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Mayeul Hiéramente/Patricia Schneider (Eds.)

The Defence in International Criminal Trials

Observations on the Role of the Defence at the ICTY, ICTR and ICC

Nomos

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Abkürzungsverzeichnis

ACHR	African Charter on Human and Peoples' Rights
A. Ch.	Appeals Chamber
Abs.	Absatz
ADAD	Association des Avocats de la Défense
ADC-ICTY	Association of Defence Counsel - The International Criminal Tribunal for the former Yugoslavia
Art	Article/Artikel
ASP	The Assembly of States Parties
CAT	Convention against Torture
CICC	Coalition for the International Criminal Court
CSS	Counsel Support Section
DCC	Decision on the Confirmation of Charge
DM	Deutsche Mark
DRC	Democratic Republic of the Congo
e.g.	for example, zum Beispiel (exempli gratia)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EDS	Electronic Disclosure System
EGMR	Europäischer Gerichtshof für Menschenrechte
EMRK	Europäische Menschenrechtskonvention
ESCOR	Economic and Social Council Official Records
ETS	European Treaty Series
EU	European Union / Europäische Union
FPLC	Forces Patriotiques pour la Libération du Congo
GAOR	General Assembly Official Records
HRC	Human Rights Committee
HRL	Human Rights Law
IACtHR	Inter-American Court of Human Rights
IAGMR	Interamerikanischer Gerichtshof für Menschenrechte
IBA	The International Bar Association
IPbpR	Internationaler Pakt über bürgerliche und politische Rechte
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICJ	International Court of Justice
ICL	International Criminal Law
ICLB	International Criminal Law Bureau
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda / Internationales Straftribunal für Ruanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force
IFSH	Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg
IGH	Internationaler Gerichtshof
ILC	International Law Commission
IStGH	Internationaler Strafgerichtshof
IT	Information and Technology Informationen und Technologie
LAS	Legal Advisory Section
MICT	Mechanism for International Criminal Tribunals
Mio.	Million(en)
NMT / IMT	Nuremberg Military Tribunal / International Military Tribunal
NNG	Nazis and Nazi Collaborators (Punishment) Law
NS	Nationalsozialistisch
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei
ODIHR	Office for Democratic Institutions and Human Rights
OLA	Office of Legal Affairs
OLAD	The Office of Legal Aid and Defence
OPCD	Office of the Public Counsel for the Defence (ICC)
OSCE	Organization for Security and Co-operation in Europe
OSZE	Organisation für Sicherheit und Zusammenarbeit in Europa
OTP	Office of the Prosecutor
PIDS	Public Information and Documentation Section
PIU	Public Information Unit
PTC	Pre-Trial Chamber
Res.	Resolution
RPE	Rules of Procedure and Evidence
RSHA	Reichssicherheitshauptamt
RUF	Revolutionary United Front

SCOR	Security Council Official Records
SCSL	Special Court for Sierra Leone
SD	Sicherheitsdienst des Reichsführers SS
SS	Schutzstaffel der NSDAP
StIGH	Ständiger Internationaler Gerichtshof
STL	Special Tribunal for Lebanon
StPO	Strafprozessordnung
T. Ch.	Trial Chamber
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UPC (RP)	Union des Patriotes Congolais (Réconciliation et Paix)
VPRS	Victims Participation and Reparations Unit
VWU	Victims and Witnesses Unit

Benjamin Ferencz[*]

Preface

This is being written on November 20, 2015, which is exactly 70 years after the trial against Nazi war criminals began before the International Military Tribunal at Nuremberg. Since that time many new international courts have been created and international trials are now in process trying defendants from many lands for the most atrocious crimes committed against other human beings. Despite current shortcomings there can be no doubt that the progress toward applying the rule of law has been very impressive particularly if one recognizes that the newborn institutions are prototypes that will be improved with time.

I am now in my 96th year. I have tried only two criminal cases in my life. The first was in one of the subsequent Nuremberg proceedings (the *Einsatzgruppen* case), in which 22 defendants were convicted of the calculated murder of over 1 million people, including thousands of children killed one shot at a time. I was assisted by a staff of three other prosecutors and each defendant was entitled to counsel of his choice and an assistant. We were thus outnumbered by at least 10:1. I was then 27 years old. The second case was when I was invited to make the closing remarks in the first prosecution by the new International Criminal Court in The Hague, for the creation of which I had labored for half a century. I was then 92 years old.

My determination to pursue the rule of law was driven to large extent by my personal experiences as a combat soldier in World War II. I participated in every major battle of the war in Europe. As a sergeant in General Patton's army I joined the liberating forces entering several Nazi concentration camps to gather evidence for future war crimes trials. The horrors I personally witnessed are incomprehensible to any rational mind.

The law has never been static but has always evolved to meet the needs of the society it was designed to protect. The evolution of international criminal law has been an ongoing process. The fair trial for adversaries defeated in war is a relatively modern invention. Indeed, the notion of humane treatment for all combatants is a principle still being espoused in many quarters but practiced by very few. "The Defence in International Criminal Trials" gives rise to many questions and problems which deserve consideration. It is not merely a matter of protecting the rights of an accused criminal suspect. The social interest of the public should always be a primary consideration. Punishment of convicted offenders should always have, as its principal objective, the deterrence of criminal behavior by others. In order for the de-

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* Benjamin B. Ferencz, J. D. Harvard Law School 1943. All of his writings and lectures are available free on his website, www.benferencz.org.

terrent effect to have a lasting impact it is vital that the trials are open to public scrutiny and to be so conducted that the fairness will never be challenged despite the gravity of the offense. We owe that much to ourselves as well as to the accused.

