Assistance and Oversight Without Interference: An Analysis and Critique of Defence Systems before the International and Hybrid Criminal Courts and Tribunals

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1. Introduction

This paper arises from a panel discussion entitled 'Evolution of Defence Systems in International Tribunals' organised as part of a legacy symposium on the work and impact of the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania on 7 November 2014.[2] In addition to the 'defence system' operating before the ICTR, this paper considers the experience of the defence before the ICTY, MICT,[3] SPSC,[4] SCSL, ECCC, STL and ICC, including the author's own experiences as a practitioner before these entities.

'Defence systems' as defined for the panel discussion refer to the organizational structures, and policies that have evolved – both inside and outside of these international and hybrid judicial institutions – for purposes of incorporating defence counsel and the members of their

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[2] The panel discussion was ably moderated by H.E. Ambassador Stephen Rapp, United States Ambassador at large for War crimes and former Prosecutor of the SCSL. The author expresses his thanks to Ambassador Rapp and is additionally grateful to the ICTR Legacy Committee for the gracious invitation to participate in the anniversary symposium.

[3] United Nations Mechanism for International Criminal Tribunals. The MICT 'was established by the United Nations Security Council on 22 December 2010 to carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the completion of their respective mandates', including "continuing the 'jurisdiction, rights and obligations and essential functions' (UNSC Resolution 1966) of the ICTR and the ICTY; and maintaining the legacy of both institutions". (see: http://unmict.org/en/about).

[4] Special Panel for Serious Crimes. See S.C. Res. 1272, U.N. Doc. S/Res/1272 (Oct. 25, 1999) (establishing the United Nations Transitional Administration in East Timor (UNTAET), which in turn established the SPSC).

teams into the system of international justice with the objective of ensuring a suspect or accused person's right to fair criminal proceedings. As noted by Robert H. Jackson, Associate Justice of the U.S. Supreme Court (prior to his appointment as Chief U.S. prosecutor of the International Military Tribunal (IMT) at Nuremburg):

> [T]he world yields no respect to courts that are merely organized to convict … [O]ur profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.[5]

In order for a criminal trial to be real and meaningful, it is essential that the fundamental rights of an accused are respected and upheld. The right to counsel of one's choice and the provision of adequate time and facilities to prepare a defence are key components to a fair trial. Given the serious nature of the crimes over which these institutions have jurisdiction, the geopolitical context in which these entities have been created and operate, and the accusations that unendingly seem to be levelled against these institutions, that they pursue selective prosecutions or victors' justice,[6] ensuring respect for the fundamental rights of an accused is especially critical. This is because, even apart from the intrinsic value of a fair trial, it is essential that "justice should not only be done, but manifestly and undoubtedly be seen to be done"[7] in order to establish, entrench, or reaffirm (as the case may be) the legitimacy of international criminal trials.

[5] Robert Jackson, 'The Rule of Law Among Nations', speech to the American Society of International Law, 13 April 1945, available at: www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-rule-of-law-among-nations/.

[6] Cecile Aptel, '*International and Hybrid Criminal Jurisdictions: Stigmatizing or Reconciling?*', (International Center for Transitional Justice) available at: www.ictj.org/publication/international-and-hybrid-criminal-jurisdictions-stigmatizing-or-reconciling (noting that the identity based crimes that international and hybrid tribunals primarily address require the tribunal, and the prosecutor in particular, to make choices that 'may be perceived publicly as politically motivated and biased' by particular groups).

[7] Lord Hewart, R v Sussex ex parte McCarthy [1924] 1 KB 256; [1923] All ER Rep 233

The defence systems of the international and hybrid criminal tribunals and court must accordingly permit and support counsels' ability to act with independence in robustly challenging the prosecution's case and putting forward a defence case. Such systems must also address the level and manner of oversight of counsel's conduct of a case when the defence is funded by legal aid., There is clearly an interest, and indeed need, that the funding institution ensure that its money is properly spent and accounted for. The process of engaging with and taking into account the views and experiences of counsel practicing or who wish to practice before these institutions is also important. As examined below, various different defence systems have evolved before the various international and hybrid criminal courts and tribunals, each drawing from the experiences of its sister institutions in attempting to establish and maintain a defence system that works.

