

ADC-ICTY Legacy Conference

Conference
Proceedings

The Hague

29 November 2013

ADC-ICTY Legacy Conference

The ADC-ICTY expresses its sincere gratitude to the Erasmus University Rotterdam and the Registry and Presidency of the ICTY for their support in organising this conference.

The ADC-ICTY would also like to thank the following ADC-ICTY interns who have provided invaluable support in the production of this publication: Laura Burmeister, Fábio Kanagaratnam, Christina Karayianni, Isabel Meyer-Landrut, Benjamin Schaefer, Daynelis Vargas, Vesselina Vassileva, Katka Velicka and Vijayatharshika Vivekananathan.

Conference Proceedings

The Hague

29 November 2013

Editor:

Association of Defence Counsel Practising Before the ICTY (ADC-ICTY)

Designed and distributed by:

Association of Defence Counsel Practising Before the ICTY (ADC-ICTY)

This publication is a transcript of the live audio recording of the ADC-ICTY Legacy Conference and may contain minor speech-related errors. The transcript has been carefully edited and revised for the reader, without altering the original content of the speeches.

The transcript of the conference is supported by two articles written by speakers of the conference, as well as an Annex including the biographies of the speakers and the programme of the Conference.

Table of Contents

List of Acronyms	2
Foreword	4
Introduction	6
Welcome and Opening Remarks	10
Keynote Speech	13
Panel I: Rights of the Accused.....	18
Panel II: Transparent Justice - 'The Defence Experience.....	40
Panel III: The Role of the ADC-ICTY	60
Panel IV: ICTY Legacy.....	79
Closing Remarks	101
Additional Article – The Rights of the Accused.....	103
Additional Article – Transparent Justice: The Defence Experience.....	118
Conclusion.....	128
Annex I	131
Annex II.....	132
Annex III	138

List of Acronyms

ADC-ICTY	Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia
AV	Audio-Visual
BiH	Bosnia and Herzegovina
CSS	Counsel Support Section
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EDS	Electronic Disclosure System
EU	European Union
HVO	Croatian Defence Council
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
JNA	Yugoslav National Army
MICT	United Nations Mechanism for International Criminal Tribunals
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OKO	Criminal Defence Section
OLAD	Office for Legal Aid and Defence
OPCD	Office of Public Counsel for the Defence
OSCE	Organisation for Security and Co-operation in Europe
OSCE-ODIHR	OSCE Office of Democratic Institutions and Human Rights
OTP	Office of the Prosecutor
QC	Queen's Counsel

SCSL	Special Court for Sierra Leone
UK	United Kingdom
UN	United Nations
UNDU	United Nations Detention Unit
UNICRI	United Nations Interregional Crime and Justice Research Institute
U.S.	United States of America
VRS	Army of the Republika Srpska
VWS	Victims and Witnesses Section

Foreword

** By Colleen M. Rohan, ADC-ICTY President*

The Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) came into existence in 2002 as an independent, non-profit, professional organisation. Its members come from all over the world and represent disparate cultures, languages and legal traditions. They nonetheless share a common goal; to ensure that the rights of the Accused and the fairness of proceedings in the international courts are guaranteed. The ADC-ICTY is unique in the international criminal law community as it is the only Association of Defence Counsel which has been officially recognised by an international court.

The ADC-ICTY Constitution describes the organisation as “a partner, along with the organs of the International Tribunal, in promoting the fairness of the proceedings and the accomplishment of the mission of the International Tribunal pursuant to United Nations Security Council Resolution 827 (1993)”.¹

This view has been part of the shared vision of the organisation since its inception but the ADC-ICTY had to struggle over the years to effectuate this vision and overcome resistance to it from those who did not understand the scope of the Defence function or the importance of a Defence voice in the development of the law and practices within the international courts.

The ADC-ICTY has achieved significant success. Members of the ADC-ICTY now participate in decision-making processes within the Tribunal relating to matters of importance to the Defence; something which did not occur during the first few years of the Tribunal’s existence. The ADC-ICTY is a self-regulating body. It has its own internal Disciplinary Council and is available to assist its members by providing advisory opinions on ethical and other practice related issues.

The ADC-ICTY also provides practical training to members of the domestic and international legal community on the substantive law as well as courtroom skills training. In conjunction with this training the ADC-ICTY, in partnership with the International Criminal Law Bureau, has for the past years hosted a Mock Trial at the ICTY which has benefited from the participation of ICTY Judges, practitioners and staff.

¹ The Constitution of the ADC-ICTY is on file with the Office of the Registrar of the ICTY. It may also be found at: www.adc-icty.org/home/documents.html.

The ADC-ICTY has intervened as *amicus curiae* in ICTY trials and appeals both on its own volition and on request from the Chambers on substantive and procedural issues. In recent years it has been asked by Defence Counsel to intervene in proceedings at the International Criminal Court and in domestic war crimes courts in the region of the former Yugoslavia.

In 2011, the ADC-ICTY produced, with the assistance of the European Union, and under the auspices of UNICRI and the OSCE-ODIHR War Crimes Justice Project, its “*Manual on International Criminal Defence—ADC-ICTY Developed Practices*”.²

The ADC-ICTY has developed a “unique expertise” arising from representation of the Accused in war crimes, crimes against humanity and genocide cases at the ICTY, including the development of a body of written work, practical experience and courtroom skills which translate to both domestic war crimes courts and other international courts.

The ADC-ICTY Legacy Conference, held in November 2013 in The Hague, was a first of its kind; a conference devoted to discussing the particular role and experiences of the Defence in international criminal proceedings and the lessons to be drawn from those experiences. The conference was attended by hundreds of interested participants including lawyers, judges, prosecutors, students, journalists, academics, and others.

One imagines that in 2002 no one in the fledgling ADC-ICTY envisioned a conference of this type ever taking place, much less attracting the attention and energy of such a diverse group of people.

There are still many issues of concern to the international Defence community which must be resolved in the international courts. There are serious concerns, for example, regarding the adequacy of Defence funding. The Defence continues to struggle for a recognised and respected voice on matters which affect its function. The public must also continue to be educated as to the fundamental importance of the Accused’s right to a fair trial, including the right to the presumption of innocence and due process of law.

The success of the ADC-ICTY Legacy Conference, as well as the ADC-ICTY itself, reflects a large step in the right direction towards resolution of these issues.

² *Manual on International Criminal Defence: ADC-ICTY Developed Practices* (UNICRI, ADC-ICTY, ODIHR OSCE 2011), Introduction, p. 3. The Manual can be found in electronic form at: <http://wcjp.unicri.it/deliverables/manual.php>.

Introduction

** By Judge Alphons Orie*

Unfortunately I was unable to attend the ADC-ICTY Legacy Conference in its entirety. Having read the contributions of the various Conference participants I regret my absence even more than I did at the time. What a wealth of experience! Therefore it is a privilege to have been invited to write a short introduction to the Conference Report. Since the early days of the Tribunal I have felt a strong involvement in this institution and it will surprise no one that my commitment finds its roots in my experience as Defence Counsel. Even though in my present position my views cover a broader horizon than the Defence alone, I am still convinced that the Defence has played an essential role in the ICTY's achievements.

In the various contributions contained in this report we find issues that are common to both the domestic criminal process and the ICTY process, whereas others are ICTY specific or more generally relate to international criminal procedure. But for almost all of these issues it can be said that, even to the extent they are well known in domestic systems, the size of the cases before the ICTY add to their complexity. Colleen Rohan reminds us how expensive and time consuming international criminal justice is. In the early days, as I remember, the expectation was that a case would take six weeks in court. *Tadić*, the first case before this Tribunal and a relatively short one in the history of the ICTY, has shown how unrealistic this expectation was, and what the real dimensions of the cases were. The *Tadić* Trial itself took already some seven months.

In a domestic context both Prosecution and Defence would perhaps not exhaust each and every detail of a case in a full understanding that often minor details will not tip the scale. But if they wish they can delve into every detail, irrespective of whether the case at hand will benefit from it. This may be annoying sometimes and be considered not to be an efficient use of time. In the ICTY context, for the Prosecution and the Defence, there is no way to explore every single detail of all facts covered by the Indictment. The parties cannot avoid having to prioritise the essential and vital materials they want to present in order to mount either a Prosecution or a Defence case. Indeed, what is most relevant comes first and matters of lesser relevance may sometimes have to be bypassed. We cannot afford the luxury to deal with all details as if they were equal, without a thorough analysis of what is most relevant and what is less relevant. This is emphasised by Lord Bonomy who recognises that the size of the cases causes the most difficulties in relation to the right of the Accused to examine Prosecution witnesses. As a consequence he urges the

Defence to identify and focus attention, effort, and resources on what really matters, that is significant and controversial issues. The size of the cases takes us near the limits of what still fits within the boundaries of criminal proceedings. But we also know that impunity, or even worse punishment without a trial, is no alternative. We have to continue to struggle with the scope of our trials with full commitment to the principle of a fair trial.

Ensuring the expeditiousness of the trials becomes problematic when Indictments cover a multitude of incidents over a long period of time and in a large geographical area. At the same time, chapeau requirements for Crimes Against Humanity may prevent a narrower and reduced approach to the charges brought against an Accused. The equality of arms between the Prosecution and the Defence, both in and out of court, requires thorough reflection on what the tasks and duties of the parties are. Mira Tapušковић draws our attention to this matter. She stresses the numerical approach: why do some Chambers allocate equal time and an equal number of witnesses when others do not. But she also asks when this disadvantage becomes substantial and that this notion of substantial disadvantage may be too vague to apply.

A mathematical approach does not often give an answer where a legal dispute has arisen. Where Christopher Gosnell seeks to gain further insight, by presenting statistics on appeal success rates, he shows that while these figures may have some illustrative value, there are other important factors to be considered. Unsettled legal issues are among them. Comparing domestic statistics and ICTY statistics would come down to comparing statistics on very large numbers in domestic practice with small numbers in the relatively short history of the ICTY. Small numbers may affect the validity of the outcome of any statistical analysis.

When I refer to legal issues, I am well aware that although at first sight they seem to be of a kind we are familiar with, they often turn out to be differently shaped. Just to give an example, borrowed from the ICC, I refer to the presence of the Accused, an issue that has divided the major legal system in the world for a long time. The matter was raised during the discussions by Saša Obradović, who referred to developments at the ICC triggered by the Kenyan case. No trials *in absentia* were foreseen in the ICC Statute (Art. 63(1)). Temporary absence of an Accused who has waived his right to be present is not the same however. But the type of cases before the ICC introduced a new element in the discussion on trials in the (temporary) absence of the

Accused, i.e. excusal from presence at trial due to extraordinary public duties. A novelty! Whether we are happy with it or not, it is now in the ICC's Rules of Procedure and Evidence.³

Many speakers referred to the practice of the ICC. That comparison, and I will not expand on it, is often favourable for the ICTY. The history, although short, and the way in which we shaped the institution as it stands now, fills us with pride. When I say us, I refer to all of those who participated in the development and the growth of the ICTY, obviously including Defence Counsel. That may not always have been fully understood when other legacy conferences were organised. When I reviewed the Conference proceedings held in Sarajevo (6 November 2012) and Zagreb (8 November 2012),⁴ I found none of the moderators or panellists to have been recruited from the ranks of Defence Counsel. Among the well over 50 contributors to the report of the February 2010 Legacy Conference⁵ we find only one, Geoffrey Robertson, practicing lawyer, although he never represented an Accused before the Tribunal and does not focus on the Defence in his contribution. The contribution of the International Bar Association's Executive Director, Mark Ellis, also does not focus on Defence issues. A similar picture arose when I reviewed the proceedings of the 2011 Legacy Conference: no moderator or panellist from the Defence.⁶

This demonstrates the need for active involvement by the Defence in many areas of the Tribunal's functioning. I remember my frustration when we had no possibility to address the Plenary of Judges on issues related to the Rules. In *Tadić* we, i.e. the Defence, strongly felt the need for a rule on *safe conduct*, but had no standing in any forum to raise the matter. Where the ICC is blamed by Mira Tapušković for not even providing for Defence input when a Code of Professional Conduct for Counsel was drafted, whereas the Prosecution's input appears in the Rules, I feel again how fortunate we are to have Defence participation in the work of the ICTY's Rules Committee. Defence input is invaluable!

Many of the topics the Conference dealt with trigger my curiosity and enthusiasm. I have to resist the temptation to deal with them all and have to remind myself that my task is limited to introducing this publication. I am convinced that everyone who reads this Legacy Conference report will agree with me that this publication, after the successful launch of *The Manual on*

³ Rule 134 *quater*, adopted by ICC-ASP/12/Res.7, 27 November 2013.

⁴ *Legacy of the ICTY in the former Yugoslavia*, published by the ICTY Outreach Program 2013.

⁵ *Assessing the Legacy of the ICTY*, ed. Richard H. Steinberg, Leiden/Boston 2011.

⁶ *ICTY Global Legacy Conference Proceedings*, The Hague 15-16 November 2011.

International Criminal Defence ADC-ICTY Developed Practices in 2011, is a new milestone. Where the Defence in previous Legacy Conferences may not have been offered an adequate role to play, it has shown its inherent fighting spirit and convincingly taken revenge with its own Conference and this publication.

Welcome and Opening Remarks

Novak Lukić, ADC-ICTY President

Good morning, Your Excellency, Honourable Judges, Dear Colleagues, Ladies and Gentlemen. Two years ago the members of the ADC-ICTY began discussing the needs and the importance of an ICTY Legacy Conference from the Defence perspective. We were aware that we are approaching the final days of the ICTY. The circle of the project that lasted for several decades is almost closed, and the focus and the energy that creates and maintains the efforts of that project will be diminished. The creation of the ICTY as the first War Crimes Court created by the UN and the first international War Crimes Tribunal since the Nuremberg and Tokyo Tribunals will certainly leave a significant mark in the legacy of international criminal and humanitarian law. Additionally, the development of the procedural and substantive law at the ICTY has informed, cautioned and instructed the international community's involvement in armed conflicts. And finally, and quite importantly, the Tribunal's work had profound consequences, both intended and unintended, on the region of the ex-Yugoslavia, politically, socially and legally.

Throughout these years, Defence Counsel and their teams were not mere spectators in the court and trial proceedings before the ICTY. We had an important responsibility in a new mixed system of law that was unsure and uncomfortable with how best to proceed in the light of the magnitude of the issue presented. That responsibility included establishing that the recognition and the respect for the Defence function was critical to the validity and integrity of this emerging body of law. We have struggled to show that a fair trial can be possible only through acceptance and respect of the Defence as an equal party in the proceedings; that only in conducting a fair trial is there a possibility that the work done here can be accepted and respected; and above all, that only in a fair trial can we achieve our main goal: professional representation of our clients.

In performing our task, we went through various experiences and shared them amongst ourselves, together with our worries, successes and disappointments. Working with this ever-growing team of people, dedicated to the proper and adequate Defence for Accused, has been exciting, educational, challenging, sometimes humorous, but also sometimes tragic and painful.

Coming to the end of this road, we believe that all we have done and went through cannot be, and must not be, disregarded. It needs to be shared with others who are not part of our

association. We believe that our experiences are worthy to be shared primarily with the international professional community and with those who will find themselves in our shoes in the future, responding to future wars. Because no matter how hard we want the word “war” to be deleted from the dictionary of modern civilisation, wars remain our reality, and besides them war crimes as an evil that follows each and every war.