If the rule of law is to be effective criminal trials must be able to reveal the truth. If the public feels that truth has been distorted the outcome will lose all credibility. On the contrary, acquittals based on false testimony or evidence will serve only to enhance more crime. It is not the primary responsibility of the defense counsel to obtain the freedom of the client by illegal or impermissible means.

Unfortunately, we have not yet developed an effective international criminal system which can ensure justice through judicial process everywhere. Humanitarian interventions are frequently a subterfuge for nations to obtain their own political or economic goals. The statutes for the International Criminal Court as well as other tribunals require both judges and prosecutors to take all facts and circumstances into account. Where it is clear that humanitarian intervention imposes a legitimate responsibility (R2P) it will be up to the court and the prosecutor, and not the protagonists, to determine whether force is permissible. Morality may determine whether a trial is justified or sentences should be mitigated. These dilemmas remain a gray zone which should be clarified as international criminal law is further developed. All persons, regardless of the magnitude of the crime, are entitled to a fair trial and an opportunity to explain their motivation and deeds. Unfortunately, our current world order still lacks unbiased and competent judicial tribunals to judge the legality or acceptability of many deeds which large numbers of the population hold to be contemptible crimes. It is not up to the parties or their allies to decide which side is right and which side is wrong. That requires an independent judgment, which is recognized and acceptable to the world community. As long as that instrument is lacking or lacks enforcement capability the protagonists will continue to slaughter each other as they have always done and continue to do now.

The Nuremberg Tribunals recognized that illegal warfare is the supreme international crime because all of the other crimes are committed when groups or nations consider themselves to be at war. Crimes are committed by individuals and those who are responsible for the massive cruelties should not be able to obtain asylum by politically organized amnesties.

When the United Nations Charter was accepted it was anticipated that the work of the Nuremberg Tribunals would be continued by establishing a permanent International Criminal Court which would be governed by a code of punishable international crimes. Defining aggression was assigned to a stream of different committees. By 1974, the General Assembly approved “a consensus definition of aggression” reached by the appropriate Special Committee. However, major powers were not prepared to entrust any independent tribunal with authority to determine whether their use of armed force

was legal or criminal. Seventy years after the Nuremberg trials and years of debate by learned jurists, it is pathetic to argue that the supreme international crime – the one word "aggression" – could not be properly defined. The political will remains absent and the world remains in increasing peril.

It is a pity that, despite almost 70 years of effort by many learned lawyers, the Kampala amended definition of aggression of June 2010 remains full of loopholes and ambiguities . Calling the illegal use of force in violation of the UN Charter a punishable "crime against humanity" under ICC, domestic, and universal jurisdiction serves as a clearer warning to perpetrators everywhere that there will be no place to hide. It is high time to stop playing deceptive games with the future of humankind.

Layers who are interested in peace and a more humane world order should denounce the illegal use of force as a crime against humanity. The ICC Statute condemns as crimes against humanity, such acts as murder, apartheid, torture, rape, and similar abominations. It allows the punishment of "other inhumane acts." Similar provisions exist in many national criminal codes. The UN Charter prohibits the use of armed force except in self-defense against an armed attack or if mandated by the Security Council. Those individuals who are responsible for violating that fundamental principle should be brought before a court to explain and try to justify their action. The public will be able to decide whether the killing of innocent civilians can be justified or whether it is a punishable crime despite the arguments of the defense counsel and their clients and friends. The court of public opinion will be the final arbiter of what actions are justifiable or worthy of punishment adequate to deter such behavior in the future.

We have yet to learn that you cannot kill an ideology with a gun. What is needed is an ideology better suited to meet the needs of society. We have got to place less faith on military armaments that now have the capacity in cyberspace to cut off the electrical grid on planet Earth. Instead we must be willing to teach tolerance, compassion and a willingness to compromise. Prosecutors, defense counsel, judges, and the public must conclude that law is better than war. Transgressors should know they can be tried by any court that apprehends the perpetrator at anytime and anywhere under principles of universal jurisdiction which are already recognized in many countries. Those individual leaders who use armed force that is not in self-defense and not approved by the Security Council and knowing that it will inevitably kill large numbers of innocent civilians, should be held to criminal account. It is also important for the victims to be given an increased status in the search for justice. It is an old principle of tort law that he who causes unjustified harm is under a duty to compensate the victim and seek to minimize the damage. The victims of armed conflict with its devastating effect should be able to seek their remedies in a civil court of law in addition to the punishment of the perpetrators in criminal proceedings.

