ACCESS TO JUSTICE: WHAT DEFENCE FOR INTERNATIONAL ACCUSED?

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I am honored to be here today and would like to thank the organizers and sponsors of this conference for having invited me to address you on the topic: «Access to justice: what defence for international accused?».

The underlying theme of this conference is international justice. In the context of war crimes and crimes against humanity, the term «international justice» is usually and almost naturally associated with statements like the «end of impunity» and «bring those presumed responsible for large-scale atrocities to justice».

But I am here to talk to you about another equally important aspect of international justice – the defence of accused persons tried before international war crimes courts.

The field of international criminal justice has seen a spectacular development over the past 15 years. The pioneers were the ICTY and ICTR – established by the UN Security Council to «prosecute those presumed responsible» for grave breaches of international humanitarian law which had occurred in the territories of the Former Yugoslavia and Rwanda respectively. Then came the Special Court for Sierra Leone and a Special Tribunal for Cambodia established pursuant to an agreement between the UN and the respective government to try similar cases. After more than 50 years of fruitless negotiations, the international community finally agreed on the creation of a permanent judicial organ – the International Criminal Court.

In the early years of what emerges as a system of international criminal justice today, the efforts were clearly focused on prosecuting those presumed responsible. Tons of money and intensive labor were invested in investigating the crimes committed, issuing indictments and arresting the accused. Little attention was paid to the organization and

quality of the defence of the accused as can be seen from the founding documents of most of these courts. The defence came as an afterthought and as far as some are concerned, the «necessary evil».

I hope you will agree with me that justice can only be done through fair and public trials, with full respect for the rights of the accused. This is a condition for the legitimacy of the judicial process and the confidence the public, including the victims of crimes, has in the courts. The presumption of innocence and the right to a fair trial are the cornerstones of criminal justice in any democratic society. You will be glad to know that these basic rights are enshrined in the Statutes of the international criminal courts. Furthermore, the Statutes also afford an accused person the standard guarantees of these basic rights, such as the right to be informed of the nature and cause of the charges, to have adequate time and facilities to prepare his defence, to be tried in his presence; to be represented by counsel and to have the free assistance of an interpreter if he does not speak the language in which the proceedings are conducted.

Translating the statutory provisions into real, effective rights has not been easy and has required a lot of work and inventive thinking.

Part of the difficulties come from the very nature of the courts.

International criminal courts are often referred to as «hybrid courts» because they try to combine features of the main legal traditions, particularly those of civil and common law. This is especially true for the courts' procedural rules. While most of these rules are set out in the Rules of Procedure and Evidence, as with any legal provision, they are subject to interpretation by the different actors in the courtroom. These actors are often trained in very different legal traditions. For example, a Serbian accused could be defended by a Canadian Defence Counsel, appearing before a a French Judge, in a case prosecuted by an American Prosecutor. All these actors interpret the rules. In addition, different languages are spoken in the courtroom - some things simply get lost in translation.

Simultaneous interpretation in court – the proceedings take place in 3 to 5 different languages at the same time – the working languages of the court (at the ICTY English and French), but also the language of the accused, and sometimes up to two other languages (those of the victims and/or witnesses).

Nature of the Cases – war crimes cases are usually of significant magnitude and complexity in terms of the number of documents and exhibits, the number of crime scenes (municipalities) covered by the indictment; the complexity of the legal issues some of which quite novel. In

addition, most of the applicable substantive law was not so clear in the beginning, particularly the elements of crimes, and the forms of participation.

Practical difficulties:

The court is usually far away from the crime scene - away from witnesses, documents, operational delays, language barrier.

The court is usually away from the accused's place of residence – the accused is away from family and friends, detained in a foreign environment, does not speak the language – affects the morale and his ability to participate actively in his defence, which in turn, makes it more difficult for counsel to work with him.

The court usually away from the counsel's place of residence – during trial, counsel is away from home, away from counsel's family and support network. These long absences result in a loss of counsel domestic practice.

I would like to talk to you about some of the challenges we at the ICTY have faced and the measures we have taken to guarantee the protection of the accused's rights in this environment.

I. Securing adequate Defence

We all agree that the right to counsel is a central element in the protection of the rights of the accused. In fact, we almost take it for granted that if an accused is represented by a lawyer, his or her rights will be protected. The lawyer is perceived as the watchdog of the fairness of the trial. According to the constant jurisprudence of the ECHR, it is a guarantee for the accused's access to justice.