The concept of this conference entails speeches of our members but also those who have had the task of sitting in judgement. It is our pleasure to say that the President of the ICTY, His Excellency Judge Meron, the former Judge Bonomy, and Honourable Judges Moloto and Morrison accepted our invitation to participate as speakers in this conference. We also want to hear the voice of those for whom this conference is taking place - young lawyers, future Defence Counsel, future Judges and Prosecutors. So we organised this conference as a panel with interactive participation.

I must underline that this is not our first public project. We are proud that we published the *Manual on International Criminal Defence: ADC-ICTY Developed Practices*. It is our immense pleasure to learn that this Manual is used as a roadmap for Defence Counsel in trainings and in trials throughout the former Yugoslavia. Our intention is to issue a publication as an outcome of this conference that will facilitate the spreading of the information that we share here to the professional public.

I wish to express our gratitude to everybody who made this conference possible, to our colleagues who accepted our invitation to participate, to the many young volunteers and interns who contribute to our organisation, and especially to our Head of Office, Ms. Isabel Düsterhöft. Our special gratitude goes to the Registrar of this Tribunal and the Office for Legal Aid and Defence (OLAD), and as well to the Erasmus University from Rotterdam. We regret that many embassies, public and international institutions never replied to our multiple requests for help in the organisation of this conference. Maybe, in the broader context that depicts the image of Defence Counsel in larger society. As for us, we will remain the keepers of the flame and we will keep it as a light for the road of the fair trial ahead. We will use it to fight the misunderstanding and misapprehensions and prejudice so far present in and out of the courtroom. I underline this in the name of six hundred legal assistants, case managers, interpreters, more than two hundred investigators, one hundred Defence experts, without whom our mission could not exist. But I

also underline this in the name of two hundred twenty Counsel from more than twenty countries who worked before this Tribunal, founded and were a part of the ADC-ICTY.

Thank you.

I am calling now President Meron as a keynote speaker. Your Excellency, the floor is yours.

Keynote Speech

His Excellency Theodor Meron, President of the ICTY and MICT

Thank you, Mr. Lukić, for your kind words of introduction. As some of you may know I have just returned from several days in Bosnia. I have been at this incredibly painful site of the recent mass excavations in Tomašica. I went to the camp, or what remains of it, in Omarska and I was in Prijedor to meet with representatives of Izvor and other victims groups, whom I have also met in Sarajevo. Nothing brings into perspective the work that we are doing at the Tribunal as much as visiting the sites of those atrocities.

Let me greet Lord Bony, a distinguished colleague of mine, who has made an incredible contribution to the work of the Tribunal as a Judge and as the Chair of the Working Group on Speeding Up Trials. His work on this Working Group led to a number of reforms in our trial practices that increased the efficiency and the fairness of our proceedings and we are all ever so grateful to him. I am so delighted to see here my distinguished colleagues, Judge Sekule and Judge Ramaroson, as well, and I am pleased to hear that other ICTY Judges will participate in the programme.

Excellencies, Ladies and Gentlemen. This past spring, on 25 May 2013, we marked an important milestone: the passage of twenty years since the establishment of the International Criminal Tribunal for the former Yugoslavia by the United Nations Security Council in Resolution 827. In the months that have followed, we have commemorated this milestone here, at The Hague, and in the former Yugoslavia with exhibits, working-level meetings and conferences. And I am delighted to take part in this ADC-ICTY Conference today, as it provides yet another opportunity for us all to reflect upon the legacy of the ICTY, in the twentieth year since its establishment.

When the ICTY was created, of course, many had their doubts as to what it could or would accomplish, and whether the bold ideals embodied in Resolution 827 and reflected in the Tribunal's Statute would become a reality. Over the years, the Tribunal has faced a number of challenges, both big and small. But as we are gathered here today, I am proud to report that the ICTY has put to rest the early doubts and achieved far more than many would have expected two decades ago. Indeed, many of the advancements made since 1993 in the world of international criminal justice were made possible thanks to the ground-breaking example set by

the Tribunal, and when the Tribunal eventually closes its doors, as it will before long, it will leave behind an important legacy.

In some respects, this legacy is quite tangible: As a result of its trials and thanks to the efforts of both the Prosecution and the Defence, the Tribunal has become the guardian of an extraordinary quantum of evidence and information concerning the events – the sad events – during the conflicts in the former Yugoslavia. This unparalleled compilation of material will serve students and researchers for generations to come.

Over the past two decades, the Tribunal has also crafted practical processes and procedures to address a wide range of responsibilities, including the enforcement of sentences, the transfer of accused persons across State borders and the protection of victims and witnesses. As the first international criminal court of the modern era, the ICTY's advances in relations to these and other key court management matters have served as valuable models for other international courts, and indeed for judiciaries and practitioners in national jurisdictions as well. These advances, and the expertise the Tribunal and its staff have developed in making these policies and procedures operational, are also an important part of our legacy.

More fundamentally, the ICTY has demonstrated that it is possible to try even the most complex of cases, involving allegations of some of the most horrible crimes imaginable and brought against senior military and political leaders – and to do so not once or twice, but time and time again.

And of course, through hundreds of decisions and judgements, the ICTY has established key precedents in the area of international criminal and humanitarian law, precedents that clarify the scope of customary international law. Our rulings on matters of international criminal and humanitarian law have not only been applied in the Tribunal, but have informed the work of other international courts and of judicial authorities, military and political advisors and practitioners in domestic jurisdictions.

But this is not all of our Tribunal's legacy. Although the ICTY is a court mandated to try individuals for serious violations of international humanitarian law, in trying these cases, our Court has also prided itself in having at its core a deep commitment to respect for human rights – and for due process of law in particular. Fair trial rights, such as the right to be presumed

innocent until proven guilty, the right to a fair and public hearing, are not simply at the core of our Statute; they are, and continue to be, a fundamental concern, the import of which informs how trials and appeals are conducted day in and day out and the structure and myriad services provided by the Registry of the Tribunal.

Fair trial rights are the focus of a great many of our decisions and judgements, and our rulings in this regard embrace a range of topics: from the sufficiency of the Accused's notice of the nature and cause of the charge against him, to the adequacy of the time and facilities granted for the preparation of his Defence, to the availability of translations of certain documents and judgements in a language that the Accused can understand. My fellow Judges and I have weighed such questions as the right of an Accused to represent himself on appeal, the scope of the principle of the equality of arms and the standard for establishing fitness to stand trial.

In its 2001 Appeals Judgement in the *Čelebići* case for example, the ICTY's Appeals Chamber concluded that in the absence of express statutory safeguards and warnings, an Accused's silence could not be considered in the determination of guilt or innocence. In the *Furundžija* Appeal Judgement, the Appeals Chamber considered the right to a reasoned opinion, and in a 2007 decision in *Prlić*, the Tribunal weighed questions involving the admissibility and evaluation of evidence.

In addressing these and other fair trial questions, we have turned time and again to the standards set by international human rights conventions, by the European Court of Human Rights and by other key human rights bodies and instruments, weaving international human rights law not simply into the fabric of our own jurisprudence but into the practical example we set for other international courts and tribunals and for courts in domestic jurisdictions. This centrality of human rights law and of fair trial principles to the work of our Tribunal is undeniably an important advancement as compared with the approach of earlier courts trying the Accused of war crimes and other violations, such as the tribunals established at Nuremberg in the wake of the Second World War.

To be sure, many may disagree with the outcome of individual decisions and judgements issued by the ICTY, but I believe that no matter one's view on individual rulings, it is abundantly clear that a respect for fair trial rights and concern for the paramount importance of ensuring fair proceedings have been central to all that the Tribunal has done over the course of the past

twenty years. The evident centrality of fair trial guarantees and due process to our proceedings has been, and will no doubt continue to be, another vital part of our legacy, both for other international criminal courts and for courts in countries around the world.

Why, one may ask, does this matter – why is there such a focus on fair trial rights? It is because, to my mind, without a fair trial – without a fair process – there is neither justice nor accountability. This is true for any court of law worthy of its name. But given the high profile of the cases that come before our Tribunal, and the nature of the alleged crimes at issue, it is all the more important that we ensure that our proceedings are scrupulously fair and governed by the sober application of the law and the rigorous consideration of the evidence put before us.

Ensuring the fairness of the proceedings is, of course, the responsibility of the Judges of the Tribunal, and it is a responsibility that my colleagues and I take very seriously. But Judges are not the only ones who are guardians of the fairness of the Tribunal's proceedings: the parties who appear before us, including both the Prosecution and the Defence, play an invaluable role in this regard.

As you are no doubt aware, the Tribunal's founding documents and Rules reflect a combination of different legal traditions, but the Tribunal's approach to matters of procedure was indisputably influenced early on by the common law adversarial system, even as its approach to evidentiary matters showed the impact of continental civil law traditions. Others may disagree, but to my mind, the Tribunal and its proceedings have benefited tremendously from this adversarial structure and from the rigorous advocacy by all parties that it invites.

Defence Counsel appearing before the Tribunal are, indisputably, vigorous advocates for their clients and their clients' interest, as they are ethically required to be – and the Tribunal greatly benefits from this robust representation. The role of Counsel in identifying and presenting careful, researched arguments concerning the potential violations of fair trial guarantees – and of the law more generally – is invaluable to the Chambers' own ability to consider and address these issues. The committed engagement and considerable efforts of Defence Counsel in service of their clients are thus crucial not just to the functioning, but to the credibility of both the Tribunal and its work.

The part played by the Prosecution is equally important. This is not simply because it falls to the Prosecution to bring the cases that form the core of the Tribunal's statutory mandate and to make cogent and careful submissions on all matter of issues before the Chambers, just as the Defence does. It is also because, as the Tribunal's Appeals Chamber recognised more than thirteen years ago, the Prosecutor and his staff are, in essence "ministers of justice assisting the administration of justice", with all of the considerable responsibilities to ensure the fairness of the proceedings that this significant role entails.

In sum, if the Tribunal's central focus on fair rights and due process of law represents one of the most significant innovations in international justice in the modern era, and if its precedents, both practical and jurisprudential, constitute one of the most significant aspects of the Tribunal's legacy – as I believe they do – the Tribunal's achievements in this regard are not the institution's alone. These achievements and this legacy are also due to – and indeed, they are thanks to – the efforts and dedication of the worthy advocates who come before the Tribunal and the seriousness of purpose with which they approach their tasks.

I recognise that the role of Counsel before a court is rarely easy, and that appearing before an international criminal court like ours may involve novel challenges, long hours and a scope of work rarely, if ever, seen in domestic proceedings. Please know, however, that all of you in the audience who appear before the Tribunal have my sincere admiration and respect for your dedication to your work, to the principles and laws that guide us and to international justice. Your role in helping to ensure the Tribunal's commitment to principles of fairness and due process have been critical to the ICTY's achievements in this respect, and for this, in particular, I salute you and I thank you. As we move forward with today's discussion of legacy, I hope that all of you know that the Tribunal's legacy is very much your legacy as well.

Thank you.

Panel I: Rights of the Accused

Moderator:

Michael Karnavas, Defence Counsel at the ICTY and ECCC

Speakers:

- Mira Tapušković, Defence Counsel at the ICTY
- The Right Honourable Lord Iain Bomy, Former Judge at the ICTY
- Christopher Gosnell, Defence Counsel at the ICTY

Moderator, Michael Karnavas

Good morning Ladies and Gentlemen, we will now start with our first panel discussion and it deals with the rights of the Accused. When I think of the rights of the Accused, I think of due process, or better yet, the process that is due. And where better to look for an expression of the rights that enable the process that is due to be afforded - both domestically and internationally - than at the International *Covenant on Civil and Political Rights* ICCPR. These rights, commonly referred to as fair trial rights are found in other prominent legal instruments such as *The European Charter on Human Rights*, *The American Convention on Human Rights*, and *The African Charter on Human and Peoples' Rights*.

So what are these fair trial rights? The right to a good Defence, the right to an open and transparent trial, the right to have enough time and resources to investigate and challenge the Prosecution's evidence, the right to gather Defence evidence, the right to have access to all of the Prosecution's evidence, the right to a fair opportunity to question Prosecution witnesses thoroughly, the right to have Defence witnesses heard, the right to be judged fairly and impartially, the right to have Judges who will follow the procedure and apply the law correctly and even-handedly. These are the rights of the Accused in a nutshell. More of which we will hear throughout the day as we discuss the ICTY legacy from the Defence perspective.

We will first hear from Mira Tapušković and she will be talking about the equality of arms. Mira Tapušković has been around for a very, very long time at the ICTY. She was Vice-President of the ADC-ICTY between 2003 and 2004 and has been working at the ICTY since 1996. She was

a Legal Assistant and Co-Counsel in the *Mužić* case, Co-Counsel in the *Radić* case and currently she is Co-Counsel in the *Popović* case and has also represented the only woman to have been at the UNDU, *Jelena Rašić*; she was Lead Counsel in that case. In addition, she has been on the Executive Committee for several years. She was also on the Disciplinary Council and on the Amicus Committee of the ADC-ICTY.

We will then hear from the Honourable Right Lord Iain Bonomy, who ran what I would consider the Rocket Docket at the ICTY. Anybody who appeared before Judge Bonomy had to move very quickly and very efficiently. Lord Bonomy has been practicing as a Solicitor Advocate and Queen's Counsel since 1968 and has served as Senior Prosecutor in the Supreme Court of Scotland between 1990 and 1996. He was appointed Judge of the Supreme Court of Scotland in 1997 and has sat in civil and criminal cases at first instance and on appeals. Between April 2004 and August 2009, he was a permanent Judge at the ICTY and a member of the Trial Chamber in the case of *Slobodan Milošević*. He was Presiding Judge in *Milutinović*, with five other Serbian politicians and military and political leaders, a trial that went on for several years. He served as Judge of the Court of Appeals of the Supreme Court of Scotland between 2009 and 2012 and he retired, unfortunately, because he is a fine Judge, in October 2013. He currently holds a part-time appointment as Surveillance Commissioner for the UK, supervising the deployment by policy and other law enforcement agencies of intrusive and sensitive surveillance techniques; he might be needed in the United States. He is a Chairman of working groups for both the ICTY and in Scotland, considering what improvements might be made in the practice and procedure for serious international criminal proceedings, producing various reports and recommendations. And, by the way, Lord Bonomy will be talking about the right of confrontation, one of our favourite topics as Defence lawyers.

And then we will hear from a distinguished lawyer advocate, both at trial and on appeal, and that is Christopher Gosnell, and he will be talking about the right to appeal. Most recently, Chris was on the *Taylor* appeal. Chris is currently serving as Vice-President of the ADC and he also served on the Amicus Committee. He has held positions as Legal Officer in the Chambers at the ICTR between 2003 and 2006, as well as in the Office of the Prosecutor at the ICTY, for which we will forgive him, between 2006 and 2008. And since 2008 he has been a Defence Counsel. He was Lead Counsel in the *Borovčanin* case. Currently, he is Co-Counsel in the *Hadžić* case and I believe he is also a Legal Consultant in the *Župljanin* case. And as I have noted, he was on the appeal of *Taylor*, but has also worked at the ICC in the Public Counsel for Victims section.