Heiko Ahlbrecht[*]

Vorwort

Mit Verabschiedung des Statuts des Internationalen Strafgerichtshofs am 17. Juli 1998 gelang der zentrale Durchbruch zu einem international verankerten Völkerstrafrecht und einem Ständigen Internationalen Strafgerichtshof (ICC), zuständig für die schwersten Menschheitsverbrechen. Zu diesem Zeitpunkt blickte man bereits auf die ersten Verfahren des Internationalen Strafgerichtshofs für das ehemalige Jugoslawien (ICTY) und des Internationalen Strafgerichtshofs für Ruanda (ICTR) zurück, deren grundlegende Rechtsnormen durch das ICC-Statut völkerstrafrechtlich in fortgeschriebener Form kodifiziert wurde. Zentrales und zugleich besonderes Merkmal dieser völkerstrafrechtlichen Entwicklung ist die Kodifikation eines allgemeinen und eines besonderen Teils des materiellen Völkerstrafrechts einerseits, zugleich aber auch die Entwicklung eines völkerrechtlichen Strafprozessrechts mit angloamerikanischen Grundsätzen im Schwerpunkt, in vielen Bereichen aber durch das kontinentaleuropäische Strafprozessverständnis modifiziert. Verkürzt gesagt: Es handelt sich um eine Mischung aus dem US-amerikanischen Parteienprozess (common law) und dem kontinentaleuropäischen Strafprozess (civil law) mit einem die materielle Wahrheit ermittelnden und über diese letztlich judizidierendem Gerichtskörper in einem Strafprozess, der von adversarischen Elementen bestimmt ist. Sowohl der ICTY wie auch der ICC haben ihren Sitz in Den Haag, im Herzen Europas, was das Erstaunen darüber erhöht, dass die Mitgliedstaaten der EU und erst recht nicht die Mitglieder des Europarates in der Lage sind, sich auf einen gemeinsames europäisches Straf- und Strafprozessrecht zu einigen. Vor allen Dingen die Fortschrittlichkeit der Hauptverhandlungsdokumentation (komplette Video- und Audiodokumentationen nebst Wortprotokoll der Hauptverhandlung, die jeweils am Ende des Verhandlungstages elektronisch zur Verfügung gestellt werden) in den Verfahren vor den Internationalen Strafgerichtshöfen ist eine Benchmark, die für die Verteidigung in jedem europäischen Mitgliedstaat in deren nationalen Strafprozessen überaus wünschenswert wäre – sie dient im Übrigen der Objektivierung der Suche nach der Wahrheitsfindung und der Qualität der Beweismittel.

Die besondere Herausforderung an eine Verteidigertätigkeit vor den Internationalen Strafgerichtshöfen liegt neben der intensiven zeitlichen Inanspruchnahme jedoch an anderer Stelle. Es ist das Verdienst dieses Sammelbandes, zentrale und in der Praxis wichtige Themen oder auch Streitfelder der Verteidigung darzustellen und im Detail anhand der vorliegenden Recht-

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sprechung der verschiedenen Strafgerichtshöfe wissenschaftlich zu kommentieren und praktisch zu unterlegen. Dies beginnt bei der Durchsetzung der Verteidigungsrechte und führt über die Spannungsfelder des eigenen Verteidigungsrechts des Angeklagten, das Konfrontationsrecht oder auch die dem deutschen Strafprozess nicht bekannte Handhabung der Offenlegung von Beweismaterialien aus dem Ermittlungsverfahren (disclosure) bis hin zur Organisation und (strategischen) Planung der Verteidigung der üblicherweise inhaftierten Mandanten. In diesem Kontext nehmen die operativen Unterstützungsmöglichkeiten durch das Office of Public Counsel for the Defence, aber auch durch die in Den Haag ansässige Verteidigervereinigung ADC-ICTY einen Unterschwerpunkt der Beschreibung ein. In der Praxis betrifft dies vielfältigste Fragestellungen wie beispielsweise die Bildung von Verteidigungsteams, den Umgangs mit den teilweise mehr als voluminösen Beweismitteln, Verteidigungskosten sowie Kosten für Sachverständige und eigene Ermittlungen oder sonstige Aktivitäten der Verteidigung.
Nur eine echte, gehaltvolle Verteidigung kann ein faires Verfahren und die Einhaltung des Grundsatzes der Waffengleichheit zwischen Ermittlungsbehörde und Verteidigung gewährleisten. Nur eine Verteidigung auf prozessualer Augenhöhe unter Ausübung aller Verteidigungsmöglichkeiten eröffnet die Möglichkeit einer Annäherung an ein gerechtes Urteil und ein “fair trial”. Dies ist die zentrale Botschaft und zugleich das wichtige Leitmotiv, dem sich die Herausgeber und Autoren dieses Werkes verschrieben haben.

Colleen Rohan[*]

The Defence in international criminal trials: important actor or necessary evil?

> "*If you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict."*
>
> Justice Robert Jackson[1]

When initially considering how to go about approaching the topic of this article my first instinct was to write only about the importance of the Defence as an institution and the importance of the Defence function within the international courts in assuring fair trials and the fair and balanced development of international law as a whole. After all, what kind of legal system would develop if only one side of a complex set of facts was heard as a means of determining whether an individual or group of individuals was culpable for war crimes. No one would want to live with an international legal system that was that skewed; certainly not Lady Justice whose scales would be necessarily well out of balance.

I then considered outlining the historical list of difficulties which have plagued the defence side of the courtroom in international criminal cases: insufficient funding, inadequate or no access to important witnesses; limitations on cross-examination due to increasing use of written statements; undermining of the right to a public trial by the overuse of closed, private sessions; lack of cooperation from relevant government and police agencies, late disclosure from prosecutors or the failure to disclose exculpatory evidence. These are topics which have been addressed before[2] and which will remain subjects of inquiry and controversy in the international courts.

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* Colleen Rohan has served as counsel and legal consultant on a number of cases at the ICTY since 2006 and is currently representing individuals in the EULEX war crimes courts in Kosovo. She served as President of the ADC-ICTY and as a member of the ICTY Disciplinary Panel. She organized and edited the „ADC-ICTY Manual on Criminal Defence: ADC-ICTY Developed Practices." She is a founding member of the International Criminal Law Bureau and is a member of 9 Bedford Row Chambers International Section. She maintains law offices in The Hague, Netherlands and Pristina, Kosovo.