But in order for this to be true, the defence must be professional, zealous and effective.

When it comes to legal representation, the Statutes of various international criminal courts afford an accused person three different options:

— representation by a lawyer of the accused's own choosing;

— representation by an *ex officio* lawyer;

— self-representation.

In the ICTY's experience, there have been very few accused (about 10% of all accused) who have opted for the first option. The vast majority of accused persons have requested the assignment of a Tribunal-

paid lawyer. Four accused have chosen self-representation to which I will come later. Representation by counsel – either privately retained or provided by the court - remains the norm.

The exercise of the right to counsel rarely poses problems before national courts: in most countries, it would be enough for the accused to give a Power of Attorney to a lawyer of his choice, which will be filed with the court, and the representation can commence. If the accused is indigent, the state would either cover the defence costs or appoint a public defender – depending on the legal aid system in place. In any event, the lawyers who could potentially represent the accused are members of the same society, who come from the same cultural background, speak the same language, and, generally speaking, have the same values. Importantly, they all come from the same legal background, are familiar with the judicial system and traditions, including the unwritten norms thereof. Finally, they are admitted to the Bar in the same jurisdiction and abide by the same professional and ethical rules, and are subject to the Bar's disciplinary regulations.

None of the above is true for counsel practicing at the international level. Counsel come from all over the world, have usually studied and practiced law exclusively in their home jurisdictions, are not necessarily familiar with other legal traditions or concepts from such traditions, do not necessarily share the same values, do not necessarily speak the same language. Most importantly, they are members of different national Bar Associations in different countries of the world and do not therefore necessarily abide by the same standards of professional conduct and ethics.

As I mentioned, the Defence is not institutionally represented (i.e. no Office of the Defence similar to the Office of the Prosecutor as an organ of the Tribunal). It was clear, however, that the interests of justice as well as those of the accused require some level of regulation of defence matters by the court, and some level of institutional support for the defence. For the lack of a better option, the administration of all counsel issues was given to the Registrar of the court.

My presentation focuses largely on the experience of the ICTY: first, obviously because this is the court I know the best and second, because the other international courts have followed the ICTY precedent one way or another, sometimes being able to learn from our mistakes.

The measures can be divided into two main streams:

1) Quality Defence counsel; and

2) Institutional support for the Defence.

a) Measures aimed at strengthening the competence of defence counsel

1. Qualification requirements – a guarantee for a minimum professional competence to be able to cope with the legal and logistical difficulties outlined above.

In 2004, a Working Group of Judges was tasked with amending the qualification requirements for counsel. There was a need to strengthen the regime as many «mediocre» lawyers had made it to the Registrar's list of counsel. Higher qualification standards and a stricter vetting procedure were put in place to guarantee a higher level of competence of counsel with the ultimate aim of ensuring that the interests of the accused and, on balance, the interests of justice, are best served. The current qualification requirements are:

- admitted to the practice of law in a State, or a university professor of law;
- written and oral proficiency in one of the two working languages of the Tribunal;
- possesses established competence in criminal law and/or international criminal law/international humanitarian law/ international human rights law;
- possesses at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings;
- not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him;
- has not been found guilty in relevant criminal proceedings;
- has not engaged in conduct which is dishonest or discreditable to 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; (examples: suspects, misconduct)
- has not provided false or misleading information in relation to his or her qualifications and fitness to practice or has failed to provide relevant information;
- is a member in good standing of an association of counsel practising at the Tribunal.

The Registrar's list of counsel (Rule 45 list) – counsel are admitted to the Rule 45 list through a thorough vetting procedure. Originals of documents are requested, the names of two referees, it is possible to

require a candidate to take a language test and to be interviewed by a panel to evaluate his/her competence. The choice of the accused is limited to those counsel whose names appear on the Rule 45 list.

Examples of limitations to the free choice of counsel (not an absolute right!!):

— qualifications (examples – a *sui generis* guarantee for equality of arms);

— conflict of interest (examples);

— scheduling conflicts.

Often, counsel issues present significant challenges in balancing between the accused's rights and the Registrar's responsibility to protect the accused's interests and serve the interests of justice. For example, counsel are selected based on their nationality as opposed to their competence. Sometimes, the Registrar is in the absurd position to protect the accused from the accused himself.

2. The same professional and ethical standards

Code of Professional Conduct for Defence Counsel – one uniformed code for all counsel!