2. Principles underlying the development of defence systems

A defence counsel's primary responsibility is to provide effective representation for his or her client in accordance with the client's instructions and the applicable standards of professional conduct. Whether the client is charged before a domestic or international tribunal, effective representation entails, at its core, a counsel's examination and analysis of the relevant law and facts in order to devise, craft and implement a defence strategy to test or challenge the prosecution's case and, if necessary, advance a defence case (or, perhaps, seek a plea agreement if that is in the client's best interests).

Accordingly, what any competent defence counsel really wants is to be able to focus on these core tasks without the burden of excessive bureaucracy or third-party intervention into the substance of the judicial proceedings. In this sense, there is likely little difference between

defence counsel, and counsel for the prosecution and legal representatives of victims – all of whom wish to dedicate the vast majority of their efforts to the law and facts of the case while professionally representing the respective interests of their client or office.

At the same time, it must be recognized that the vast majority of suspects and accused persons who have appeared before the international and hybrid criminal courts and tribunals benefit from defences funded by legal aid. As mentioned, this makes third party oversight absolutely necessary. International criminal cases are complex and often stretch for years, so the total funds expended on legal aid may not be insignificant – though the adequacy of legal aid is a wholly separate matter and legal aid itself constitutes but a small percentage of the overall budgets of these institutions.

Additionally, the *sui generis* nature of these institutions – in jurisdiction, substantive and procedural law, and the technical 'e-court' systems developed to process, manage and present / submit evidence and written submissions – may also require a certain level of institutional support for the defence. This is particularly so when one compares the average defence team (perhaps two senior counsel, a junior lawyer ('legal assistant'), case manager and an investigator) with the far greater resources, institutional knowledge and broad expertise of the offices of the prosecutor of the international and hybrid criminal courts and tribunals.

Finally, whatever the defence system, it must recognize and interact with defence counsel not simply as clients to be supported on an *ad hoc* basis. Rather, an effective defence system is one which approaches the defence as a body of stakeholders whose experiences and views should be taken into account in order to improve and render more credible the framework of international justice.

3. A critique of 'defence systems' before the international and hybrid criminal courts

The underlying dynamic governing the above-identified principles and issues as they pertain to defence systems within each of the international and hybrid criminal courts and tribunals can be reduced to: 1) a balancing of interests between legitimate and sometimes competing goals; and 2) the most efficient and effective manner of guaranteeing defendants a fair trial, including a holistic approach to, and longer time-horizon for, considering defence issues.

As the first of the modern international and hybrid criminal courts and tribunals, the ICTY and ICTR adopted a relatively 'hands-off' approach to the assistance and support extended to the defence. In particular, the legal aid system of the ICTY and ICTR provided lump sum disbursement of funds to lead defence counsel, which lead counsel then had significant discretion to utilize towards the remuneration of the legal team members, the renting of office space and provision of supplies, and the facilitation of investigations. While the Office for Legal Aid and Defence (OLAD) within the ICTY Registry and the ICTR Registry's Defence Counsel and Detention Management Section (DCDMS) reviewed the time sheets and general work plans of defence team members and the funds expended for material resources and activities, the ICTY and ICTR defence systems represent, in many ways, the high-water mark of independently acting defence counsel before the international criminal institutions.

Experienced counsel may well prefer the ICTY and ICTR models, which offer the most flexibility for counsel in managing legal aid resources and conducting a defence case. However, it is critical that the defence bar before the international and hybrid criminal courts and tribunals be kept open to all counsel who satisfy a minimum level of experience and competence. Indeed, as has often proven the case in trials before these institutions, defendants

frequently wish to retain at least one counsel from his or her domestic jurisdiction, some of whom may not have previously practiced before an international tribunal or court. An accused's right to counsel of his or her choice is a fundamental principle that must be respected and facilitated by the defence systems of the various international criminal institutions.