Each panellist has ten minutes and I will act as Judge Bonomy would in his court, I would cut them off at ten minutes. Then we will have some questions and answers.

Thank you.

Mira Tapušković: Equality of Arms

Good morning to everybody, I will do my best to fit within ten minutes, but it is not my brighter side. My subject is the equality of arms. This is one of the basic principles. In *stricto sensu* it means that the Defence and the Prosecution must have procedural equality, equal access to the Court.

Since the creation of the United Nations, we are witnesses of a strong commitment to all human rights instruments, the *Universal Declaration of Human Rights 1948* and others, and to the principle of fairness as well as the perception of the fair justice system.

Today, we are not dealing with the equality of arms in general terms, but how that principle is implemented and how it functions here, before the ICTY. The principle of equality of arms is a jurisprudential principle and is a part of the right to a fair trial. We just heard his Honour Judge Meron telling us a lot about the fair trial. What is a fair trial? It is to afford every party a reasonable opportunity of presenting its case under conditions which do not place a party in a substantial disadvantage vis-à-vis its opponent. When is that principle violated? When a party can prove that it has suffered irreparable prejudice, that substantial disadvantage exists and was proven.

The strong link between the equality of arms and the right to a fair trial is an expansive institutional entitlement, and relates to the structural independence of the Defence. Equality of arms is crucial, not only to protect the human rights of the Defendants, but also to ensure the legitimacy of the courts themselves.

Let us start from the ICTY Rules, the Statute and other Regulations. The Statute in Article 21 prescribes: “*All persons shall be equal before the International Tribunal. [...] the accused shall be entitled to a fair and public hearing. [...] the accused shall be entitled to the minimum guarantees, in full equality*” and so on. But in spite of the meaning of that principle, the equal access to court, from the Defence’s

point of view, is double-folded. We have, let us say, “in-court” situations and “out of court” situations.

Regarding “in-court” situations, the ICTY jurisprudence shows the disparity between theory and practice. The Chambers define and apply the principle differently in different cases. Usual issues raised before the Chambers are the number of witnesses and the time allocated to present the Defence cases. The Defence is on a regular basis limited to a number of witnesses and time allocated. A strict mathematical equality would suggest that all parties should be allocated the same number of witnesses and amount of time to present their cases. Chambers have expressed disfavour with a strict mathematical approach and support a standard of basic proportionality. In some other cases the Chambers have applied this substantially disadvantageous standard to decide on claims of inequality of arms. But, that substantially disadvantageous standard is quite an unclear threshold that is very difficult to satisfy. It is always up to the Chambers to define, to evaluate, what disadvantage is and what substantial disadvantage is.

Protecting human rights and the fairness of the trial requires that all persons have effective access to legal services provided by an independent legal professional. The independence of lawyers means that they perform their professional duties without any improper restrictions, influence and inducement.

I will tell you about just one very intrinsic example when the independence of our profession is in question. It is Rule 8 of the ICC Rules of Procedure and Evidence: *“The Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft of Code of Professional Conduct for counsel, after having consulted the Prosecutor”*. The Defence lawyers have no right to provide input into the Prosecutor's Code. This is certainly a lack of independence under the Council of Europe guidelines.

Now, let us start from the ICTY jurisprudence. We have several cases, such as in *Prlić*, *Stakić*, *Orić*, *Tadić*, *Karadžić*, where in the majority of those cases, issues related to the number of witnesses and time allocated persist. In the *Prlić* case for example, the Trial Chamber reduced the time already allocated to the Defence. The Trial Chamber took into consideration the complexity and number of witnesses in determining whether the reduction of time would afford the Defence a fair opportunity to present its case. The Defence got twenty-five per cent of the time allocated to the OTP, and the conclusion was that the Defence was placed at a substantial

disadvantage vis-à-vis the Prosecution. The other issue in the *Prlić* case was the number of material that each Accused can translate through bodies within the ICTY.

In the *Orić* case, the Appeals Chamber has found, which is very interesting from the Defence point of view, that the OTP *“has the burden of telling an entire story, to present a coherent narrative and provide every necessary element of the crimes charged beyond a reasonable doubt. But, Defence strategy, by contrast, often is focused on targeting holes in the OTP cases which may require less time and fewer witnesses and this is sufficient to explain why a principle of basic proportionality rather than strict mathematical equality generally governs relationship between time and witnesses allocated to the both sides”*. In the *Karadžić* case, the Trial Chamber allocated the same time for the Defence to present its case as it was allocated to the OTP, which is something new.

But let us see how this relates to “out of the court” situations, which are very important for the Defence. Generally, the Prosecution has more resources to work with than the Defence. The OTP enjoys the use of vehicles, drivers, investigators, interpreters, money and other resources, while Defence teams are much more limited. The Prosecution is permanently based in The Hague. Defence Counsel go back and forth.

This is obviously an inequality of investigative resources. The OTP began investigations, one of the most important stages of the proceedings, years and decades before most of the Defence teams. They did so together with enormous teams of investigators, experts and other support staff. You can just look at the Demographic Unit of the OTP, which is something that the Defence can only dream of. The OTP is accommodated in a much more convenient working space. Between 2002 and 2008, we were struggling for Defence space in up to fifty square meters with hundreds of lawyers and support staff.

The budget of the ICTY is a very good example. For the years 2004 and 2005, when we had several on-going, very big and very important cases, the Defence budget at the ICTY was just a bit less than thirty million, while the Prosecution budget was a hundred million. My conclusion is that the equality of arms should be considered much wider, to include the equality of means and resources as well.

The other Rules of the ICTY are very interesting and, from my point of view, violate this equality of arms. The *Directive on the Assignment of Defence Counsel* prescribes limited time to prepare

the case in the Pre-Trial stage, according to the levels of cases. Moreover, Co-Counsel joins the case at the very late stage, just a few months before the commencement of the trial. Generally, the OTP has much easier access to the local authorities and to the archives. Access to witnesses is a separate issue. Whenever we talk to witnesses, if they accept to talk to us, we do so in muddy places, café bars and restaurants. But the OTP has its field offices and the assistance of the police and local authorities.

In my point of view there is another dimension in that principle. An example of this is the decision in the *Gotovina* case. The members of the *Gotovina* Defence team were under criminal investigation and criminally prosecuted in Croatia for acts performed in the fulfilment of their official functions before the ICTY. The Prosecution never faced such a problem. Pursuant to Rule 29 of the Statute, States are obliged to cooperate with the Tribunal and any Chamber's orders. In practice, this means cooperation with the Prosecution. Seldom and with a lot of difficulties does this relate to cooperation with the Defence. As it was said in the *Gotovina* case and the *Rasić* contempt case, members of the Defence teams, even case managers, are the ICTY's "officers of justice". Such an institutional weakness can undermine the legitimacy of any criminal court over time and affects its credibility.

Thank you.

The Right Honourable Lord Iain Bonomy: Right of Confrontation at Trial

Well, Mr. President, your Excellencies, Distinguished Guests, Ladies and Gentlemen, many of whom I hope I can still call friends. As a champion of a rigid application of time limits, often robustly challenged by members of the ADC, I stand here feeling utterly vindicated by the conversion of the ADC to be dedicated disciples of time limits. The evidence could not be clearer. Not one speaker today will have more than ten minutes and some even five. That is quite a short time. Mind you, and I am thinking of no one in particular Mr. Karnavas, there are those who can make ten minutes seem like an eternity.

It is always a pleasure to visit The Hague. There are many reasons for that, but I will mention only two of them. The first may seem strange to you and that is the weather - I suppose that I have not chosen a particularly good day as an example - but if you are surprised by that statement, you have not been to Glasgow. I am one of a very small number at the ICTY who come from a worse climate than in The Hague.

The second reason is this. For any lawyer with an interest in international law The Hague is the undisputed capital of the international legal world. There are countless international legal organs based in many different parts of the world, but The Hague is home to the principal ones and bears its status with dignity and distinction. Among those principal international organs, I count the ICTY and its various component parts, including the ADC. Those of you who were here during my time know the high regard in which I hold the ADC. It is therefore an honour and indeed a privilege to be invited to address this Legacy Conference.

As an outside observer now, I am acutely aware of recent unfortunate events relating to the work of the ICTY and also the adverse criticism made of certain judgements. The Tribunal has recently figured large in the mind of the international community and that can be a cause for anxiety. However, the power of the work done here by the Tribunal since 1995, its positive impact on international humanitarian law and international criminal law, and its resilience as an institution are such that it will emerge from this difficult period and, in bringing its mission to a close, hand down as part of its legacy a foundation for the continuing development of international criminal law and procedure. And none of that could have been achieved without a stout, intellectually robust and energetic Defence. That, Mr. Moderator, has been and continues to be your contribution to the ICTY and its legacy.

And I turn now to the right to confrontation at trial, a key component of the adversarial process under which we appear at the moment to be condemned to operate in international criminal tribunals. Generally speaking, in any properly organised criminal justice system, the majority of Accused are convicted. I say that purely and simply as a statistical fact. It is what you would expect of a rigorous system of public prosecution. So statistically, the Defence start at a disadvantage. In a well prosecuted case, by that I do not mean an aggressively prosecuted case, but a sensibly prosecuted case, most interlocutory decisions tend to go the way of the Prosecution. That is probably a reflection of the generally stronger nature of the Prosecution case. Those facts of life, combined with the gravity of the allegations brought before this Tribunal and the length of the sentences that may be imposed, place an enormous burden on Defence Counsel who, in addition, do not set the agenda, but must respond to the programme set by the Prosecutor. You will never redress the balance entirely, but you can go some way towards that goal by challenge and confrontation. It may be the strongest weapon in the Defence armoury.

So how is this weapon to be deployed? Well, certainly not aggressively or obstructively. The words “challenge” and “confrontation” may sound aggressive or obstructive; both, I would say, negative qualities. In my experience, neither approach will produce positive results. Productive confrontation demands skill and guile if it is to achieve its objective, whether that be to obtain a favourable answer, or to discredit a witness, or indeed to obtain a favourable ruling from the Court. You must never lose sight of the purpose of the confrontation. You will note from the examples that I have just given, that I give confrontation at trial a wide definition, extending not only to the application of cross-examination skills, but also to exercising powers of advocacy and persuasion. Confrontation may, therefore, be with the Judges on issues of law and procedure and a witness on the evidence. From neither can you expect to gain much by defiance or discourtesy. Let me deal very briefly with confrontation with the Judge or Judges; in view of the time I will say very little on this. It is my belief, expressed in this institution on a number of occasions, that one of the functions of Defence Counsel is to make the Judge’s job difficult. That is a subject that, at your next conference, I should be delighted to develop further.

But today, let me concentrate on confrontation in the conduct of examination and cross-examination. The starting point for the right of confrontation of the witnesses is Article 21 (4) (e) of the Tribunal’s Statute: “*the right to examine witnesses against the accused*”. In the description of the points I should address, prescribed in my invitation to the conference, is a series of what has said to be obstacles to the exercise of this right: changing rules and procedure, untimely and voluminous disclosure, irregularities in the preparation of witness statements, problems of dealing with adjudicated facts, inadequate investigation, inadequacy of prior counsel. Well, I recognise that rule changes and delayed and incomplete disclosure can place additional, untimely and often unnecessary burdens on the Defence. However, some of the difficulties highlighted there I am not really qualified to speak of, such as inadequate investigation or inadequacy of prior counsel; it is not something I have any great experience of here. The difficulties I do recognise mostly arise as a result of the size of the cases.

In spite of the length of the trials we have, you will never have the time you would like to do the job the way you would like, as a perfectionist would wish to. In the defence of Accused before the ICTY, it is unquestionably necessary to identify and focus attention, effort and resources on what really matters; that is on the significant controversial issues. It is counter-productive to spend time exploring trivial inconsistencies, challenging the irrefutable and confronting the incontrovertible. Sometimes, wise discretion decrees that you accept that the evidence is the

evidence and that you must await final brief and closing arguments to put your gloss upon it. Where the Trial Chamber can see determined efforts by Defence Counsel to focus on the issues in dispute, the Chamber will inevitably be receptive to applications for indulgence. Defence Counsel may also strengthen their case for time for preparation for cross-examination by assisting the Chamber in the pre-trial phase, and indeed during the trial, to draft bespoke procedural rules, specifically tailored to the requirements of that case.

Under reference to the Rules of Procedure and Evidence, which give the Trial Chamber very wide powers to control the proceedings, astute Counsel may, for example, suggest time limits for disclosure of witness statements under Rule 92 *bis* and *ter*. On the other hand, statements under these rules, compiled under pressure, especially if they are an amalgamation of several statements by the witness cobbled together often at the last minute, can be very fruitful cross-examination material for Counsel. So I urge you not to be quite so circumspect as in the past perhaps about your preparation. Sometimes speedy and clever reaction to last minute documents produced by the Prosecution will enable you to focus on inconsistencies and omissions that, given time, would probably have been detected by the Prosecutor before the material was presented.

These are but a few examples to illustrate the main point I seek to make. The right to confrontation is but one element in the scheme of international criminal justice. It must be seen and exercised within that greater scheme. The overarching principle is that of fair and expeditious trials. Fairness and expedition run hand in hand. Tribunal Judges are conscious of the need to expedite trials. Once the process begins and the clock starts ticking, it will grind remorselessly to a conclusion. There is nothing to be achieved by defiance. On the contrary, there is a great deal to be achieved by cooperation. And because, as I believe, astute proactive cooperation of Defence Counsel with a Trial Chamber will provoke a positive response from the Trial Chamber and render its own rewards, cooperation should be seen, not only as a good idea, but as a responsibility of Defence Counsel.

Now with that I have come full circle. If confrontation is one the foremost weapons in the armoury of the Defence, then Counsel have a duty to their clients to maximise the impact of confrontation, by playing their part in a positive way in making the adversarial process work. The duties and responsibilities that go hand in hand with the right to confrontation as such as to make it difficult, if not impossible, for a self-represented Accused to defend himself or herself

adequately. Of course, whether international criminal trials should be conducted under the adversarial system at all, is another major controversial issue, but one for another day.

I wish you well in your deliberations during the course of today.

Thank you very much.

Christopher Gosnell: Right to Appeal

I would like to thank Judge Bonomy for those remarks about confrontation and it reminds me that another vital element of functioning trials is collegiality, as well as confrontation. Looking out, I am deeply gratified to see so many former colleagues and friends from the different organs of the ICTY as well as other Tribunals. This conference is the kind of exchange that is all too lacking from our, not only professional lives, but perhaps personal lives with unfortunate and perhaps unintended consequences in the courtroom.

You do not need me to tell you that both the Prosecution and the Defence have a right of appeal before the ICTY. You do not need me to tell you about the distinction between the standard of appellate review for findings of fact and the standard of appellate review for findings of law. Instead, I propose in the short time available to try to encapsulate what has been going on recently in the appellate practice of the ICTY; the reasons for these recent developments; and examine how they affect the overall fairness of the proceedings.

If we look at the last fourteen Defendants before the Appeals Chamber, and I am including here two ICTR Defendants, we see that six Defendants had their convictions substantially affirmed with no change in sentence. That does not mean that no grounds of appeal succeeded in respect of those six Defendants, but merely that any such errors discovered on appeal were too insignificant to warrant any change of sentence. Two Defendants had their sentences increased and the average increase was seven point five years.