- Lawyers practicing before the court originate from all parts of the world. It is therefore advisable to implement one uniformed Code of Conduct for all counsel, so that the same standards and disciplinary regime apply to all counsel practicing before the court. Disciplinary measures taken against counsel are reported to their national bars.
- The Rules refer to professional misconduct. Hence, in order to identify misconduct, it is necessary to first define what is considered to be proper conduct.
- The various national Codes of Conduct and the standards provided by the International Bar Association were used as a reference point. We developed a number of proposals that were subjected to the scrutiny of, amongst others, the International Bar Association, the Union Européene d'Avocats and the Advisory Panel.
- We avoided a 'lowest common denominator' approach in favour of adopting the highest standards possible in order to guarantee the best protection of the rights of the accused.
- The Code of Conduct was substantially revised in 2002 and amended to include, amongst other things, regulations related to conflicts of interest and a specific prohibition on fee sharing.

- The 2002 Code of Conduct also introduced a disciplinary regime, which includes sanctions and a Disciplinary Panel to investigate complaints on counsel and with the power to take measures against counsel.

3. Attractive remuneration scheme and adequate facilities to attract good lawyers

— In recent years, the Registry has adopted a an attractive Lump sum remuneration scheme, which provides adequate compensation for counsel's work and a large degree of flexibility, while holding counsel accountable for the expenditure of public funds;

— Several Defence team members (legal assistants, investigators, interpreters) are assigned to assist counsel in the representation of the accused;

— Counsel's access to the client is facilitated by the court through the payment of travel costs and Daily Subsistence Allowance (client is detained in a foreign country and relies exclusively on counsel to organize his defence);

— Translation/interpretation costs are borne by the Tribunal.

4. Training for lawyers

Regular mandatory training sessions for defence counsel are held in cooperation with the Association of Defence Counsel Practicing before the ICTY (ADC-ICTY). The topics covered include the latest Tribunal jurisprudence, advocacy skills, professional conduct and ethics, conflicts of interest.

b) Institutional support to Defence counsel and their work

One of the most prominent lawyers practicing before the ICTY recently remembered that when he first arrived at the court in 1996, he was provided with a copy of the Directive on the Assignment of Defence Counsel and wished good luck. Indeed, in the early years, there wasn't much support for the Defence. Defence counsel were not allowed into the cafeteria, did not have free access to the court's building, were escorted to and from the courtroom by security, were perceived by many as «the enemy». These days are long gone and the position of the defence has improved significantly over the past years.

Defence facilities at ICTY

The Registry has designated several offices on the Tribunal's premises for exclusive use by Defence counsel. The offices have all the necessary office equipment, including computers with internet connection and access to the Defence network and the Judicial Database, printers, telephone and fax, and a TV set allowing the viewing of ongoing proceedings with a 30-minute delay. Have access to all areas of the Tribunal apart from Office of the Prosecutor, Chambers, and some sections of the Registry (Victims and Witnesses Section).

Technical/logistical assistance to the defence teams

The Office for Legal Aid and Detention Matters (OLAD) handles all defence counsel-related matters. In addition to dealing with assignment and payment of counsel, OLAD provides assistance and information to Defence counsel and their teams (currently over 500), facilitates travel to and from the seat of the court, mission trips, visits of the accused at the United Nations Detention Unit (UNDU), acts as liaison between the Defence and other sections of the Tribunal, etc.

Judicial Database (JDB)

It 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 is available to the Defence. 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.

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

Library

The Tribunal has a specialized 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.

Outreach

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

ADC-ICTY

In 2002, the Registrar supported the creation of and officially recognized the Association of Defence Counsel practicing before the ICTY as the official organization representative of all counsel practicing before the court. The creation of the ADC-ICTY was an effort to offset some of the disadvantages of the Defence not being institutionally represented and at least partly, to bridge the gap caused by the absence of a bar association at the international level. The idea was to create a peers' organization, which would promote the highest standards of counsel's professionalism and ethics, while at the same ensuring that the interests of all defence counsel were collectively represented by one body.

Accordingly, the Rules were amended to require that all counsel be members in good standing of the ADC-ICTY in order to be admitted to practice before the court. The ADC-ICTY vets counsel qualifications before admitting them as members (doubles the screening of counsel's eligibility to practice before the Tribunal). Importantly, in accordance with its Constitution, the ADC-ICTY has the power to take disciplinary measures against its members (peer control).