1 Rule of Law Among Nations Speech, 13 April 1945, https://www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf ; presented prior to the opening of the Nuremberg trials.

2 See, e.g. Ellis, M. S. „The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia". *New England Law Review* vol. 37:4. , K Gibson, C Lussiaa-Berdou, „Disclosure of Evidence," in Principles of Evidence in International Criminal Justice, K. Kahn, C Buisman, C Gosnell, eds (Oxford Press, 2010); K. S. Gallant, „Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might Be Done about One of Them". Kluwer Academic

The more intriguing issue, though, became why the public and even members of the legal profession believe or express the attitude that the defence in a criminal case is ever unnecessary or irrelevant. That attitude essentially equates with the view that it is improper for the accused in criminal cases to have rights since they are guilty and the presumption of innocence is just a fiction.[3]

However that is not the case under international law nor, for that matter, in most domestic courts. Every person charged with a crime is entitled to a defence. The fact that acquittals are returned after trial demonstrates that all indictments are not founded on solid evidence. The existence of Innocence Projects now flourishing in various countries reflects that not all verdicts are well informed or reliable. Human beings make mistakes. Initial perceptions can be wrong.

Unfortunately, the tendency for the public to pre-judge an accused or to view the Defence function as unnecessary or even unethical because of the presumed character of the accused or the nature of the charged crimes is, as one commentator put it: "cognitive dissonance at its worst." Defence lawyers who represent people accused of crime honor the rule of law which requires "a stringent process before taking away a citizens' freedom ... ."[4]

I. The defence function in the international criminal courts

Since 1993 when the International Criminal Tribunal for the Former Yugoslavia (ICTY) was first established by the United Nations Security Council[5] a number of international courts have been created to prosecute war crimes, crimes against humanity, and genocide arising from various regional conflicts, including the International Criminal Tribunal for Rwanda (ICTR), the Special Tribunal for Lebanon (STL), the Special Court for Sierra Leone (SCSL), and the Extraordinary Criminal Chambers in Cambodia (ECCC).[6] As of the writing of this article, a Special Court for Kosovo is in the making,

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Publishers, 2004; Tolbert, David. "The ICTY and Defense Counsel: A Troubled Relationship". *New England Law Review* vol. 37:4; Tuinstra, Jarinde Temminck. "Defence Counsel in International Criminal Law". University of Amsterdam, 2009; Tuinstra, Jarinde Temminck. "Defending the Defenders: The Role of Defence Counsel in International Criminal Trials". *Journal of International Criminal Justice*, 2010; The Ashgate Research Companion, W. Schabas, Y. McDermott, N Hayes eds, C Chernor Jalloh, A BiBella, "Equality of Arms in International Criminal Law: Continuing Challenges."

3 An ICTY judge (who is no longer sitting at that institution) once famously gave a public speech in which he stated his view that there is no such thing as the presumption of innocence as the mere existence of the (unproved) allegations in the Indictment is sufficient to negate that presumption.

4 See discussion at: http://ethicsalarms.com/2013/08/15/yes-the-best-criminal-defense-lawyers-represent-the-worst-people-or-you/ .

5 See UNSC Res 827 (25 May 1993).

6 The ECCC is not an international court. It is a domestic court which functions with significant international financial and professional assistance.

reportedly to address war crimes committed by ethnic Albanians during the conflict in Kosovo.[7] The International Criminal Court also came into being upon passage and enforcement of the Rome Statute in 2002.[8]

With the exception of the ECCC, which utilizes a civil law system based on French law, all of these courts employ a hybrid mix of the civil or continental legal system and the adversarial legal system. In general the trial process itself, however, is, at least in theory, adversarial in structure. That is, each party to the case is able to conduct its own factual investigation of the case and during trial each party (prosecution, defence and, at the ICC and STL, victim's counsel) is entitled to present witnesses as part of its case and to cross-examine witnesses presented by the opposing party or parties.

This process presumes the inclusion of an active defence presence before, during and after trial. International instruments that address the subject of the rights of the accused who are brought before these criminal courts clearly delineate that the accused is presumed to be innocent[9], is entitled to a fair and public trial,[10] without undue delay[11], is entitled to the assistance of legal counsel,[12] has the right to confront and cross-examine witnesses called against him or her at trial[13], and has the right to "adequate" time and facilities to prepare a defence.[14]

Additionally, the prosecution bears the burden of proof at trial; to prove the underlying charges and the accused's factual and legal responsibility for them beyond a reasonable doubt. This is a burden which *never* shifts to the accused. Hence, the accused has *no* burden to prove he or she is not guilty, although in practice most accused have put on some form of affirmative defence to the charges.[15]

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7 See BBC News, "Kosovo Parliament Approves Special War Crimes Court", 4 August 2015 http://www.bbc.com/news/world-europe-33770897 . Two prosecutions of Kosovar Albanians were already brought at the ICTY during its mandate*; Prosecutor v Limaj et al*, ICTY Case No IT-03-66-T *and Prosecutor v Hardinaj et al*, ICTY Case No IT-04-84-T and IT-04-84*bis*-T. The proposed new Special Court for Kosovo is intended to pursue additional prosecutions.

