giving life to the Statute's prescription that each accused person hailed before the Tribunal to answer for alleged violations of international humanitarian law be afforded the means to defend himself against those charges. These are not merely empty words. The Tribunal has put forward the resources to ensure that the right to a fair trial is viable in practice.¹⁹

Far from weakening the integrity of the proceedings before the ICTY, a zealous and professional defence only augments the Tribunal's credibility as an independent and impartial judicial organ. This is all the more important at a time when international criminal courts are attacked as political and biased constructs of political organs. The Tribunal is therefore at the forefront of providing fair and effective legal aid in an international criminal setting.

¹⁷ Rule 44(A)(iii) of the ICTY Rules of Procedure and Evidence.

¹⁸ Article 40 of the Code of Conduct.

¹⁹ For example, the Defence team assigned to a level 3 case at trial receives 733,284 Euro for a period of 18 months.