In this regard, the international and hybrid courts and tribunals established after the ICTY and ICTR have moved in the direction of providing formal institutional support and assistance to the defence while also increasing oversight of the activities of legal aid funded defence counsel and their teams. If properly functioning, such systems of support and assistance will provide a counsel inexperienced in practicing before a particular international or hybrid criminal tribunal or court some initial capacity and guidance on relevant legal and technical matters while the counsel becomes acquainted with the workings of the court as well as the precise content of the institution's jurisprudence.

At the SCSL, the Office of the Public Defender (OPD) was established within the Registry which, '[i]n addition to administrative functions, such as payment of counsel fees, … [had] the authority to advocate on behalf of the interests of the accused vis-à-vis other courts actors … [and] also … to provide legal support to the Accused'.[8] The OPD was, in principle, empowered to act autonomously from the Registrar.[9]

In practice, however, the OPD model has been subject to significant criticism. With regard to the engagement and remuneration of defence counsel, the OPD established such modalities through "individual contracts ('Legal Services Contract') negotiated between counsel and the

[8] A. Gell, 'Lessons from the Trial of Charles Taylor at the Special Court for Sierra Leone', in C. Jalloh, ed., *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (2013) at 656.
[9] SCSL Rules of Procedure and Evidence, Rule 45.

[OPD], … [which were] not necessarily referenced to their prosecution counterparts".[10] This 'absence of an objective reference point for the calculation of payments … renders it difficult to assess whether there is parity between defence resources and those of the prosecution, but also introduces the potential for discrimination between individual defence teams'.[11] Further, several defense counsel … have stated that the legal assistance provided by the OPD to defense teams was weak. OPD staff also expressed the view that the OPD model is not suitable for the provision of legal support to semi-autonomous defense teams, in part due to confidentiality issues.[12]

Perhaps of most importance to the functioning and independence of the defence, "there were several reported instances where the OPD was directed by the Registry to either desist from making certain submissions, contrary to the Registrar's stated position, or 'encouraged' to modify submissions that were to be made".[13] Indeed, Justice Robertson, in a separate and concurring opinion to a SCSL Appeals Chamber decision, noted that:[14]

> The staff of the Defence Office and its head the Principal Defender, are all 'support staff', and have no independent authority to disobey or ignore a direction from the Registrar … [I]n future courts, the office should be an independent 'fourth pillar', alongside the judiciary, the Registry and the Prosecutor.

[10] T. Gut et al, 'Defence Issues', in G. Sluiter et al, ed., *International Criminal Procedure: Principles and Rules* (2013) at 1228 (internal citation omitted).
[11] *Ibid*.
[12] A. Gell, supra note 6 at 656 (internal citations omitted). That said, the present author must note, from personal experience, the excellent assistance by some members of the Defence Office. Notable amongst these is (now Professor) Charles C. Jallow who worked as Legal Adviser, Office of the Principal Defender in the Office of the SCSL. In addition, Professor Vincent Nmehielle, Principal Defender SCSL, Ms, Simone Monasaebian, and Mr. John Jones (now QC), all acted, over the years, as Head of the SCSL Defence Office with dedication and distinction.
[13] K. Khan QC, 'Article 34: Organs of the Court', in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008) at 935.
[14] *Prosecutor v Brima et al*., Separate and concurring opinion of Justice Robertson on the decision on Brima-Kamara Defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara, 14 December 2005, paras. 83, 87.

Whatever the criticisms of the OPD, it was nonetheless an important experiment in providing, for the first time, an institutional voice and presence for the defence within an international criminal court or tribunal, which undoubtedly influenced the approaches of the ECCC, STL and ICC with regard to the development and refinement of their respective defence systems.

The legal aid systems of the ECCC and STL, for example, do not allow counsel discretion with respect to their own remuneration or those of the members of their defence teams, which are instead set by the institutions themselves. Indeed, at both the ECCC and the STL, apart from counsel, members of defence teams in legal aid cases are contracted by (in the case of the ECCC) or are staff members (at the STL) of the institution. In this manner, both the ECCC and STL have standardized and made more transparent the payment of fees to counsel and supporting defence team members.