8 ICC Statute of the International Criminal Court, 2187 UNTS 90 (17 July 1998, entered into force 1 July 2002).

9 See, e.g. ICTY Statute, Art. 21 (3); ICTR Statute, Art 20(3); ICC Statute, Art 66; International Covenant for Civil and Political Rights (ICCPR), Art 14(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6(2).

10 ICTY Statute, Art 21(2); ICTR Statute, Art 20(2); ICC Statute, Art 67(1); ICCPR, Art 14(1); ECHR, Art 6(1).

11 ICTY Statute, Art 21(4); ICTR Statute Art 20(4); ICC Statute, Art 67(1); ICCPTR, Art 14(3)(c); ECHR, Art 6(1) [trial must be "within a reasonable time"].

12 ICTY Statute, Art 21(4)(b); ICTR Statute, Art 20(4)(b); ICC Statute, Art 67(1)(b); ICCPR, Art 14(3)(b); ECHR, Art 6(3)(c).

13 ICTY Statute, Art 21(4)(e); ICTR Statute, Art 20(4)(e); ICC Statute, Art 67(1)(e); ICCPR, Art 14(3)(e); ECHR, Art 6(3)(d).

14 ICTY Statute, Art 21(4)(b); ICTR Statute, Art 20(4)(b); ICC Statute, Art 67(1)(b); ICCPR, Art 14(3)(b); ECHR, Art 6(3)(b).

15 See, e.g. *Prosecutor v Limaj et al* (Trial Judgement) ICTY Case No. IT-03-66-T (30 November 2005), para 10; *Prosecutor v Naletilic and Martinovic* (Trial Judgement) ICTY Case No. IT-98-34-T (31 March 2003).

Given that all accused are presumed innocent unless and until the prosecution meets its burden to prove guilt beyond a reasonable doubt, the accused's right to "adequate" time and facilities to prepare a defence refers not just to the preparation of an affirmative defence case but also to adequate time and facilities with which to investigate the credibility of and to prepare to meet the prosecution's evidence at trial.[16]

Despite the existence of these rights and all that they imply – including the indispensable role and function of the defence to ensure fair trials in international criminal proceedings – the international criminal courts, including the ICC, do not recognize the Defence as one of the pillars or organs of the court.[17] There is usually very little communication between victims' rights groups, NGO's and even journalists regarding the Defence view of proceedings in any given case; even cases in which acquittals have occurred in whole or in part. The Defence has been, for the most part, historically excluded from official outreach events and official legacy conferences put on by the various international courts. As a result the public at large is generally ill-informed about the role and function of the defence. This gap in knowledge has potentially far-reaching consequences for the continuing development of a fair and balanced system of law in the international courts.

A few months ago, for example, I was interviewed by an individual who was writing a Ph.D thesis intended to include an analysis of the defence function in the international criminal courts. The individual is not an attorney nor did he have any particular interest in "defending the defence". After he became immersed in his topic, however, he developed some concerns. As he put it: "An anonymous reviewer of a paper I submitted last year to a peer-reviewed political science journal commented, in a critique of my argument, that fairness for defendants is a poor source of legitimacy for trials because it's the victims that really matter. Two audience members at a presentation of a paper on defence rights in international trials at a West Coast political science conference this year made the same comment more forcefully: 'we shouldn't concentrate on fairness for perpetrators of mass atrocities – increasing defendant rights just weakens the legitimacy of trials'".[18]

It is understandable that these kinds of attitudes exist among those who have suffered through armed conflicts and/or been the victims of war crimes. It would be difficult, if not impossible for such victims and witnesses to maintain a neutral or detached view about subsequent legal proceedings re-

16 See general discussion of this right in "The Ashgate Research Companion to International Law, eds W Schabas, Y. McDermott, N. Hayes (Ashgate Publishing Ltd. 2013), C. Rohan, "Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action:", p. 290.

17 The sole exception to this is the STL which has a defence office that is considered to be an organ of that court.

18 Interview with the author in November 2015 by Martin Burke, Research Fellow, Ralph Bunche Institute for International Studies, New York, and PhD Candidate in International Politics, the City University of New York Graduate Center.

lated to these events in their own lives. It is also understandable, though regrettable, that the public at large may develop similar views. The cases brought in the international courts invariably involve horrendous crimes committed against vulnerable civilians during war. News coverage of such crimes is usually widespread in the international press. More often than not the identity of the perpetrators is widely assumed and discussed well before any arrest or legal proceedings take place.

It is inexcusable, however, that such attitudes are expressed among those who are actively involved in observing and assessing the work of the international courts and therefore, individuals who present themselves as reasonably well informed about the underlying legal process. Indeed, if the international legal community is to maintain and continue to develop a legitimate, reliable system of law then courts, activists, academics, politicians, and other commentators must accept that international criminal trials are held "not to convict those presumed to be guilty in a theater piece designed to assuage an outraged public" but to dispassionately evaluate the actual evidence regarding the specific accused. Any other approach simply fails to respect and enforce the rule of law. An accused, in accordance with democratic principles and international law must be tried in a setting which recognizes the presumption of innocence and is designed to promote fair and "legitimate" verdicts. That will occur only when the rights of all parties, including the human rights of the accused, are valued and enforced.

Any other position reflects a wholesale misunderstanding of international law, the defence function in the international courts, the reasons for the courts themselves, and rests on situational attitudes which serve to violate, not enforce, the rule of law.