In recent years, the Registry has made a real effort to include the ADC-ICTY in various aspects of the life of the Tribunal making it *de facto* a fourth organ of the court. In particular, all major policies which affect the work of defence counsel or the rights of the accused are adopted in consultations with the ADC-ICTY. The ADC-ICTY is invited to comment on major amendments to all Tribunal rules and regulations. The President of the ADC-ICTY is usually invited to address the Judges

Plenary. The Registrar and Judges are invited to address the General Assembly of the ADC-ICTY. The dialog between the Registry and the ADC-ICTY has contributed to improving the situation of defence counsel in the Tribunal.

Self-representation

For the sake of completeness, a few words on self-representation as this is a form of defence which some accused choose. Some of the Tribunal's most prominent accused have elected (and have been allowed by the court) to represent themselves. The cases of Slobodan Milosevic and Vojislav Seselj in particular have raised some fundamental legal and practical questions regarding self-representation before an international war crimes court.

Is self-representation an absolute right and in what circumstances, if any, can the court limit its exercise? What is the role of the court in ensuring that the accused's election to represent himself is an informed one and how to balance between the different rights of the accused (e.g. the right to an effective defence and the right to self-representation)? What facilities are «adequate» for a self-represented and detained accused - is a self-represented accused entitled to more than an accused represented by counsel? Is a self-represented accused entitled to payment for his defence?

Self-representation poses a big challenge for international courts. A self-represented accused has significantly less chances of putting forward the best defence possible. In addition, a self-represented accused may undermine the court's legitimacy in several ways (e.g. lack of real equality of arms with the Proscutor, difficult to keep a self-represented accused 'on task', the proceedings are used for purposes other than answering the case against them, the proceedings are slow and judicial resources are wasted).

In addition, self-representation could create perception problems as war crime trials have political and historic connotations. One of the declared goals of International Criminal Justice is to bring reconciliation to the region. A former wartime leader, now self-represented accused, who uses the courtroom as a platform to further his political agenda or to defend his wartime policies does not contribute to achieving this goal. Furthermore, such a behavior could potentially have witness intimidation effects.

Last but not least, self-representation presents huge practical problems for the curt:

- The communication facilities offered to a self-represented accused at the UNDU must be extended to allow him to prepare his defence. This creates serious security concerns;
- Self-represented accused require much more technical facilities and logistical support than accused represented by counsel;
- All documents filed with the court need to be translated in a language the accused understands which affects the court's translation capacity and could lead to delays in all cases;
- Privileged communications and confidentiality – a self-represented accused needs to be able to communicate with persons who assist him in preparing his case. This raises serious issues about the confidentiality of documents, and in particular the protection of sensitive witnesses;
- Unlike defence counsel, a self-represented accused cannot engage in professional misconduct and could therefore abuse the court process; a self-represented accused can also manipulate the system and abuse his rights under the pretext that he does not know how to do things;
- Many of the existing procedural rules are not fit to apply to self-represented accused.

The ICTY's response has been:

- The provision of adequate facilities – as needed depending on the circumstances of each case;
- Establishment of a *Pro Se* Office to assist self-represented accused in the preparation of their defence;
- Recognition of legal advisers with whom the accused can be allowed privileged contacts in the UNDU;
- Payment of some defence costs if the accused is indigent;
- Establishment of policies specifically designed for self-represented accused.

In the ICTY's experience so far, it would appear that some accused who have chosen self-representation have done so primarily for political or other reasons. Examples: Milosevic and Seselj have used the courtroom to make political speeches and further their political agendas. Zdravko Tolimir has been refusing to receive documents translated in his language (Serbo-Croat) because they are not in Cyrillic script, thereby effectively delaying the trial.

II. Conclusión

The role of the Defence is not only to challenge the Prosecution's case in court, but also to use all legal means at counsel's disposal to push the limits of the system to ensure that the client gets a fair trial. Contrary to what some might think, a strong defence does not weaken the court. On the contrary, a strong and effective defence increases the court's credibility as an independent and impartial judicial organ. This is particularly important for international courts which are often seen as political and biased against a certain ethnicity.

Therefore, the court should maintain and increase the independence of lawyers, and continue providing institutional support, including substantive support.

Finally, an International Bar for all International courts needs to be established, with similar functions to those of national bars (e.g. admission to practice before the courts, a mandatory competence requirement), all issues of disputes over payment and disciplinary matters to be delegated to the Bar as opposed to the Registrar.