However, in completely removing lead counsel's discretion to flexibly utilize the legal aid budget for fees, the argument may be made that counsel is unduly restricted in structuring his or her team in a manner to best facilitate and conduct the defence of the suspect or accused person. Under the ICC's legal aid policy, a transparent maximum monthly fee is set by the ICC Registry for each category of defence team member. However, within this maximum ceiling, lead counsel may reach agreements with the Counsel Support Section (CSS) to modify the fees of team members and utilize any resulting surplus to engage additional team members in a manner that best supports the interests of the client. That flexibility has certainly been appreciated by some ICC defence teams.

The STL Defence Office, as an organ of the Tribunal, represents for the first time in the history of international and hybrid criminal courts and tribunals full structural parity for the defence with the Office of the Prosecutor. For example, pursuant to Rule 15 of the STL Rules of Procedure and Evidence, the Head of Defence Office may, just as the Prosecutor, 'seek cooperation … from any State, entity or person to assist with the defence of suspects and accused before the Tribunal'. The Head of Defence Office also sits on the Senior Management Board of the Tribunal, and he or she, pursuant to Rule 5(A), may submit proposals for amendment of the Rules of Procedure and Evidence of the STL.

In order to address the tension between a singular entity that provides both substantive legal assistance and administrative support to defence counsel, as well as managing and implementing the legal aid system, the author understands that the Head of Defence Office has established a strict division between the functioning of the Legal Advisory Section of the Defence Office and the Legal Aid Unit. This is not to say, of course, that tensions and suspicions may not arise between appointed defence counsel and the Defence Office with respect to legal aid-related decisions, which may then also impact on a counsel's willingness and trust to accept substantive legal assistance from the Defence Office. However, at the very least, there can be no doubt as to the STL defence organ's clear and unequivocal structural mandate and ability to support and represent the interests of the defence – and the defence alone – in a fully independent manner.

From the perspective of defence counsel, the structural parity of the STL Defence Office with the Office of the Prosecutor is a significant boon in terms of the availability of substantive and administrative resources to the defence. It is important that, for the first time, the Defence have an equal voice at the decision-making table of an international or hybrid criminal

institution. That said, counsel who have become accustomed to largely unimpeded independence and discretion in terms of the conduct of the defence of their clients and the management of their team members may have cause for concern with respect to the authority of the Head of Defence Office to review counsels' activities and intervene in Tribunal proceedings. For example, Rule 57(F) of the STL Rules of Procedure and Evidence provides that:

> At the request of a Judge or Chamber, the Registrar, the Defence or where the interests of justice so require, proprio motu, the Head of Defence Office or a person designated by him shall have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.[15]

While, the current Head of Defence Office, Mr. François Roux, is a hugely experienced and highly competent international criminal law practitioner who respects the principle of independently acting defence counsel, a new Head of Defence Office may not take such an enlightened view and embark instead on paternalistic intervention into the conduct of a defence counsel's case before the STL. We simply do not know. Be that as it may, at least two broader, and important points may be taken from the possibility of the Defence Office's propio motu intervention in the conduct of defence cases.

First, it is critical that the defence systems of the various international and hybrid criminal courts and tribunals properly appreciate the role and challenges facing the defence and that core principles concerning the rights of the defence are entrenched within these systems. Second, it is not enough to simply discuss in sanitised fashion the organisational structures and policies of the defence systems before these institutions. It is additionally important to

[15] See further Practice Direction on the Role of the Head of Deffence Office in Proceedings before the Tribunal, STL/PD/2011/04, 30 March 2011.

recognize that the appropriate functioning of these structures and policies are dependent upon the people who inhabit and implement them. They must be knowledgeable, competent and able to exercise good sense to apply their mandates, discretion and available resources in a manner that is harmonious with and supportive of the strategy of counsel actually engaged to conduct the defence of an accused.