As Justice Jackson also remarked in his famous speech on the Rule of Law Among Nations:

> *"The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty."*[19]

The international courts have on occasion unwittingly reinforced misguided attitudes and beliefs, in particular regarding the notion that the Defence is somehow irrelevant to or a minor player in international criminal proceedings.

The ICTY, to provide only one example, put together its "ICTY Manual on Developed Practices"[20] which was published in May of 2009. The Manual, as described on the ICTY website, is "part of a broader project to promote and preserve the Tribunal's legacy."[21] The ICTY Manual is an impor-

19 Rule of Law Among Nations Speech, 13 April 1945, https://www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf.

20 The Manual is available electronically at: http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf.

21 See http://www.icty.org/en/node/8127.

tant publication. It explains the history of the institution, its internal structure and many of the basic legal principles at work in the day-to-day functioning of the ICTY; a Tribunal which is considered by most, including this author, to be a successful example of the fair, reliable and efficient imposition of international criminal law.

At the time the ICTY Manual was produced the Defence at the ICTY was asked to contribute to it by writing a chapter on the Defence role, function and experience at the Tribunal. The Defence chapter was excluded however when objections were raised by the Prosecution, and the institution acceded to them. The Defence never learned of the existence of the objection by the Prosecution to inclusion of the Defence legacy nor was it given any opportunity to discuss or respond to it until the final decision to exclude the Defence was *a fait accompli*. Hence the official ICTY Manual contains no contribution from the Defence at all, despite the fact that the Manual represents itself as preserving the legacy of that court.

This particular set-back for the Defence in being excluded from the official ICTY Manual turned out to be a cloud with a silver lining. The United Nations Interregional Crime and Justice Research Institute, which had sponsored the ICTY Manual, thereafter agreed, on its own initiative and that of the Association of Defence Counsel Practicing Before the ICTY (ADC-ICTY), to sponsor a separate Manual for the Defence. Hence, a practice oriented manual written by experienced ICTY Defence counsel, the "Manual on International Criminal Defence: ADC-ICTY Developed Practices," was published in 2011, as part of the War Crimes Justice Project involving the ADC-ICTY, UNICRI, and the O.S.C.E. Office for Democratic Institutions and Human Rights (ODIHR).[22] Since the independent publication of the Defence Manual the ICTY has included it on its new official website.[23]

In this instance, then, the initial exclusion of the Defence was ultimately rectified; a step forward for the Defence, not to mention an illustration of the need for defence counsel associations, like the ADC-ICTY, at the international courts.[24] The subsequent inclusion of the Defence Manual on the official ICTY website is also a positive comment on the ICTY's evolution as an institution; specifically its ultimate recognition of the Defence function and legacy as an important contributor to the legacy of the institution as a whole.

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22 This Manual is available electronically on the ADC-ICTY website: http://adc-icty.org/ The Manual has been translated into Serbian/Croatian/Bosnian and Albanian. It is currently being translated into Spanish.

23 http://www.icty.org/en/node/8127.

24 The ADC-ICTY is the only association of Defence counsel which has been official recognized by an international court. It was just recently officially recognized as the association of defence counsel for the Mechanism for International Criminal Tribunals (MICT); the institution created to carry out essential functions of the ICTY and ICTR now that both institutions have completed their mandates. A movement is in progress to create an official association of defence counsel at the ICC, however as of the date of this writing such an association has not yet been formed.

Public comments made by officials in the international courts have unfortunately also served the opposite end: to directly and improperly promote ideas which undermine and misconstrue the Defence function as well as the rights of the accused. These comments, which have not been corrected in the public press or otherwise rectified, may continue to mislead the public and, in doing so, undermine the rule of law.

At the ICTY, for example, there are general regulations[25] which provide that prosecutors must "avoid outside the courtroom, making public comments or speaking to the media about the merits of particular cases or the guilt or innocence of specific accused while judgment in such matters is pending before a Chamber of the Tribunal."[26] Despite these regulations, in 2007 Carla Del Ponte, then the Prosecutor at the ICTY, told a *Der Spiegel* reporter, in an article subsequently published by that magazine, that the *Haradinaj et al.,* case, on trial at the ICTY at the time, should result in a conviction because she had "the evidence to prove" it.[27] It is difficult to conceive of a clearer and more improper comment on the merits of a pending case.

The Trial Chamber refused to grant a Defence request for a hearing on Ms. Del Ponte's inappropriate comments finding that there was no evidence that Ms. Del Ponte's comments affected the fairness or expeditiousness of the trial.[28] While that finding may have been true in this specific case, it is impossible to know whether public comments such as those uttered by Ms. Del Ponte affected the willingness of witnesses to come forward and honestly testify concerning matters that contradicted her claims. The Chamber also did not address other troubling aspects of the prosecutor's comments; their improper, indeed misleading influence on public perceptions and understanding not only of the *Haradinaj et al.* case but of the presumption of innocence to which all accused are entitled under international law.[29]

In *Lubanga,* the first case to go to trial at the ICC, a member of the office of the Prosecutor opined in a public press interview that certain intermediaries used by their office to select witnesses for potential testimony against Mr. Lubanga were "carefully chosen" and "much admired" by the office,[30]

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25 There is no enforcible, internal Code of Conduct for prosecutors at the ICTY; only "guidelines." See "The ICTY and Defense Counsel: A Troubled Relationship," D. Tolbert, 37 New Eng. L. Rev 975 (2003), 982.