Six Defendants – and this is the figure that has provoked consternation amongst some observers – had their sentences reduced, and the average reduction for those six Defendants was twenty-three years. In other words, 43 per cent of those recent appeal cases involved substantial reversal on appeal with a major reduction of sentence or outright acquittal.

The next slide illustrates how that compares to domestic rates of reversal on appeal. The Chinese rate of reversal of appeal is zero point five per cent; in England it is eleven per cent; and even in the ever-litigious United States, the reversal rate in federal cases - which tend to involve the most complex criminal matters - is twenty per cent. Of those twenty per cent, incidentally, about half are remanded, whereas the other half are terminated.

Why is there such a high rate of intervention by the Appeals Chamber? Why is it so dramatic, at least when measured against these domestic rates? And dramatic is the right word, given the public perception engendered in some quarters by these appellate decisions, with widespread accusations that this is an usurpation by the Appeals Chamber of the Trial Chamber's functions. My own view is that the rate of appellate reversal must be viewed within a broader context. The first factor is that the law in international criminal cases is still, even now, unsettled in very important areas. The basic elements of aiding and abetting, for example, remain unsettled after almost twenty years of international jurisprudence. The *Perišić* Appeals Chamber changed the law, at least as it was widely understood after *Mrkšić*. Whether crimes against humanity could be committed against combatants was not finally settled until 2009. There are many other issues that have not been adjudicated, simply because the jurisprudence has not yet developed and there are, relative to domestic jurisdictions, so few cases. The practical effect of this uncertainty for ongoing trials cannot be overstated, with the parties sometimes adducing facts, and the Trial Judges hearing evidence without knowing with certainty the grounds for adjudicating criminal liability of the Accused. That uncertainty, present in any legal system, is particularly acute in international trials, and leads to a situation where there is a high likelihood of a potential change on appeal.

It is not just legal uncertainty that increases the likelihood of appellate intervention. Most international criminal trials involve extremely broad issues of fact. The indictments involve sprawling allegations; sprawling because there are many material facts charged, but also because just about every crime that has a chance of being successful is charged and every mode of liability is charged. Indictments encompass years of events. How often have we seen, those of us who have been practitioners, that the final trial briefs are like two ships passing in the night? That tendency is not mitigated by the common practice of requiring both parties to file their briefs simultaneously. The arguments, even in final arguments, often fail to provide that clash of views that is so vital to the proper functioning of an adversarial trial. And the lack of clash arises because, unlike a domestic criminal case, there are such a wide range of issues in play during an

international criminal trial. The consequence is that even with trial judgements that are extremely lengthy - perhaps because they are extremely lengthy - the results come out of the oven half-baked.

I say that without intending any criticism to the Trial Chambers. They often go to great lengths to be as exhaustive as possible, but I think that many trial judgements are developed without a full clash of opinions between the parties at trial. And that requires Trial Chambers to come up with their best determination as they can, but without necessarily the type of clash which is supposed to happen in an adversarial trial and which is supposed to winnow down the issues, so that when there is a judgement that comes out of an adversarial trial already there is focus in the determination and the basis for the conviction. Once that focus is developed at the trial, then the issues are narrow on the appeal. In developed legal systems with a third level of appeal, the truly complex and difficult legal issues are winnowed down even further. The context, as described above, works against that winnowing process, leaving many issues on the table, often for the first time, at the appellate stage.

Now, I was going to go through several slides to illustrate how the Appeals Chamber in particular passages has been interventionist. I will simply summarise it like this: although the Appeals Chamber on the one hand says that it is very deferential to findings of facts by Trial Chambers, there are at least three categories of reasoning that substantially intensify appellate scrutiny of trial judgements. First, there is the mixed issue of fact and law. Prosecution and Defence appeal briefs now often frame issues as mixed issues of fact and law. Why? Simply because that is the bridge-head to try to get into a lower standard and to a fuller review by the Appeals Chamber. What we are discussing here is not factual findings by the Trial Chamber, but “conclusions” of the Trial Chamber based on their factual findings. Since inferences are based on reasoning as much as on an appreciation of the evidence, why not apply a more intense standard of review? What we have seen in several judgements, particularly in *Mrkšić*, is that the standard applied to “conclusions”, is much lower than in respect of factual findings.⁷

⁷ **Selected PowerPoint slides included in footnotes:** *Conclusions:* The Prosecution does not show any errors in the factual findings of the Trial Chamber on these events but rather relies upon these findings to impugn the conclusion drawn from them and propound a different conclusion. The Prosecution relied on these findings to support the conclusion that Šljivančanin had sufficient accumulated knowledge to fulfil the *mens rea* requirement” (Mrkšić Appeals Judgement, para. 58).

The “Conclusions” Standard in Action: Šljivančanin testified: “I went to see Mrkšić to tell him what I'd seen at the hospital, and what happened at the hospital that day and to see what would be further tasks and duties”. Given that Šljivančanin was inquiring about his next duties and had been delegated the responsibility for the security of the prisoners of war by Mrkšić, the only reasonable conclusion that can be drawn is that Mrkšić must have told

A second category of error is referred to as the “approach” adopted by a Trial Chamber. That’s what was applied in the *Gotovina* judgement, where the Appeals Chamber, without finding that there was a traditional error of law, found that there was an erroneous or incorrect “approach” to the analysis of the evidence. And when that characterisation is applied, again, the standard is closer to an error of law, even though it is not really an error of law.⁸

The third factor that intensifies the manner of appellate review is the consequences of legal error. It is uncontroversial and well-established that that triggers a *de novo* assessment of the evidence. Does that mean that the Appeals Chamber can rummage through the entire trial record, often without specific submissions, to support its own *de novo* assessment of the correct legal standard to the facts? In theory, yes. Sometimes the Appeals Chamber has purported to limit itself, as it did in *Mrkšić*, to looking only at evidence referred to in the body of the trial judgement itself or in a related footnote, evidence expressly referred to by the parties and any additional evidence that admitted on appeal. The *Mrkšić* formula at least illustrates that the Appeals Chamber itself recognises the danger of embarking on a review of the entire trial record without, however, providing a very satisfactory solution to the danger of making factual findings without submissions from the parties responsive to the new legal standard.⁹

Šljivančanin that he had withdrawn the JNA protection from the prisoners of war ... the only reasonable inference is that upon learning of the order to withdraw the troops, Šljivančanin must have realised that the killing of the prisoners of war at Ovčara had become a likely occurrence” (Mrkšić Appeals Judgement, para. 62)

⁸ *The “Approach” Standard*: The Appeals Chamber must *a priori* lend some credibility to the Trial Chamber’s assessment of the evidence proffered at trial, irrespective of the approach adopted. However, the Appeals Chamber is aware that whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice”. (Gotovina Appeal Judgement, para. 50).

The “Approach” Standard in Action: “The Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that the Trial Chamber committed fundamental errors with respect to its findings concerning artillery attacks and by extension JCE, which stood at the core of findings concerning the Appellants’ criminal responsibility” (Gotovina Appeals Judgement, para. 155)

⁹ *Consequence of Errors of Law*: “The Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal. The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties and additional evidence admitted on appeal”.

(Mrkšić AJ, para. 12) “Being aware through Šljivančanin of the illegality of Mrkšić’s order, it is likely that the military police would have obeyed Šljivančanin’s order to remain in place” (Mrkšić Appeals Judgement, para. 96).

“... [A]s long as JNA troops were present, that might have kept the TOs and paramilitaries at bay...” (Mrkšić Appeals Judgement, para 97).

“Had his attempts to persuade Mrkšić not been successful, when Šljivančanin telephoned Belgrade in order to speak with General Vasiljević he could have sought the General’s assistance on the matter” (Mrkšić Appeals Judgement, para. 98).

Markač v. Krstić, Simić, Vasiljević and Šljivančanin: “In none of these judgements was the trial chamber’s analysis concerning the factual basis underpinning the existence of a JCE materially reversed. By contrast, in the present case, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that the Trial Chamber committed

I will conclude by saying that we cannot, as Defence Counsel, genuinely claim, given the statistics that I put on the first slide, that Defendants have in general been disadvantaged by the rather interventionist approach of the Appeals Chamber. On the other hand, I think all of us, who are practicing at the appellate level of the ICTY view it as a highly unpredictable process. There have been some big surprises going in both directions. To a very large extent, that is because the issues have not been winnowed down and focused by the time we get to an appeal. It is in a very fundamental sense a second trial, but without the guarantees and procedural rigour of a trial. That does diminish the overall effectiveness of the trial, not necessarily the fairness, but the effectiveness of the trial procedure as a whole. I do not fault the Appeals Chamber for that as much as the overall structure of the proceedings which have not generated sufficient focus by the end of trial. Too much information funnelled into the meat-grinder does not produce an adequately digested product, let alone palatable to all those vitally interested in these judgements.

Thank you.

Questions and Answers

Moderator, Michael Karnavas

Ok now we have approximately forty to fifty minutes for questions. So if you have any questions, please stand up. There are microphones. Please stand up to the microphone, identify yourself and identify to whom you wish to pose the question; and please ask questions as opposed to making short speeches. Brief comments and observations are of course welcome.

Question from the audience: Chafic Majdalani, Attorney at Law at the Beirut Bar Association

Good morning, my name is Chafic Majdalani and I am an Attorney at Law at the Beirut Bar Association and now Visiting Professional at the Defence Office of the Special Tribunal for Lebanon. I have two small questions if it is possible. The first question is to Lord Bonomy and

fundamental errors with respect to its findings concerning artillery attacks and by extension JCE, which stood at the core of findings concerning the Appellants' criminal responsibility" (Gotovina Appeals Judgement, para. 155).

Vs. Šljivančanin: Convicted of Murder based on a radically *de novo* assessment of the evidence, including conclusion as to whether his actions would have made it "substantially less likely" that the crimes would occur.

the second one was supposed to be asked to President Meron, but he is not here, so I will ask it to any member of the Panel who wishes to answer.

My first question is about the Kosovo War. As we all know, war crimes were committed from both sides, from Serbians and Albanians, and also from others. You know about whom I am talking. However, only Serbians were sentenced for these crimes. The question I am asking to you, your Honour, not as a former Judge, just as a simple human jurist, is it not unfair?

My second question is, President Meron has talked about serving sentence in some states. Now that we are not in 1993 anymore, the situation in the former Yugoslavia has sensibly changed. Is it not inhumane and against human rights to send people to serve sentences in countries other than their own? Especially since many countries that have signed an agreement with ICTY do not have international standards in jail, and I would cite France, United Kingdom, where there is big violence in jails. I would also cite Italy, Portugal and other countries. Is it not time that this practice should change and those people should have the right to serve a sentence in their own countries?

Thank you.

The Right Honourable Lord Iain Bonomy

Well, I will deal, in a fairly limited way, with both. Your first question about Kosovo ignores the fact, I think, that there were prosecutions involving Albanians, albeit no convictions. Well, in fact, it is not a case of no convictions. There may have been several acquittals, but there has been some conviction. So it is not true to say that there has been nothing done in relation to anyone other than Serbs. So far as NATO is concerned, if that is the other organisation to which you were pointing in that question, the matter was subject of investigation and that is the end of it as I am concerned. I am not in a position to say what were the rights and wrongs of the investigation carried out in relation to NATO, but we do know that at least, it was subject to some early investigation.

On the question of serving sentences, I understand your point, even of the United Kingdom, because one of the Accused from here suffered a very severe attack in an English prison. On the other hand, it is not clear to me where you are saying or suggesting that the sentences could be served and where the Accused would choose to serve them? If you are saying in the country

from which they came, there may be time that that is the right thing to do, but looking at the history, up until today, of all that has been going on since 1991, it seems to me we are not quite at the stage where it would be right for the Accused, and certainly in ICTY proceedings, to be serving sentences in the Former Yugoslavia.

Moderator, Michael Karnavas

Thank you for the question and maybe next time we will invite Madame Del Ponte and you can ask that question to her, the first one at least.

Question from the audience: Cynthia Sinatra, Former ICTY Defence Counsel

Hello, Cynthia Sinatra, Counsel with many of you on *Čelebići* and *Srebrenica*. I want to ask Mira Tapušević if she also remembers that when we arrived at the Tribunal, as far as equality of arms goes, the Defence room had no telephone, no copy machine, no computers, nothing at all, in which we could compete with the Prosecution and it did take a series of – I think you said that we should not be contentious about this or argue, but I remember asking Madame de Sampayo, in a kind way, to settle this, but it took years and years for us even to get a copy machine. So the equality of arms issue, I think, is still a very large issue between the Defence, the Prosecution and the Registry.

And also, Judge Bonomy, you said that we have all of the evidence that we need from the Prosecution when we get our discovery. The discovery is given to us in a piecemeal and very often it is even trial by discovery, because we do not find out the documents that were missing, until we have the witnesses testify. And that is why there are prolonged trials, because we do not have the evidence and the evidence that we do get, is sometimes summarised from the view of the Prosecution. So we need the raw evidence, it really takes discovery by trial, in order to get there and Ms. Tapušević and I were in the *Čelebići* case and Mr. Karnavas and I were in the *Srebrenica* case, so you do understand. And it is just not as simple as distilling it down to a ten minute argument. We have had to fight very hard to have equality of arms, equality of appeals and the fact that where our clients serve their sentences is depending on what kind of treaty is worked out between the United Nations and the Tribunal.

Mira Tapušковиć

Yes Cynthia, I do remember that time that we opened the gate of this Tribunal and it was a very hard time. I cannot say that is better now, because there were too many lawyers in these spaces. I did not want to take an example of my case, I am on the *Srebrenica* case, but the equality of arms is really violated in this case, because there were forty-six different expert reports from glass, ammunition, structure, buildings, genetics and so on. The OTP has one member of their team for each kind of experts. At the other side of the table, there were two of us, Lead Counsel and Co-Counsel. There is no equality of arms; really, there is no equality of arms. That is the reason why I focused more on this “out of court” inequality of arms, but following the jurisprudence, equality of arms is the procedural equality that you have the same access to the Court. But from the Defence point of view that is not true, it is much wider: equality of resources and all the rest.

Cynthia Sinatra

Well I thank you, I think mine was a combination of too many questions but if you have any comments that you would like to make on my statements, I would appreciate it.

The Right Honourable Lord Iain Bonomy

Well, I would like to correct one thing. I do not think I have said that the Defence have all disclosure from the Prosecution, anything but. It is certainly not my experience and I think anyone involved in any trial here recognises that disclosure is presented in a very unsatisfactory way. The only significant point I was trying to make, was that when the Prosecution in the course of a trial throws statements of witnesses at you, the day before the witness gives evidence, there is probably, in most cases, more mileage in just accepting it and looking for all the holes from this cobbled together statement, than there is in trying to adjourn the case for things to be done more properly. There is a time and place in this institution for just taking what is given to you and running with it. On the other hand, in the general overview of the way discoveries are conducted here, I think it is unsatisfactory. I think the Defence on occasions are not given the respect that ought to be in which the material is presented. I think there are two sides to that story too though. I think that Defence in many instances demand and look for material which has nothing at all to do with the case and do not contempt themselves, in certain instances, with identifying what really matters and getting what really matters. The system has grown out of all control here because of so much material. Everybody wants every bit of press report that has been done on Yugoslavia since 1991. Can you imagine the volume that there is, how many times the name *Karadžić* might have been said if you were to put something into a search engine. But

does it matter? You really have to, I think, cooperate with the Prosecution and identify what really matters. And when you are sure you have done that, I would be surprised if a Trial Chamber is not compelled to be indulgent. That was the main point that I was making.