The ICTY and ICTR (with the residual MICT), SPSC, SCSL, ECCC and STL are all (or were) institutions of limited geographic and temporal jurisdiction. The ICTR is expected to close its doors in September 2015, and transfer all remaining responsibilities to the MICT, with the ICTY expected to follow suit in the next two to three years. The SPSC and SCSL have both concluded their operations with the Residual SCSL now fully operational. While the closure of the ECCC and STL are likely several years down the road, as noted, their work and mandates will eventually come to an end.

The ICC, however, was established as a permanent international criminal institution with regularly increasing geographic jurisdiction (there are presently 123 States Parties to the Rome Statute) mandated to exercise complementary jurisdiction over 'the most serious crimes of concern to the international community as a whole'.[16] The experience of and lessons from the defence systems of other international and hybrid criminal courts and tribunals is therefore of great import to the success, functioning and reputation of the global international criminal justice framework, of which the ICC is an important pillar and model.

Unlike the SCSL, ECCC and STL, the ICC has adopted a bifurcated approach to its defence system. The independently operating Office of Public Counsel for the Defence (OPCD)

[16] Rome Statute, Preamble.

provides substantive legal assistance and support to defence teams, is authorized to act akin to a public defender office when so appointed by the Court, and has additionally developed into an institutional and external representative and voice for the defence before the ICC, where no association of counsel has yet been established. The Counsel Support Section (CSS), which is within the normal organizational and reporting structure of the Registry, is responsible for administering the Court's legal aid system as well as providing administrative assistance to the defence, and liaising between the defence and other sections of the Regsitry – such as the Field Operations Section and Interpretation and Translation Section.

The OPCD's genesis is unique in comparison to its counterparts in the defence systems before the ad hoc and hybrid international courts and tribunals. The first judges of the ICC, led by now Lord Justice of the Court of Appeals of England and Wales, Sir Adrian Fulford, sought to institutionalize and develop the principal of equality of arms between the prosecution and defence by requiring via Regulation 77 of the judge-adopted Regulations of the Court that the Registrar establish an OPCD that, while administratively located within the Registry, would function 'wholly independent[ly]'.

However, the future of the OPCD, as well as the ICC's defence system as a whole, is uncertain. The current ICC Registrar, H.E. Herman von Hebel, appointed by the ICC Judges in 2013, has embarked on a thorough and far-reaching review of the Registry – entitled the *ReVision* project – with the much-needed and laudable goal of improving the efficiency and functioning of all aspects of the Registry. Change and reform of the Registry is undoubtedly needed and there is much to commend within the ReVision project. As far as the defence is concerned, the *ReVision* team has proposed abolishing the OPCD, and instead creating a singular Defence Office more akin to that of the SCSL and ECCC, which would be

responsible for provision of substantive and administrative assistance to defence teams, as well the management and implementation of the ICC legal aid policy.

Lord Justice Fulford recently provided his observations on the legacy and fate of the OPCD at the annual Sir Richard May Memorial Seminar.[17] They are insightful and far reaching and merit rehearsing at length:[18]

> "My original idea had been for representation for the defence … to be provided to a very real extent in house, in order to ensure that there is something of a mixed economy as regards how … defendants are represented: some by external counsel, some by internal counsel and possibly with some teams having a mixture of both. …
>
> The proposals [of the ReVision project] in [] regard [to the defence] are [] troubling. …
>
> The accused before the court are confronted by the undoubtedly powerful Office of the Prosecutor ('OTP') which has a substantial budget, a large number of permanent experienced counsel, along with other staff, and it has a high degree of institutional independence. It … has an incalculable permanent advantage over the accused …
>
> I had envisaged a body which had independence and experience equal to the OTP, even if it did not equal its funds and resources; a wing of the court that would always provide – at the very least – real support services for counsel appearing in cases … and in appropriate circumstances taking on the conduct of trials. …
>
> There have been problems. … But mistakes are sometimes made – the OTP has hardly been free of them – and to use a single error, at least in part, to justify disbanding the entire office is to forget the strong support that the OPCD has provided to many of the defence teams before the court and its potential for a far wider role if only the court would provide it with the resources and the impetus that it needs.