26 ICTY Prosecution Regulations, regulation 2(k).

27 See *Prosecutor v Haradinaj et al*, ICTY Case No. IT-04-84-T, Idriz Balaj's Citation of Prosecutorial Violation of Ethical Code of Conduct and Request for Evidentiary Hearing Regarding Interview of Carla del Ponte, 30 October 2007.

28 *Haradinaj et al*, ICTY Case No. IT-04-84-T, Decision on Idriz Balaj's Request for Evidentiary Hearing Regarding Interview of Carla Del Ponte, 29 January 2008, para 8.

29 Two of the three accused in *Haradinaj et al* were subsequently acquitted of all 37 counts alleged in the Indictment. The third was convicted of 3 of 37 counts. *Prosecutor v Haradinaj et al*, ICTY Case No. IT-04-84-T, Trial Judgement, 3 April 2008.

30 See *Lubanga*, ICC Case No. ICC-01/04-01/06, Decision on Press Interview with Ms. Le Fraper du Hellen, 12 May 2010, paras 3-4 [*Lubanga* Press Decision]; and see the comprehensive discussion of these events in M. Markovic, "The ICC Prosecutor's Missing Code of Conduct," 47 Texas Int'l L. Rev 201, 209 (2011), pp 238-241.

that the prosecution witnesses were "very credible,"[31] that there was no abuse of process regarding disclosure in the case as the Prosecutor was "very experienced," that all exculpatory evidence had been disclosed, and that any contention to the contrary was "just talk" from the Defence.[32] She told the press that Mr. Lubanga would be "going away for a long time."[33] These comments were made before any trial verdict had been returned and *after* the Trial Chamber had previously and specifically admonished the prosecution not to make statements to the press about the merits of the case.[34]

The Trial Chamber, in a court filing, severely criticized the prosecution spokesperson,[35] found the statements "seriously intruded" on the role of the Trial Chamber, were misleading, and were unfair to the accused.[36] No other action was taken however. The offending statements, at least as to those who do not know of or know how to navigate the website of the ICC so as to find the specific court filing, presumably remain entirely uncorrected.

Two months later, despite the events in *Lubanga*, the then ICC Prosecutor wrote a piece for the *Guardian* newspaper in which he misleadingly implied that President Omar Al-Bashir of Sudan, then under warrant of arrest, had already been found guilty by the ICC.[37] No action was taken by the court in response to that public misinformation.

It is not surprising, given these kinds of events, and the historical exclusion of the Defence as an organ of the international courts, that the general public remains largely unaware of the rights of the accused in international criminal proceedings, including the presumption of innocence and the prosecutor's duty to meet its burden to prove the case beyond a reasonable doubt.

The Defence does not have a similar public platform as the official organs of the courts. In addition, ethical codes regulating the conduct of defence counsel were enacted at all the international courts, including the ICC. Defence ethical codes have been historically enforced.

Contrary to the relative inaction taken as to court personnel in the instances mentioned above,[38] a defence lawyer was affirmatively disciplined for engaging in the most general public comment about the international

31 *Lubanga* Press Decision, para 6.
32 *Lubanga* Press Decision, para 8.
33 *Lubanga* Press Decision, para 8.
34 *Lubanga* Press Decision, para 15. The comments were also made after the Trial Chamber had previously stayed all proceedings due to the failure of the prosecution to disclose exculpatory evidence.
35 *Lubanga* Press Decision, paras 41-49.
36 *Lubanga* Press Decision, para 49.
37 "Now End This Darfur Denial," Luis-Moreno Ocampo, *Guardian*, 15 July 2010.
38 Ethical Codes of Conduct which regular the professional conduct of defence counsel exist at all the international courts and include detailed procedures for discipline when the codes are violated. The same is not true for the Prosecution at the ICTY and ICTR. The ICC first enacted a Code of Conduct for Prosecutors in September 2013, almost twelve years after it came into existence. There are no enforceable ethical codes for judges at any of the international courts.

courts. In the *Fila* case at the ICTY,[39] a defence attorney who also served in various advisory capacities to the Serbian government and hence was a public figure there, was charged with misconduct for stating in the Serbian press that "the main aim has been achieved, Serbia has been demonized."[40] The statement was held by the majority of the ICTY Disciplinary Panel[41] to violate Article 3(v) of the ICTY Code of Conduct for Defence Counsel. That article states that defence counsel "shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute". The majority of the Disciplinary Board in *Fila* held that Mr. Fila's comment, even though it did not refer to the ICTY or to any specific case or individual at the ICTY, violated Article 3(v). In fact, it went on to hold that Article 3(v) imposed "a positive obligation on all counsel to protect the reputation of the Tribunal."[42]

There was no evidence in *Fila* that Mr. Fila's comment brought "proceedings before the Tribunal into disrepute." To the contrary, Mr. Fila's opinion, whether one agrees with it or not, was precisely that and nothing more. He did not refer to any pending cases and the statement was not an attempt to influence judicial authorities in any pending cases. He named no names. He made no factually false assertions. He did not vouch for the credibility or reliability of anyone. He merely stated his opinion.

The Tribunal, and other international courts, are public international institutions. Healthy debate about the effect of their work is important to the positive development of international law as well as the continued development of a democratic society. The interest in encouraging freedom of expression in a democratic society certainly outweighs any theoretical and unproven benefit of censorship. Open and honest discussion of the mistakes and successes of the international courts should take place without the potential – for defence counsel – of facing ethical proceedings for expressions of opinion.