Cynthia Sinatra

Your Honour, I am sorry, but I think it does depend on – when you say what really matters – it depends on what really matters to whom at what point of the trial. Thank you for your indulgence.

Moderator, Michael Karnavas

Thank you for that. Excellent set of questions. I am still interested to hear from Judge Bonomy when he talks about being nice to the Judges. That is the part that I do not quite get. Because, sometimes when you try to be nice, you are still getting shut down; what do you do then? Especially for some of us, who do not have the sort of personalities that just exudes lovey-doveyness.

The Right Honourable Lord Iain Bonomy

I will give you the name of ten Counsel in here you can go and ask that question of later.

Question from the audience: Saša Obradović, Embassy of Serbia

Thank you, Saša Obradović from the Embassy of Serbia. Allow me to firstly congratulate Mr. Novak Lukić and the others from the ADC for organising this conference and also to express my gratitude to the Faculty of Law from Rotterdam as the official sponsor of this event.

Firstly, I would just like to make a very short comment on what we have heard about enforcement of sentences, I am grateful for that intervention. I would just like to remind you that the Prosecutor for war crimes in Serbia, at this moment to date, has one hundred fifty-eight Defendants out of whom seventy have been convicted. If those seventy can serve their sentences in Serbia, in their country, in their own language, in the system of their own language where their families can visit them, I think it is in accordance with human rights. I cannot see any reason why the others, convicted by the ICTY cannot be in the same system. In addition, I also would like to tell you that Serbia has an agreement on enforcement of sentences with the ICC. So I could not see any differences then between the two systems.

Now I will ask two questions. The first one: yesterday, the Assembly of the ICC finished its twelfth session, amending the Rules of Procedure and Evidence in relation to the presence of the Accused at the trial. There were three inventions, all of them concerning the summons, the Accused who are summoned to appear before the Trial Chamber and not for whom arrest warrants have been issued. The first intervention was that the Accused can be temporarily absent from the trial under exceptional circumstances. The second one was that in parts of the trial the Accused can be presented through video technology. And the third one was that the sitting Heads of States or Government can be excluded from physical presence at the trial and replaced only by Counsel during the trial.

All of those three inventions were based on two presumptions. The first one is that tension is not necessary in the trials before the International Criminal Court. And the second one is that the presence of the Accused at trial as it is defined in the Rome Statute, as well as in the Statute of the ICTY, does not necessarily mean a physical presence of the Accused in the courtroom. That approach has never happened in the Rules of Procedure and Evidence of the ICTY and I am interested in your opinion concerning many of the Accused who voluntarily surrendered to the ICTY and were supported by the government, either during the course of their surrender or later during the provisional release, through the guarantees of the State for monitoring the provisional stay in the country.

And the second question is concerning the Accused who are acquitted. We have today several acquitted persons who spent several years in the detention of the ICTY – no reparations to them. What about their human rights? Thank you very much.

The Right Honourable Lord Iain Bonomy

The Rule changes at the ICC may be influenced by the particular circumstances of the case in Kenya, I am not sure. And I am sure many persons here may have their own personal political view about the rights and wrongs of trying the sitting State President. So I am not entering into that territory. I think you have to, though, take account of the fact that in general throughout the world, accused persons are expected to be present at their trial. And if you are going to allow them not to be present, then it has to be done in a way that is generally publicly acceptable and does not just apply to the type of trial we are doing. Video appearance is in my view appropriate in the right circumstances and I am certain that in international trials there will be a place for it. It already occurs in European countries in relation to interlocutory hearings and appeal hearings.

It is slightly trickier where evidence is given and judgements have to be given about the bearing of the individual. And indeed, in the *Milutinović* trial here, there were a number of occasions when the Accused were not present in court on an agreed basis. There was a high level of cooperation that led to that. Video recordings were made available of the day's proceedings. It could be reviewed with the Accused. So there are sufficient safeguards as long as it is something generally publicly acceptable. I do not think that you could argue that most people on trial in the world should not have to attend court.

As far as reparations for acquitted Accused are concerned, the position is not different from that in probably the vast majority of countries. In my own country, well certainly in England and Wales, it is possible for the costs of proceeding to be awarded in favour of an accused person who is acquitted, but in Scotland you get nothing, not even the expenses that you have incurred if you had to pay for your own representation. So there is nothing exceptional, I am afraid, about that. It seems to be generally acceptable and not a contravention of human rights and certainly never been seen as such by the European Court of Human Rights.

Question from the audience: Jens Iverson, Researcher at Leiden University

Thank you. My name is Jens Iverson, I am researching at the University of Leiden. My question regards a statement, a brief statement on interlocutory appeals. It was an assertion made that in a well-prosecuted case, in such a case, the Prosecution would win the majority of those. My question, firstly, is just why and whether the other panellists agree with this statement and what that says about a well-defended case; if the implication is that there should be a certain conservative nature to the Prosecution's case and a certain more rigorous, challenging approach for the Defence case with regard to such appeals. Thank you.

The Right Honourable Lord Iain Bonomy

That statement was made in relation to all proceedings in general, not with particular reference to the ICTY. President Meron referred to it. It was based on the notion that a Prosecutor is a "minister of justice", and a Prosecutor, who prosecutes his case well, will not argue against a decent Defence submission. He will, therefore, have conceded anything that ought to be properly conceded.

The Defence on the other hand, are up against it, in my view, all the way through. And the burden on them is entirely different and it is one that results, generally speaking, in more issues

becoming contentious than would be from the Prosecution's point of view. It just reflects the imbalance of the cases as I see it. And therefore, in general, and I would not be critical on the Defence for the fact that that they lose more than they win in interlocutory cases. If it is arguable at all, it is the duty of the Defence to argue it. On the other hand, that is not the position of the Prosecutor. He is entitled to take a reasoned decision about the prospects of success and to abandon his own position. So in my experience that is what happens from cases that are well-prosecuted.

Moderator, Michael Karnavas

Thank you, well I have never seen a Prosecutor abandon their position. Hope, as they say, springs eternal. So last question, keep it short, keep the answers short please.

Question from the audience: Nadia Shamsi, Student at Leiden University

Thank you, my name is Nadia Shamsi and I am a lawyer in Chicago and a student at Leiden University. My question is regarding the right to appeal. I was wondering if Mr. Gosnell would be able to comment on whether the interventionist approach that the Appeals Chamber has is prevalent in other international tribunals or whether it was more the ICTY, because it was the first international criminal tribunal.

Christopher Gosnell

The Special Court for Sierra Leone, very non-interventionist; nothing reversed by the Taylor Appeals Chamber of any substance. I do not think there is a 2.800 page judgement that does not have some element reversed at the ICTY. The ICTR, of course, shares the Appeals Chamber with the ICTY. The ICC is not really in the position to be commented on and frankly, there is not a record yet of appeals from trial judgements to be able to say whether or not there is such a trend. You know, the big issue is whether or not there is a mechanism to narrow the cases early on so you do not have a situation where trial judgements, of necessity, are these sprawling beasts, where there is an opportunity for substantial errors and mistakes because the parties are not engaging on issues, and the trial judgement is sometimes creative in terms of making conclusions based upon matters that have not been fully argued between the parties. The ICC purports to have a much sophisticated process of narrowing down the charges. And, of course, there are more interlocutories, frankly at the ICC. So that may reduce the need or the extent of reversals from trial judgements, but we do not know yet.

Moderator, Michael Karnavas

But reflecting back, would you say that early on, the Appeals Chamber was very conservative, and that only lately they have come into their own, they are willing to take the right action, to make the right decision, whereas before it was a given. You were supposed to come to The Hague, there was a conviction, the conviction was supposed to be appealed, end of story.

Christopher Gosnell

Well maybe. It could also be that the Defence bar has become a lot more sophisticated. With all due respect to the earlier cases. I am being sincere, I think we have learned, I think appeals are probably better crafted, based upon what I have been able to see anecdotally. And also the law is less of a *terra nullius*. Now we do know what we can argue and what we have a crack at, whereas back in 1999 and there are others who are in a better position to speak about this. Maybe it was not so clear that what matters was going to be successful on appeal.

Moderator, Michael Karnavas

Well thank you, thank you very much.

Panel II: Transparent Justice - The Defence Experience

Moderator:

Slobodan Zečević, Defence Counsel at the ICTY

Speakers:

- Suzana Tomanović, Defence Counsel at the ICTY
- Steven Kay QC, Former Defence Counsel at the ICTY and Defence Counsel at the ICC
- Gregor Guy-Smith, Former Defence Counsel at the ICTY

Moderator, Slobodan Zečević

Your Honours, Dear Colleagues and Guests, Ladies and Gentlemen. The transparency in justice is a much involved topic in our time. A number of domestic jurisdictions or justice systems, globally, are endeavouring to create a transparent justice system so that the public and its citizens will be able to see how the justice system works where they live and so they can hold public services to account. This is true for all over the world, from Canada to the United Kingdom, Europe to my own country, Serbia.

This goal is achieved by the improvement of transparency, by publishing data and information that is accessible, meaningful and easily understood. The concept of transparency in justice is a domestic concept in its nature, as it envisages the accountability of the public servants to the local community. In the realm of international law the issue of transparency in justice is not only applicable, I would dare say, it is even more important.

The problem is that its complexity is enormous. Starting from the definition of justice transparency for purposes of international law, it must be modified and defined as the transparency of justice to a public, which is affected by a concrete justice system. The affected public is faced with numerous obstacles. Not only is the justice system that affects their daily lives usually conducted abroad, it is usually conducted in a foreign language. The Rules of Procedure and Evidence are equally very different from domestic procedure to which the public is accustomed.

There is little doubt that the transparency of justice in such cases is a far more complicated issue and far more important goal to be achieved. It was our strong belief that as one of the parts of the ICTY – who by its body of jurisprudence in a number of cases is undoubtedly a leader in international criminal law – our association does have a responsibility and duty to bring this issue forward at the conference. To this end, I present three of our most distinguished colleagues and friends and speakers on this subject.

The first speaker was Ms. Suzana Tomanović who unfortunately could not make it and Mr. Michael Karnavas gratefully accepted to give a speech on the subject of witness protection measures. Mr. Karnavas is former President of the ADC, a Defence Counsel in numerous cases at the ICTY, ICTR, the Tribunal for Cambodia (ECCC) and the ICC.

Mr. Karnavas will be followed by our distinguished colleague from the United Kingdom, Mr. Steven Kay QC, Defence Counsel in the *Tadić* and *Milošević* cases before the ICTY, the *Kenyatta* case at the ICC at the moment, to name just a few. He will address the highly contested issue of the application of Rule 70 of the Rules of Procedure and Evidence.

At the end, Mr. Gregor Guy-Smith, a Defence Counsel from California, former President of ADC and a Defence Counsel in some of the most significant cases at the ICTY, both in trial and at the appeals stage, such as *Haradinaj* and *Perišić*, to name just a few. He will address one of the most intriguing issues in modern culture, namely the ethics of talking to the media.

Thank you very much. I will give the floor to Mr. Michael Karnavas.

Michael Karnavas on behalf of Suzana Tomanović: Witness Protection Measures

Good morning again, one slight correction, I am standing in for Suzana Tomanović, so this is her prepared presentation; I hope I do it justice. It is unfortunate that Ms. Tomanović is not here. It is a true mark of a professional Defence lawyer who puts the client's interests first and then her own personal needs and interests. Ms. Tomanović is not here because she has a pressing matter in the State Court of BiH. Her client's gain is our loss.

Her presentation deals with the transparency of justice, the Defence experience. And so I begin: Referring to openness and transparency, U.S.' Supreme Court Justice Louis Brandeis, famously noted, "sunlight is the best disinfectant", indeed it is, or at least it should be at international

criminal tribunals. Convictions are legitimate only when based on credible evidence presented in public trials. Witnesses are more, not less likely to be forthcoming and truthful at open proceedings when they are testifying under the watchful gaze of the public.

Less room for confabulation, yet one pervasive conflict throughout the existence of the ICTY has been that of transparency, concerning witness testimony and the production and news of certain documents in public hearings. Balancing the rights of an Accused to a fair and public trial against the safety of the witnesses and victims of war crimes is an unavoidable consequence. In fact, we see this every day in our national courts when our domestic Rules of Evidence and Procedures temper the questioning of certain witnesses or the use of certain evidence before public galleries.

When considering that the truth in the court is based, for the most part, on perceptions when, how and for whom protective measures are used, the extent to which they are used is a critical issue for the future of the international criminal tribunals; a part based on the experience here in the ICTY.

The ADC invited me, (Suzana Tomanović), to present at this Legacy Conference a brief overview of the witness protection measures in the ICTY procedures, from the Defence perspective. So I shall be brief.

Article 21 tells us that *“in the determination of charges against him, the accused, shall be entitled to a fair and public hearing, subject to Article 22 of the Statute”*. Article 22 calls for the International Tribunal to provide in its Rules of Procedure and Evidence for the protection of victims and witnesses, *“such protection measures shall include but shall not be limited to the conduct of in-camera proceedings and the protection of the victim’s identity”*. So the answer seems to lie in an appropriate equilibrium between Article 21 and Article 22 of the Statute on a case-by-case basis.

The question we must try to answer, though, is whether ICTY Trial Chambers have been successful in achieving this balance; in my opinion, not always and certainly not consistently. I am not going to lecture you about the legal framework of the various witness protection measures. If you are involved with, or student of the ICTY, you are well acquainted with Rule 75 dealing with measures for protections of victims and witnesses and Rule 79, dealing with the taking of testimony in closed sessions. All Counsels for the Accused in some point or another,

challenged a Prosecution's request for protective measures and surely we have all as Defence lawyers challenged a Trial Chamber's decision to grant such measures.

But we too, have availed ourselves to the same rules and have often asked for protective measures of Defence witnesses. We are all too familiar with what I consider one of the most significant Rules for the Defence perspective: guaranteeing safe passage. I say significant, though, I must stress that this should not be understood to mean the Defence witnesses are criminals and therefore need safe passage; rather, it is because they are testifying for the Defence that they have a heightened level of anxiety and fear to appear and give evidence. Put differently, because Defence witnesses will be giving evidence against the Prosecution, a UN organ, which to their understanding has extraordinary power to arrest and prosecute with few, if any limitations, they fear retribution that they will be arrested in the Hague, if their truth, that is the witness' truth, does not coincide with the Prosecutor's truth. Even when protection measures are offered on top of safe passage, the fear of some witnesses is not diminished, and in such situations, it is not unusual for the Defence to be deprived of valuable witnesses in possession of exculpatory evidence. In part because of this fear, it matters not whether the fear is justified, it is a reality, which I am certain all Defence will have to deal with in a course of a trial and probably all have experienced at one point or another.