[17] Held in London on 29 October 2014.
[18] Text of Lord Justice Fulford's speech is available at: https://www.facebook.com/RozenbergJ/posts/1501437393441890.

> What is proposed? … That the OPCD and the CSS are to be abolished, and a new Defence Office will be set up within the Registry. …
>
> I have significant concerns about these developments. I accept that they may have some utility if all goes well, but I foresee that in an age of budgetary constraints, the new and reduced Defence Office with its somewhat imprecise role of solely providing generalised support for defence teams from within the Registry will become a prime candidate for a limitation on, or a reduction of, funds …
>
> The ASP has very considerable budgetary responsibilities, but the pursuit of financial discipline should not result in undermining [] [one] of the key participating bodies: the defendants accused of crimes … Their ability to engage with the court and with the Chambers during cases, to be represented to a high standard, and to be afforded a real measure of equal footing with the prosecution ensures the health and well being of the institution. I fear for the court if they are diminished."

Lord Justice Fulford's views are prescient and neatly tie together various principles, trends and interests that have been discussed in this paper. His comments and expressed concerns clearly detail what is potentially at stake for the 'evolution' of defence systems before the ICC in the event the *ReVision* project's currently envisioned proposal for a unified Defence office proceeds. First, as alluded to by Lord Justice Fulford, systems of international criminal justice require maximum flexibility, and the various possibilities that exist for a defendant to engage counsel should be retained and strengthened at the ICC. In some instances, a defendant may find it in his interests to be represented by the 'in-house' counsel of the OPCD. In other circumstances, an accused may wish to engage counsel from the private bar or pursue the halfway house of external counsel engaged by the Court who are supported by the internal defence office.

Second, Lord Justice Fulford notes that the consequences of abolishing the OPCD and placing some of its substantive assistance and support functions under a unified Defence Office would be the loss of 'a body, essentially independent of the Registry, that represents the interests of the accused' within the ICC system. Such a potential loss of statutory independence raises the specter of the compromised OPD of the SCSL, and would move in the opposite direction of the structural parity for the defence provided at the STL.

Third, and following from the potential compromised position of the mooted ICC Defence Office, the trend towards and goal of 'a body which had independence and experience equal to the OTP' given the OTP's 'incalculable permanent advantage over the accused' will likewise be at risk. What is vital for the administration of international justice to run smoother and in a fairer and more transparent fashion is for the defence as a body to be included in discussions with the Court's decision makers on policies and plans that impact on the functioning of the defence and the rights of defendants. Equally important is to foster an environment where the Defence are genuinely welcomed as equal and valued stakeholders – not unwanted outsiders – in the system of international justice.

4. Conclusion

The work of the international and hybrid criminal courts and tribunals is undeniably important and difficult. They are tasked by the international community and entrusted by those who were the victims of the crimes over which they have jurisdiction, to investigate and prosecute those persons most responsible for said crimes. However, as alluded to by Associate Justice Jackson, these courts and tribunals and the decisions they render will be

held in little regard if the trials conducted are not seen as fair in accordance with the highest standards of international justice.

The defence systems of the international and hybrid criminal courts and tribunals are, therefore, not only necessary to secure a fair trial and respect for the fundamental rights of an accused within an individual criminal case, but more broadly essential to an international criminal institution's success and legacy. A defence system that helps an accused and his or her counsel properly test the prosecution's evidence or fully advance a defence case enhances the legitimacy of any judgment rendered by the Court. It makes no difference, for these purposes, whether that judgement be a conviction or acquittal. The legitimacy and value of international justice is enhanced by due process and respecting the role and responsibilities of the defence. The fairness of the process itself helps guard against historical revisionism and subsequent denial of crimes. The role of the Defence and the objectives of any defence system devised must never lose sight of this objective.