Again, small wonder that the public, including members of victim's rights groups, NGO's and journalists, are at times misinformed as to the rights of the accused, the responsibilities of the international criminal courts to enforce those rights, the Defence function as an institution, and the primary purpose of the trials.

I have been asked over the years, as have many attorneys who practice in the international courts, to give lectures to law students and new lawyers interested in international criminal law. One of the first questions I will usu-

39 *In the Matter of Mr. Toma Fila*, ICTY Disciplinary Board Case No. IT-13-93-Misc-1; IT-05-87-A, 3 July 2013 [hereinafter "*Fila* Decision"].

40 *Fila* Decision, paras 81-90.

41 The *Fila* Decision was a split decision of the ICTY Disciplinary Board, with a majority of three and two dissents.

42 *Fila* Decision", para 70] The Majority, in interpreting this ethical code which applies only to defence counsel, did not find that a similar, positive obligation to protect the reputation of the Tribunal applies to any other actors at the Tribunal such as prosecutors, judges or other staff.

ally ask these groups is what they view as the purpose of an international criminal trial. The answers are interesting. The students respond by explaining that international criminal trials will end impunity for political and military leaders; deter future war crimes; establish an historical record of the conflict at issue; result in reconciliation among the people in the conflict or post-conflict region; provide reparations for the victims of war crimes, crimes against humanity and genocide; give victims a voice in court, and develop and strengthen international criminal law by imposing the rule of law throughout the world.

There is nothing wrong with these answers. These goals are laudable. Most are listed on the websites of the international courts as among their aspirations and sometime achievements.[43] What is distressing are the many times that students fail to mention that an international criminal trial is also about determining the guilt or innocence of the particular accused on trial; the fundamental and primary reason for the trial.

By its very nature a criminal trial, domestic or international, concerns itself, first and foremost, with the culpability of the accused. Students and young lawyers who are not taught or who fail to understand the importance of that fundamental fact may find themselves participating in the building of international courts that give only lip service to the presumption of innocence, the proper burden of proof of crime, and due process of law. As a society we should do everything we can to avoid this kind of development; not to perpetuate it because it may be seen as difficult or distasteful to openly discuss the necessity to enforce the rights of accused charged with horrific war crimes.

This final point leads back to the comment about fairness for defendants in international trials being "a poor source of legitimacy for trials because it's the victims that really matter."

The international criminal trial process provides victims with a forum in which to tell what happened to them and to testify as to who they believe is culpable. Understandably, not all victims wish to testify in an international court; but many do. At the ECCC, the STL and at the ICC, victims participate in the trials through counsel and are permitted to put questions to witnesses through counsel, under circumstances specified by the rules of evidence and procedure which apply to each of those courts. All international courts also provide significant support systems for victims and witnesses in criminal cases, including financial assistance, medical and psychological support, and protective measures for victims and witnesses and their families when appropriate. Victims are also entitled to seek reparations.

At the ICC, a fund for victim reparations was put in place at the time the Rome Statute was enacted: The Trust Fund for Victims. As described on the ICC website:

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43 See e.g. http://www.icty.org/en/about/tribunal/achievements and see e.g. https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

"The Rome Statute created two independent institutions: the International Criminal Court and the Trust Fund for Victims.
While it is impossible to fully undo the harm caused by genocide, war crimes, crimes against humanity and the crime of aggression, it is possible to help survivors, in particular, the most vulnerable among them, rebuild their lives and regain their dignity and status as fully-functioning members of their societies.
The Trust Fund for Victims advocates for victims and mobilises individuals, institutions with resources, and the goodwill of those in power for the benefit of victims and their communities. It funds or sets up innovative projects to meet victims' physical, material, or psychological needs. It may also directly undertake activities as and when requested by the Court.
The Trust Fund for Victims can act for the benefit of victims of crimes, regardless of whether there is a conviction by the ICC. It cooperates with the Court to avoid any interference with ongoing legal proceedings."[44]

To the author's knowledge no reparations have been paid to date to any individual victim or collective group at the ICC. The ICC Appeal Court decision on victims' reparations in *Lubanga* held that Mr. Lubanga, even though presently indigent, will remain individually responsible for reparations[45] It ordered that reparations from The Trust Fund for Victims were to be paid on a collective basis and that the group eligible to receive such reparations could include victims of the crimes which were proven, even if those individuals did not participate in the trial or file requests for reparations.[46] In the only other completed case at the ICC, *Katanga*, no appeal was brought from Mr. Katanga's conviction. His sentence will be completed as of 18 January 2016. The court has not yet returned any decision in that case on victims' reparations.[47]

There is no reason whatever, given the obvious sensitivity to victims in the international courts, for any informed individual to juxtapose the rights of victims against the rights of the accused. Both matter in a democratic system of law. Each is entitled to different rights under international law and under the statutes of the various courts and tribunals. Enforcing the rights of one group does not preclude enforcing the rights of the other.

None of these circumstances change the inherent nature of a criminal trial. The verdicts ultimately returned after trial arise from the factual find-

44 https://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/27.aspx.

45 See https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1092.aspx, and see *Prosecutor v Thomas Lubanga Dyilo*, ICC Case No. ICC-01/04-01/06-3129, "Judgement on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2", 3 March 2015.

46 See summary of judgement: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1092.aspx

47 *Prosecutor v Katanga*, ICC Case No. ICC-01/04-01/07, summary at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx [noting decision on victims' reparations will be returned on a later date].