It is widely accepted that many people who are victims of, or witnesses to crimes find the criminal justice process stressful; addressing this stress is essential. Much of it does result from fear, real or otherwise, that their safety is at risk if they give evidence. If there is any common factor between Prosecution witnesses and Defence witnesses it is fear. This is not just at the ICTY but in all international tribunals. For this reason rules have been enacted and modalities implemented to assure that both Prosecution and Defence witnesses are afforded protective measures.

I do not think that anyone among us would object to witnesses having reasonable protective measures based on a legitimate, and I underscore that "legitimate" showing for protection. Also, the level of protection should be proportionate to the actual need for the sake of transparency and it should be the least restrictive.

Now, some thoughts on public trials at the ICTY. Rule 79 provides for closed sessions: the barring of the present public from watching or listening to testimony. In virtually every case

before the ICTY the Prosecution is requesting protective measures for a substantial number of witnesses. Those requests have virtually all been granted by the Trial Chambers. It should come as no surprise, that there have been trials at the ICTY, where as much as fifty per cent of the witnesses testified under pseudonyms or with face and/or voice distortion or in closed sessions; fifty per cent.

Throughout the proceedings and in the final judgement, protective measures are referred to by their pseudonyms. Trial Chambers go in and out of closed sessions with considerable annoyance to the viewing public and I am sure the press. It does so to see the identity of the witnesses or to discuss matters of so-called confidential nature, some of which is merely discomforting or inconvenient but not confidential at all. If these deviations or diversions, depending on how you view it, were nearly limited to one or two witnesses per trial, it might not raise any serious questions, as to whether the trials were adhered to the statutory of guarantees of holding public trials. But when we often see and experience that at the ICTY nearly fifty per cent of the hearings are in closed session to the public, then we should be concerned.

Also, in my experience, the most important witnesses incriminating to the Accused seem to testify in closed sessions. I wonder why. And is the trial really fair and open and consistent with the Statute and international principles and standards as reflected in the *International Covenant on Civil and Political Rights*, where more than the fifty per cent of the witnesses testify under protective measures so as to ensure the witnesses' anonymity or even existence? Is it not difficult to envision a point at which so much of the testimony comes from secret or disguised witnesses that the trial becomes distorted, a parody?

Pseudonyms and closed sessions also complicate the reading of judgements peppered with concealed identities, and key witnesses make the judgement impossible to be scrutinised by the public. This can, and often does, lead to the questioning of the validity to what is represented in the judgement as facts that supposedly have been established beyond a reasonable doubt because here, after all, we are speaking about public perceptions. Are our trials fair, really fair, and are they transparent?

Protective measures for witnesses participating in proceedings must be balanced with the rights of the Accused to a fair trial. There is a general principle that conviction cannot be based solely, or to a decisive extent, on testimony of anonymous witnesses. Also, an Accused has the right of

confrontation - here he must be able to meaningfully put questions to an anonymous witness giving evidence and do so publicly, to a large extent at least. Typically, the Defence is not allowed to approach anonymous witnesses without informing the Prosecutor who then ascertains, objectively supposedly, if the witness wants to talk to the Defence. This is during the investigative phase or during trial when you need to question someone in preparation for your confrontation. I personally never even dare to entertain the motion of contacting an anonymous witness in preparation of our cases, too many obstacles for too little in return.

Rule 66 dealing with disclosing a subject, to Rule 69 dealing with witness protection. Under the disclosure rules the Prosecution must disclose all prior statements in its possession for witnesses it intends to call as well as all material submitted to the Judges who confirmed the indictment. Where witness protection measures had been imposed, much of this material must be restricted for distribution or even redacted to avoid undue disclosure of witness' identities. These Non-disclosure rules complicated the Defence's pre-trial preparation and in-trial preparation, especially in instances where the Prosecution is asking the Trial Chamber to grant protective measures for large numbers of its witnesses.

These complications directly impact the equality of arms that Accused are entitled to enjoy. Concretely, it is questionable whether an Accused through his Defence team, with its limited resources, if represented by court-financed Counsel – because you cannot compare those of us who are under the ICTY scheme and those who are privately retained – will have sufficient time and facilities to effectively prepare his or her Defence.

The Accused's rights to examine or have examined the witnesses against him, in few words in *Tadić* and I see that there are some distinguished guests here and one speaker who was in *Tadić*, the first ICTY case, where the Trial Chamber granted the Prosecution motion to keep some of its identities anonymous not just from the public but from the Defence too, because they had this fear of retaliation that the Trial Chamber explained in its decision, which can be found in paragraph 81; that there is a strong likelihood that witnesses would decline to give evidence if the disclosure was conditioned to their testimony. Surprise, surprise it happens to us all the time.

The judgement of the European Court of Human Rights suggested that it was impermissible but the majority of Trial Chamber, with the Judge Stephen dissenting, said the jurisprudence of the European Court of Human Rights only applied to ordinary criminal jurisdictions. This decision

was much criticised and discussed, and no other Trial Chamber that we are aware of, after that, imposed such restriction or attempted to impose such restrictions. Not too long ago, however, this issue cropped up again through a report of witness protection in the Balkans. In its report of June 2010 drafted by the Parliamentary Assembly of the Council of Europe, the report highlighted the plight of witnesses in the former Yugoslavia who have been murdered, threatened and had their identities revealed by parties intent on obstructing justice. It was concluded in the report that many witnesses are reluctant to testify, believing that they will be marked as traitors for doing so. In light of this, the Assembly criticised the ICTY's current practice of disclosing the identities of anonymous witnesses to the Defence prior to trial. In cases where revealing the identities of witnesses is disproportionate to the risk of the harm to that person, the Assembly contended that such a policy is not in the interest of justice. The Assembly encouraged the ICTY to consider amending its Rules so to allow witness anonymity to the Defence. It has been established in the European Court of Human Rights in several cases to consider using "a special advocate functioning independently of the parties to analyse the evidence and act as an intermediate between the witness and the Defence".

I am not aware of the ICTY's reactions to this recommendation, I do not think I have ever seen it being discussed or implemented, but whether such measures of additional witness protection at the ICTY or with the Mechanism that we are into now takes to address this criticism in the future, it is a daunting task of balancing such measures against Article 21 of the rights of an Accused to examine or have examined witnesses against him. How can you possibly even begin thinking about-cross examining someone? It is a little bit like a puppet show. The Defence is going to have a significant challenge in trying to influence the future of this particular decision if it is ever implemented.

In closing, a few words about the Victims and Witness Section, also known as VWS. I thought I would end with perhaps a happier note, highlighting the professionalism of the Victims and Witness Section. As we all know, VWS was created to support and protect all witnesses with a call by the Prosecutor, the Defence or the Court. This section of the Registry provides counselling, makes travel and lodging arrangements for witnesses coming to The Hague, supervises their visits and ensures their health and safety and security, and on a numerous occasions she, Suzana Tomanović, has had the opportunity to work with the folks in that unit.

I want to express my satisfaction and gratitude for their work and for their highly professional behaviour, patience and understanding towards witnesses and towards the Defence lawyers and case managers during the hectic time of the Defence case. I am saying this from my experience and based on the feedback I got from Defence witnesses, who testified in two cases in which she was involved, approximately 80 witnesses. Surprisingly, however, at the Seminar of Counsel of the ICC on 21 and 22 December 2013, the Special Rapporteur who was there, he was commissioned to evaluate the Victims and Witness Unit at the ICC and he presented this scathing report, which was rather interesting both in listening to it but the fact that it was in a very transparent fashion; and it talked about low morale, poor service, the atrocious mismanagement and so on. One has to wonder why the good management practices of the ICTY Victims and Witness Section, was not taken into consideration by the ICC. This is for certain one part of the ICTY legacy which should be taken under serious consideration not only by the ICC, but by other international tribunals.

And this ends Ms. Tomanović's presentation. Thank you.

Steven Kay QC: Rule 70

This is going to be a challenge I can see and it serves me right for not printing anything. Well, it is good to be back and if you have been in the place where I have been for the last couple of years you would really feel for me. It really is another place down at the ICC. You learn to value this institution and what it created over its twenty years and the legacy it leaves, which they deliberately sought to ignore down the road. They thought they could do it better on blank sheets of paper rather than following the model that they had at the ICTY.

This is a Legacy Conference and that is why I was very pleased and honoured to be asked to come today. In thinking about Rule 70, I trolled around the Internet, as one does, and I came across a very interesting exchange in the *Hamdan v Rumsfeld* case concerning the Military Commission at Guantanamo Bay. It touched upon the ICTY and the Court in *Hamdan* was discussing the perceived lack of procedural guarantee at the ICTY and why the Military Commission at Guantanamo Bay could follow this as some kind of example and operate what was described in the text as being “a lack standard of justice”. In many respects it shows a complete misunderstanding and knowledge of the work of this Court by the participators involved.

I will start with Commander Swift, for it is he of Counsel, who said: “*Now the government again has suggested that there might be rules that could work around all this and what is important for your honours to note is that at this time and this place there are not any*”.

So the Judge replied: “*Is that also true of the, what is the name of that court the International Court of Criminal Justice? They tried the, you know the Milošević guy in Bosnia, they did not have any rules either, they did not even have any rules regarding punishment*”.

Commander Swift: “*The International Court, your Honour, it did develop rules*”.

Judge: “*Oh they developed them?*”

Commander Swift: “*Yes sir. But at the **beginning** they had nothing*”.

In many respects that was so at the ICTY. At the beginning there was nothing. I remember just before the *Tadić* case started. Judge Orie wanted to see the library at the ICTY because we thought we might find some stuff in there that might help us in relation to the legal submissions we were going to file. We went and there was one book. It was Archibald’s Criminal Pleading circa 1968, sitting proudly on a shelf. I knew instantly it was not the right edition as it was a green one rather than a red one and in those days they changed the colours! So we decided we had to write to colleagues around the world to find some ideas on submissions and to set up a kind of network of exchange of information. It was by letter then as none of us had e-mail addresses. I do not think there was even an Internet or it had just started in 1996.

So out of very small and humble beginnings, you have developed now all this vast reservoir of justice and judicial thought, with tensions on all sides, tensions from the Defence, tensions from the Prosecutor and tensions from the victims. But as I said you have not seen anything yet. You have not been down the road to the ICC, because I would swap my position down there any day to be doing a case up here, to be frank!

But there we are, our ICTY Rule 70 was added after the original text of the Rules and was deemed a way of getting co-operation from states and other organisations, which had been in the field in order to provide so-called sensitive information. Originally, it did not encompass the Defence, only the Prosecution. In fact as someone referred earlier, a lot here did not encompass the Defence at the start; from fees at twenty-five dollars an hour as the going rate, to many other aspects of the Defence. It just was not something that Antonio Cassese took on board in those days as it was not about the Defence here, it was about prosecuting and that really was the genesis of the Court.

I heard the President talk about Defence guarantees, these are very minimum guarantees that you see in our Rules and not reflective of a big judicial organisation. All our states have more than those minimal guarantees and it has taken the Judges some time to develop and add to them, so that we have extended the jurisprudence outside the original code. Rule 70 reflects that, because later on it was realised that the Defence may have sensitive information that it wanted to keep to itself and play the same game relating to information that you could not use.

I recollect in the *Tadić* case the first test of Rule 70 came. We sat down, Professor Wladimiroff, Alphons Orié and myself, looking at this text. The issue that had arisen concerned a satellite photograph taken by a foreign State of the Trnopolje Camp near Kozarac in Bosnia; an important third of the allegations against him. This satellite photograph purported to show a line of buses and they were taking people on a particular journey. I cannot remember quite now, how all that evidence tied up, but it was to reflect something that the Prosecution wanted to make as a point. We had been to that camp and knew that there was actually a small fence around it. We wanted to use the evidence for our benefit to make further points within the trial. We were stopped from doing that. It was quite clear you could not do that, we took issue over the context in which this photograph was being used because we wanted to see the rest of the photographs: what happened further down the line? In which direction did they drive? Where did they go? That was impossible. The Judges really came to this point with us through a nod and a wink: well, you know what the Rules are, we will allow this in but for what it is worth; and that is as far as it went. It was an early tester, if you like, of the Rules by the OTP, seeing what they could get, what kind of judgement that they could get in their favour. They would then be able to use it in the next case down the line and the next case down the line after that. That tendency to use Rules in that way is something that all experienced Defence Counsel would probably recognise and understand. I am sure the Judges did as well: this is a test here of this Rule, they have taken this situation and they want to see what kind of judgement they can develop with it. I think that was what happened in relation to that matter in the *Tadić* case.

The next point I want to make, concerns exculpatory material. It is very difficult when evidence and rules are used in a way that provide an opportunity for one party to present the case it wants or it sees without the wider picture of that evidence or information being clearly understood. I wonder if this is really understood and recognised. That the withholding of surrounding information under the guise of confidentiality, may be used by a party supporting, usually, the Prosecution, to make a point that it wants to be made. I am very nervous about the selective

nature by which evidence is used in that way, being unable to say: you have given us this, we now want to see what else you have got and see where this takes us, what this information really is. I am very uneasy about third parties being able to put information in a way that is cloaked and obscured from the wider context. This we all know: that some versions of the truth may be made available by a party to influence the outcome of a case.

Turning now to deal with the final issue which might be of interest, in the *Milošević* case, I have been asked to refer to today, I remember the Rule 70 issues concerning General Wesley Clark. It was before Lord Bonomy joined us in the trial, and I have never seen such a circus in my life over that man. He came along under an enormous cloak of secrecy. This, that and the other; I could not read this; I could not read that. I had a sort of half page summary. Judge May was banging this issue that we were being obstructive. It was not handled in a satisfactory manner in my view. The evidence had to even be reviewed by people in the Pentagon before it could be allowed out into the transcript. Mira Tapušković is nodding her head. She was with us then. We were so uneasy about what was going on. In my mind the Prosecution were jumping to the tune of another party, the U.S., and it was so apparent. I think we would have had a different outcome actually with Lord Bonomy there. I think he brought in freshness, a vision that was needed because it was not healthy. What happened was that I actually took exception with one part of his evidence; I did not think that it was right at all what he was claiming. He went out and gave a press conference outside the ICTY having been cloaked in secrecy inside! He was standing as a presidential candidate and that summed up the whole bizarre circus of shenanigans, in my view. I think that a more robust approach by the Prosecution in relation to matters like that, instead of cow-towing to information providers who may bankroll this, that or the other. I am sorry, justice should be kept apart from politics, and Rule 70 is a way that outside politics can influence the outcome of cases and trials, so it has to be watched very, very carefully in my view.

Thank you very much.

Gregor Guy-Smith: The Ethics of Talking to the Media

I think before anybody decides to make a presentation they run through a variety of different introductions or avenues that they would take in order to figure out how best to either amuse the audience, shock the audience, interest the audience, offend the audience, or have the audience begin to engage in thinking. So, I came up, of course, with a whole bunch of different approaches to this presentation and I do not know which one of those approaches ultimately is

the wisest, nor do I know which one of those approaches I will touch you with, collectively or individually. Let me start by saying the topic of ethics in the media is far reaching. I realised when I was invited to speak about this, that today, unlike yesterday, whenever any of us stand in a public forum, we have an immediate relationship with the media. As a matter of fact, for the purposes of this conference today, there was an invitation for people to Twitter, something that I do not do and I do not understand. But I know that it means that there is going to be or the possibility that there is a rapid ability for the media to become involved in the conversation at hand.

Lawyers, as far as I am concerned, are members of a truly noble profession. And we conduct ourselves with dignity, we conduct ourselves with integrity and we are concerned with the work that we do, and with the business that we are involved in. One of the parts of that work and an important part of that work, is raising issues not only in the courtroom, but outside in the market place of ideas. And in the market place of ideas the standards of ethical behaviour, and I am not at this point going to speak at an abstract level, that the standards of ethical behaviour are in marked contrast depending on what kind of work you do. If one is a Judge, whether they are writing privately or not, there seems to be one standard. If one is a Prosecutor, there seems to be another standard.

But if one is a Defence Attorney, and if one is a Defence Attorney who has done work at the ICTY, there is a very clear standard and it is a troublesome one. And that standard is that we have a positive obligation to protect the reputation of the Tribunal. That particular holding came out of a Disciplinary Opinion concerning one of our colleagues who made the following statement in an interview: “The main aim has been achieved, Serbia has been demonised”. No attributions made to an institution, no attributions made to an individual and for this it was found that he was in violation of Article 3 of our Code of Conduct. Which is: “*Counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute*”. You can each and every one of you think about whether or not in fact that statement did or did not bring the Tribunal, the reputation of the Tribunal, into disrepute.

I would like to contrast that with another statement that was made publicly a while ago and for brevity's sake I have taken some of the language out, but I promise you I have not changed the meaning at all. This was a question and answer session:

Question: Is it not true that several witnesses against the Accused have been murdered?

Answer: The witnesses in this trial are walking away from me.

Question: But is the Tribunal itself to blame for this? Did not the Tribunal set the Accused free until the start of the trial?

Answer: The Judges of the Tribunal made this decision, I very strongly agreed with it.

Question: It could get worse namely if the Accused is acquitted because of lack of witness testimony?

Answer: I hope not, he is guilty through and through, I have the evidence.

If you take that statement - this criticism - these questions and answers, and you think about whether or not they might bring the Tribunal into disrepute - because Judges have made a decision concerning somebody this individual believes is involved in murder, given the standard applied to the Defence should there not be some kind of sanction, some kind of concern, perhaps an investigation? The author of the statement was Carla del Ponte in an interview she had in 2007 concerning a pending case at the Tribunal. There are no rules - that concern this kind of statement - for the Prosecutor.

You may be aware of a case in Cambodia. In that case, Counsel sought to intervene, and was about to intervene in the first instance in some of the judicial proceedings concerning a matter of great interest to their client. After a period of time, Counsel was foreclosed from filing motions, from making submissions in a case in which they clearly had an interest. So a choice was made and whether we criticise or not criticise Counsel or the Court and I am being very careful now about the language I use, because I want to make sure that if I do criticise anyone, I have not violated my ethical duties. Counsel made a determination that the appropriate thing to do, would be to get those filings into the public and make not only the public but also the Court aware of the legal arguments that were being made, so they were posted on the website, they were picked up by the media, they were picked up by the Court, and the Court went after Counsel saying that he had engaged in an unethical behaviour. He was referred to his local bar. His local bar did not feel that he did anything wrong. The Tribunal that he was appearing in front of took the position that he had engaged in a behaviour that brought disrepute to the Tribunal among other things.

Part of this may be a difference of attitude in terms of what one thinks the function of Defence Counsel is. But I do not believe that I have seen anyone yet in any international case, at least the Defence, engage in irresponsible conversation with regard to criticism of the Tribunal at all. And with regard to the behaviour of the Prosecutor, again, I do not think that I have seen any

Defence Counsel engage in behaviour that would give occasion, or give rise to any kind of discipline. But that is a state of affairs right now, and it is a serious state of affairs, and the reason it is a serious state of affairs is because to the extent that, as Steven said, that place down the road has not paid much attention to what has happened at the ICTY, to the extent they have paid attention to anything, they have paid attention to the notion that it is appropriate to muzzle Counsel when speaking in public concerning matters of concern to all of us. In the absence of criticism, honestly held criticism, honest opinion, we run a very, very great danger. That is the danger that we will be silenced. Critical thinking that exists with regard to the law that allows for the development of the law will evaporate and disappear. So I would urge all of you to think carefully about what you say when you speak in public, but do not lose either heart or courage. Maintain your convictions in criticising and questioning the state of the law, the state of the Tribunals, the state of the Prosecutions, and the state of human existence.

Thank you.

Questions and Answers

Moderator, Slobodan Zečević

We will take the questions now.

Question from the audience: The Right Honourable Lord Iain Bonomy

Can I just say something and pick up on what Mr. Kay said. You do not need to rely on his complementary words about me. To get the whole story on General Wesley Clark you should look up the proceedings in *Milutinović* and see the circumstances in which he came not to give evidence in that case at all.

Steven Kay QC

There we had *Milošević* running his case and this was a big issue over the conflict over Kosovo and he was called, he was put up there and simply no questions could be asked. I really do wonder what the Judges thought they were doing permitting that, because it was almost like the Prosecution were trying to set up a conflict with *Milošević* and that should not be going on in that way. It was a strategic thing. One afternoon in court, for an hour and a half, he said what they wanted him to say, but the Defence could not touch a single point and there was even a heavily challenged statement he made to do with Srebrenica and it deserved cross-examination. *Milošević's*

time ran out. I start cross-examining on it and it was all closed down, shut, bang, out and he goes off to do his press conference. It really was unsatisfactory and perhaps now it would not happen again but people may have learned from lessons.

Question from the audience: Mira Tapušković

I do not consider the audience's participation just in a way to put questions. I would like to add something. I do not have any questions to my colleagues but since Suzana Tomanović opened with her very interesting speech the door for some additional submission, for the sake of young colleagues that are going to follow us, I would like to add something in regard to witness protection measures. There are many colleagues present here who remember that witnesses were not protected just with the pseudonym, voice and with face distortion and closed sessions. In a way the OTP took this kind of justice and transparent justice in their hands, disclosing to the Defence redacted versions of the statements. No names, no any other relevant data for the witness. You got for example fifteen pages long statement and more than half of that statement was black, no details.

If we have in mind the Appeals Chamber decision in the *Mkrtić* case that the witnesses are not property of any party that means that we have the right to have access even to the Prosecution witnesses. If we would like to interview them we are entitled to do so. But having the statements and, let us say in the pre-trial brief there is just a pseudonym, we do not know who the witness is and how to approach that witness. And we had to fight with the Prosecution, addressing all the time the Trial Chamber to give a time limit to the Prosecution to disclose details to the Defence. I think that with that this basic rule of fairness of the trial was violated because we had no such access to the data and to the witnesses.

Thank you.

Gregor Guy-Smith

I would actually care to comment because you are absolutely right Mira. You may recall it a number of years ago the ADC proposed to the Rules Committee a specific rule dealing with a disclosure cut off deadlines, which as I recall were really quite generous, meaning that from the time that they got the information, I think we had at least a year from the receipt of information then to give it to the Defence, whose information we have for that period of time. That was unfortunately rejected by the Rules Committee, but it was something that we did actually try to do.

Michael Karnavas

My only supplement is that early on you might recall when the Rules required you to engage in reciprocal discovery and some did not quite understand the Rules, thinking that they were required to turn over to the Prosecution whatever they gather in the field, when in fact all that needed to be disclosed to the Prosecution was what was actually going to be used during the Defence case. The Prosecution supposedly had to turn over the exculpatory evidence. But we had one American Prosecutor, a very, very experienced Prosecutor, now an Investigative Judge in the French system, writing an article claiming that he, as a Prosecutor in these cases – and keeping in mind having investigated the case for several years – could not recognise exculpatory evidence without the help of the Defence pointing out their theory of the case in advance. And so therefore, he could not be in violation of any obligation to turn over exculpatory evidence because he could not recognise it when he saw it.

In other words, he was inviting the Defence to disclose their theory of the case before he could actually recognise exculpatory evidence, which is ridiculous yet that was the sort of thing that was being played, and then, when the Rules changed so that they had to give us everything, supposedly everything, then they just dumped everything, hundreds of thousands of pages of documents and you were expected to figure out where the exculpatory material was. And then you would find out that there is a warehouse of documents that the Prosecution had not turned over. Either because some government or some agency did not want them to turn this evidence. Not even the Trial Judges were privy to this evidence until the Prosecution deemed it necessary to show it to the Judge and then have the Judges decide whether to provide it to Defence. I think we have come a long way since then, but I also think those issues will always exist and will not just go away. I also think that at the ICC these problems will probably be magnified.

Question from the audience: Chafic Majdalani, Attorney at Law at Beirut Bar Association

In my modest opinion, bringing an anonymous witness is strongly against the right of the Defence. And when there is no right of the Defence there is no fair trial, when there is no fair trial there is no justice. What do you think you could do to fight this rule of anonymous witness and to end it? Thank you.

Michael Karnavas

I think that at the ICTY they try to reach some sort of a balance on a case-by-case basis. Some Judges actually took the time to look at the legitimacy of why this witness had to have a pseudonym and so on and so forth. And sometimes they got it right, but it is a balancing act, some witnesses do need protection. We have to respect that. You want witnesses to give evidence. So if you say to witnesses we are not going to give you the protection, we are not going to give you this pseudonym, but come anyway and appear, witnesses will simply not come because they really do not have to come – especially when their safety and well-being is at risk. Of course, they can compel the witness to come, and maybe even sanction the witness for not coming as they have done, or sanction for not testifying. I think it is a balancing test and the question is whether this test is being abused.

In my opinion, on many occasions it has been abused, primarily when dealing with Prosecution witnesses. My experience, my personal experience and I am not speaking for Ms. Tomanović, has been that on a number of occasions when we bring in witnesses and we say we want a pseudonym, we want protective measures, the hurdle seems to be very, very high. In many occasions we lost witnesses because they were not going to be given the sort of protection accorded to Prosecution witnesses. When it is the Prosecution witness, they come in and say any little excuse and the Judges would merely say ok that is fine, that is enough. That was part of the problem.

And one other issue that might be relevant to this discussion is the fact that in one of my cases, in the *Prlić* case, the moment we disclosed who our witnesses were and that they were going to come here to The Hague, whether with pseudonym, protective measures what have you, the State Security Services in Bosnia and Herzegovina began investigating them. That was very, very clear. It was a form of intimidation. We raised it with a Trial Chamber. No relief. Our witnesses were being approached by these services, their employers were being approached by these services, and in the end some of these witnesses were too scared to come and give evidence. And realistically speaking, what can a Trial Chamber actually do? These were State organs, on behalf of the State, or a segment of the State, carrying out these intimidation practices – and for all we know, they may have been doing so to assist or at the behest of the Prosecution as part of their “due diligence” on gathering background information on the Defence witnesses. You raise these issues but what can the Trial Chamber really do to ensure that your witnesses are not going to be lost because they are being investigated in this intrusive manner for no other reason than to

intimidate them into not coming to The Hague to give evidence against the Prosecution's truth. That is my personal opinion.

Question from the audience: Peter Haynes QC, Defence Counsel at the ICTY and ICC and Victims Representative at the STL

I am a bit concerned about the misunderstanding of the term anonymous witness. I think, Michael, your last response might have given a false impression as to the practice at the Tribunal. In my understanding an anonymous witness is one who nobody knows the identity of and I do not think that was the practice of the Tribunal over the majority of its existence. There may have been witnesses who remained anonymous to the public and whose identity was disclosed on a delayed basis to the Defence, but beyond *Tadić*, I do not think there were any anonymous witnesses at the Tribunal and I think that needs to be made clear because the last question and answer was quite confusing, but that was not really my main purpose in standing.

My main purpose in standing was to address what Gregor said about talking to the press. Like Steven, I come from a jurisdiction where Counsel talking to the press is actually frowned upon, and, like Steven, I had a very unpleasant experience down the road for the last three years particularly during the last week. The aspect of ethics in talking to the press that I think you need to think about and perhaps needs proper regulation by the ADC and other Defence Counsel bodies, is not the ethics of bringing yourself into trouble, it is the ethics of talking to the press without express instructions from your client. One of the things that is repeatedly done at the ICC is to use the statements that Counsel make to the press against the Accused in the trial. And I think the ethics of talking to the press really do require regulation and you should not do it unless your client tells you that you can do it and unless he approves exactly what you are going to say.

Gregor Guy-Smith

Initially, I would say that I think this raises a question of difference of tradition because as you know, two things: first of all, Americans can speak to the press and also there is some division at least between our two traditions; and American attorneys do not take instructions. So we in first and second instance reach a bit of a difficulty. However, having said that, I think that there are some very serious concerns about, as you just pointed to Peter, the notion that an attorney statement can be used as an adoptive admission of an Accused and I do not see how precisely

the Court is entertaining that as valid evidence, or are you referring to this only from the standpoint of outside of the four corners of the Tribunal?

Peter Haynes QC

No, well they form the basis of submissions by Counsel for the Prosecution that Defence Attorneys have made comments on the record and then the press. It will form the basis of written filings and submissions in court that there have been things said by Counsel which indicate contrary position to that which is taken by the Defence. That is why I think the ethics of talking to the press for Defence Attorneys are very different.

Gregor Guy-Smith

I do not disagree with you. My concern would be that any competent Counsel that is making comments to the press which is inconsistent with the Defence and the theory of the Defence that they have adopted, or that they and the client have adopted, seems to me that would be incompetence of Counsel in the first instance. So it is unfortunate that it is occurring. I do not know whether or not you can really regulate that, unless you have a, what I would call a gag law, which is an absolute bar to any of the parties making any comments whatsoever about their views and opinions of a pending matter while the case is being tried.

I think it oftentimes occurs in the United States and I know it occurs in Great Britain, I know you do not talk about cases that are going on. And a lot of that is a purpose of protecting the fact finder which is a jury. But we have professional Judges and as we know, and as we have been told repeatedly over the years, professional Judges are not victims of or subject to the same kind of undue influences that jurors or laypeople would be subject to, because they can rise above that because they are professional Judges. So quite frankly, all of this kind of chatter that occurs in the media should have absolutely no effect whatsoever on the fact finders determination of the validity of the case being brought in front of them. I say that with a bit of sarcasm because we all are human, but it is certainly something that is going into the formula as long as I have been involved in the international process.

Question from the audience: Colleen Rohan, Defence Counsel at the ICTY

It will be very short. I am Colleen Rohan, I am a Counsel at the ICTY and I just wanted to draw a distinction between Counsel who may come in the press about a case and the particular case that Gregor was referring to, which was Counsel who was interviewed by media and was simply

expressing his political views. He was not referring to a specific case and that is where I think the danger lies: that Defence lawyers in the process of criticising the Tribunal could be ethically, and in this instance were, even assuming that this statement could be construed as a related to the Tribunal, can be subject to discipline for expressing political views. That is the danger.

Moderator, Slobodan Zečević

Thank you, Colleen. Ok if there are no other questions. Thank you very much.

Panel III: The Role of the ADC-ICTY

Moderator:

Dominic Kennedy, former ADC-ICTY Head of Office

Speakers:

- Judge Bakone Justice Moloto, Judge at the ICTY
- Eugene O’Sullivan, Former Defence Counsel at the ICTY and Defence Counsel at the STL
- Stéphane Bourgon, Defence Counsel at the ICTY

Moderator, Dominic Kennedy

Good afternoon and welcome back. The next panel this afternoon will discuss the function of Defence, the role the Association of Defence Counsel has played and the future of Defence organisations in international criminal courts.

The ADC was created in September 2002 and officially recognised as the only Association of Defence Counsel at the ICTY. Compulsory membership was incorporated into the Rules of Procedure and Evidence, requiring all active Defence Counsel to be members of the Association. Although the ADC was established originally to fill the gap and give Defence at the ICTY some body by which to be represented, it effectively became the *de facto* Defence office. This was a compromise between full recognition and no recognition at all. Since its inauguration there have been over three hundred fifty members coming from over twenty-five different countries. During the three years I spent as Head of Office at the ADC, it was clear that the Association has become an essential player for communication and cooperation between Defence Counsel and other organs of the Tribunal. The Association has acted as a collective voice for all Defence Counsel and continues to support all members to ensure that the rights of the Accused and the Defence are protected. I would quite happily speak more about the ADC, but I am going to leave that to the panellists.

I would now like to introduce our distinguished panellists. First, we have Judge Bakone Justice Moloto. He has been a Judge at the ICTY since 2005, sitting on various trials. Prior to joining

the ICTY he was a Judge at the Transvaal Provincial Division of the High Court of South Africa, focusing on constitutional matters and reviews of proceedings in the lower Courts. He has also served as a Judge of the Land Claims Court of South Africa, hearing disputes arising from South Africa's land reform initiative. Judge Moloto acted as Executive Director and is a former trustee of the Black Lawyers Association Legal Education Centre. He is currently sitting on the ongoing trial of *Ratko Mladić* and is also a Judge assigned to the Mechanism for International Criminal Tribunals.

Next on the panel is Mr. Eugene O'Sullivan. He was one of the longest serving Defence Counsel at the ICTY, first assigned to represent *Zejnir Delalić* in 1996. Since then, he has been assigned as Defence Counsel at a number of cases before the Tribunal. Eugene has been a long-standing member of the ADC Rules Committee, representing the views of Defence Counsel in relation to amendments to the Rules of Procedure and Evidence. He is currently representing *Salim Jamil Ayyash* at the Special Tribunal for Lebanon.

Our final panellist is Mr. Stéphane Bourgon. He is a Military Academy graduate, former Officer, and Military Legal Adviser. He has worked in the Office of the Prosecutor and subsequently as the Chef de Cabinet in the Office of the President. Since January 2002 he has acted as Defence Counsel representing a number of persons and is currently assigned to represent *Drago Nikolić* and *Miće Stanišić*. Stéphane has served two terms as President of the ADC and one term as Vice-President. He is currently a member of the Disciplinary and Rules Committee for the Association. Stéphane was also recently appointed as the *Amicus Curiae* Investigator at the Special Tribunal for Lebanon to investigate allegations of contempt.

I would now like to give the floor to Judge Moloto.

Judge Bakone Justice Moloto: The Importance of the Defence Function

Good afternoon to everybody. I hope that you did not eat too much during lunch time, but if you did and wish to fall asleep, by all means do so, because I am not going to be telling you anything you do not already know. When Mr. Lukić asked me if I could speak at this conference, he said to me that the topic I should speak about is the function of the Defence in international justice. I agreed. How presumptuous of me to come and talk to Defence Counsel about their function, when I have never been one in international justice. Very, very

presumptuous I must say, but be that as it may, I am going to tell you a few thoughts and you are welcome to add or subtract from them as you please.

In my view, the function of Defence Counsel in international justice is not different from the function of Defence Counsel in a domestic jurisdiction. In fact, I would dare say that the functions that are crafted into the framework of the Defence in the international justice system were taken from the domestic jurisdiction. So, what I say about the function of Defence Counsel in international justice would be equally appropriate for Defence Counsel in a domestic jurisdiction.

The main important function that Defence Counsel must think of at all times, is the very obvious one: defend your client; and defend your client to the best of your ability. Refuse to be browbeaten by anybody in the exercise of that duty to your client, whether that person is from the Prosecution, whether that person is a Judge, whether that person is any other Counsel. Your job is to defend your client and if at the end of the trial, whatever the outcome, you can say I could not do any better, then you are entitled to peaceful sleep. That is the most important function. Now, subsidiary to this function, are a whole number of rights and obligations that attach to the Accused. And it is your function as Defence Counsel to make sure that those rights are observed where they have to be observed, and that the obligations are performed where they have to be performed. I just want to mention a few of the rights and obligations. It is not an exhaustive list, but just few of those that I regard as very important.

The first one is, and I am dealing with the rights first, there is a presumption of innocence in favour of the Accused. And this presumption needs to be guarded very jealously by Counsel who defends the Accused. You must make sure that nothing gets into the evidence that comes as a conclusion, that the Accused is guilty before judgement is given. What comes in is an allegation, it is subject to testing through cross-examination, it is subject to verification in the light of the entirety of the evidence to see, whether it is the kind of allegation that can stand and stand firmly against the Accused. And make sure that it never happens that an allegation comes as fact. Facts are facts, allegations are allegations, and a clear distinction must be made between the two.

The next important point and there has been a discussion about this earlier, a few moments before lunch, is the right of the Accused to be tried *in presentia*. He has got to be in court, it is his right, if he does not attend court because he chooses not to, it is his right to waive. Now, I

understand that there are certain jurisdictions where Accused are tried *in absentia*, I am not going to talk about that. I am talking about the international justice system as it is practised by what I would regard as the majority of jurisdictions in the world. It is the right of the Accused to be present in court and to be able to hear the accusations against him, so as to be able to give appropriate instructions to his Counsel on how he understands the evidence and how Counsel can, having heard that understanding, put it before the Court.

The Accused has the right to confront his accusers. And this is the one major function that is being performed by Defence Counsel on behalf of the Accused, when he, as Counsel, confronts those who testify against the Accused. Counsel does that by way of cross-examination. And he must ensure that he covers the entirety of his theory of the case. Now, let me be understood on this point. Certain people think that cross-examination means just to ask questions. You do not just ask questions, you ask relevant questions, pertinent questions to the point at issue. And some questions, although relevant to the case, may not necessarily be relevant to your theory of the case. You need to concentrate on those points that have to do with your theory of the case, so that you stay within the theory of your case from beginning to end. I know, and I have seen in many trials, that cross-examinations seem to just go anywhere and anyhow without any purpose. This, to my mind, is unfortunate, because it suggests that Counsel does not know what his theory of the case is. And if you do not know your theory of the case, if you do not know what your Defence is, you cannot organise a meaningful cross-examination. You are going to be asking questions to fill up time. And time is money.

The fourth right that the Accused has, is the right to a fair and expeditious trial. And what do we mean by a fair trial. A fair trial, as again was being mentioned this morning, is ensured by having a public trial. And yes, I will concede upfront that the protective measures that are being given to some witnesses have, to some extent, a negative effect on the fairness of the trial of the Accused. But again, that is a balancing of rights of the Accused with the interests of the witnesses and the victims. But to the extent that the trial is predominantly public, to that extent is the Accused assured of a reasonably fair trial, because as the trial is going on, so are the proceedings being judged in the eyes of the community out there. And without that judging by the community, the balance goes and the trial is not fair. Now, we all know of the saying that justice must not only be done, it must be seen to be done. And who must see it to be done? Not the Judge, but the community out there, the society out there. We owe it to society, we are prosecuting this Accused in the name of society. And society, as that is the institution that mandated us to do this

job, is interested to see that the trial is fair. What do we mean by expeditiousness? Expeditiousness again is explained by another phrase that has Yours Truly's name in it. "Justice delayed, is justice denied". So, it is important to the extent possible to make sure that the trial comes to a conclusion as quickly as possible. Taking into account all other problems that have to go with trials, which may cause a delay, the delay must be a reasonable delay, it must not be unreasonable. Reasonable in the sense that the reason for the delay is justifiable, and the length of the delay is also not excessive.

The Accused has the right not to incriminate himself. That is why the Accused may or may not testify in his own cause, according to what he chooses to do, or according to what his Counsel advises him to do. Again, it is a strategic decision this one, it is usually taken by Counsel. Let me take a step back. It is not taken by Counsel, it is taken by the Accused preferably on the advice of Counsel. If Counsel knows, or at least if I were Counsel in the case, and I said to my client it is dangerous for you to take the stand and he insisted on taking the stand, I would make him understand that he does so at his own risk. And I would take no responsibility for that because he has come to me as the technician. The technician to help him with his problem. If he could prosecute his own case, he would do it on his own. You do not go to a motorcar repair shop to repair your car and then tell the mechanic how to do it. You hand the car over and the mechanic decides to do what he does and he bills you for that. So should it be with Defence Counsel. If my client is not going to take my considered opinion, my considered advice, he is on his own.

The Accused has the right to lead evidence in rebuttal of the accusations against him. Again here, with the help of Counsel, you have got to choose your witnesses strategically according to the theory of your case. You do not have to call anybody who is enthusiastic about testifying in favour of the Accused, irrespective of whether what he is going to say is or is not relevant to your theory of the case. And I keep coming back to this point of the theory of your case because certain evidence on the face of it appears relevant to the case, but it may not necessarily be relevant to your Defence. And it is therefore not necessary, in my view, to lead evidence, which is just relevant to the case even though it is not relevant to your Defence. So, you are going to be working with the Accused to select those witnesses that you think support your theory of the case, and you as Counsel, knowing what kind of information you want from them, are the one who must decide what questions to ask those people and what evidence you want them to put before the Court. Of course, here comes a very important part in the game, control of your witnesses. It is Counsel's responsibility not to put a wide question to a witness and expect him to

rattle away for ten minutes far beyond the question that was asked. You have to get just that information that you asked for. And once you have got that, the witness must stop and you can ask the next question. One of the means of control is to ask very simple, one fact questions. “Where do you live?” “What is your name?” “What is your father’s name?” “Where were you on such and such day at such and such time?” You get almost monosyllabic answers, but very clearly focused to the question. Do not allow the witness to rattle away and maybe say things you might regret at the end of the day. So, the function of Defence Counsel is a very important one and particularly when leading your own witness, of whom you are supposed to have absolute control. But it is equally important, even when you are cross-examining.

The practice at the International Criminal Tribunal for the Former Yugoslavia, and I dare to say also at the ICTR, has inherently in the system, some kind of infringement of the next right I am going to talk to you about. And that is the right to have sufficient time to prepare one’s Defence. Now, this unfortunately is a systemic problem, which the two Tribunals can do nothing about. And it is systemic simply because they are temporary institutions that must come to an end and therefore, there is pressure to come to an end. And when Counsel says I need two weeks to prepare for this, or I need six months to prepare for that, or I need three years to prepare for that, it becomes important for the Bench to balance that request with the need to complete the cases and bring the institution to a close, which is not that very important in a particular case, if fair trial rights must be respected. However, that right also has an opposing right within the rights of the Accused. We just mentioned the right to have an expeditious trial. So, long delays, which are not justified, infringe the right to expeditiousness even though they may still be at the request of the Accused. So, there is a need to balance those two and give Counsel sufficient time to prepare, but not just time because that is what Counsel asked for. We have got to look at the task at hand in comparison with the time that is reasonably required to achieve the task.

The last right I want to talk about, and it is not the least of the rights of the Accused, is the right to have Counsel of his choice, if he is paying out of his pocket. Now, this may or may not be a problem if the Accused is on legal aid, particularly at the Tribunal that I keep referring to, the ICTY, because that is the one I know best. This is because there are certain regulations, and there are regulations even domestically about this point. I might want Counsel to defend me that comes from Timbuktu and is not a member of the ADC; and depending on how much time is required for that Counsel to get himself on the list and handle my case, I may or may not be allowed to get the Counsel of my choice. It becomes important for those administering the

system to take that into account that if that is the client's choice, then Counsel must be given an opportunity to come onto the list of ADC members, to be able to defend his client, provided he qualifies. Of course if he does not qualify to become a member of the ADC, or qualify to appear before the Tribunal, that is just unfortunate, the Accused must try next door. So far so good about the rights.

But side by side with these rights are the Accused's obligations. And again, I am going to mention very few of them. There is the obligation to treat the evidence fairly. People have observed Counsel on many occasions, paraphrasing what has been said by a witness and in so doing, putting a twist to what the witness has said, resulting in embellishment of the evidence. You know, a simple example that comes to mind would be an answer by a witness that says "I think it did happen". And then Counsel says "oh yeah, you just told us it happened". Now, you are obviously embellishing that witness' evidence if you say that. He does not know what the correct answer is. What he is telling you is not fact. What he is telling you is what he thinks. And because he just says "I think it happened", you then want to draw the conclusion and you squeeze it in by your next question that it actually did happen. Now, it becomes important for your colleague on the opposite side to be alive to that kind of embellishment and make sure that when that happens he can jump up. It is also the job of the Bench to make sure that you do not embellish the evidence. But primarily, it is your opposite number's responsibility, because in typical ICTY situations - which is seventy per cent, eighty per cent, ninety per cent common law - the Judge is but a referee. He does not descend into the arena as we say in the common law systems. So, whereas he is there to ensure that the game is played according to the rules, it is also your colleague on the opposite side to bring the balance and make sure that you do not embellish the evidence.

It is not only evidence that must be treated fairly. It is to treat witnesses fairly, particularly witnesses from the opposite side. That is the second obligation. It does not matter how uncomfortable the questions you put to the witness may be, they must be put in a fair, respectable and respectful manner. Do not harass the witness on the opposite side. Do not trick the witness on the opposite side. Make sure if we have to quote what the witness said, you quote exactly what he said. And that is why there is a practice in the Tribunal that insists on Counsel going back to the transcript. Thank God we have that cool thing called e-Court. To say that if you are going to put the answer of the witness back to him, read what was said, do not

paraphrase, because that is an example of an unfair treatment of the witness and it is actually tricking the witness.

I just wanted to say finally that you have the duty to act honestly and honourably towards the Court, you know what that means, we have been talking about ethics this morning. Finally, here is the most important function of Defence Counsel from the point of view of the community out there that mandates us to prosecute these cases. That function is your contribution towards the development of the law. The tendency to see Defence Counsel as step children of the system should be driven out of our minds and we must accept that their submissions, their arguments go a long way to contributing to the jurisprudence and the development of the law.

Thank you so much.

Eugene O’Sullivan: The Role of the ADC-ICTY

Excellencies, dear Colleagues, Ladies and Gentlemen. I wish to thank the organisers of this conference for inviting me to come here today to speak to you and I think all the Defence Counsel here fully understand and respect your robust independence, Judge Moloto, for daring to go over time with Judge Bonomy sitting in the front row. I will not dare to do that.

In the context of this Legacy Conference I thought I would speak about the role of the ADC in two ways. I hope to remind those of us who have been on this journey here for the last almost twenty years of some of the accomplishments, some of the things we have done, some of the inroads we have made into ensuring that the Defence Counsel do their work well. And also by giving an account of that, those of you who are perhaps new or newer to this field can see that the mantle has passed to you, the work is not done, and as you become Defence Counsel or Prosecutors or other players in these international courts, hopefully you will keep this in mind and learn from what we have been through.

I think everyone knows that the Defence Counsel or the ADC, has never been, or was not and has never been an organ of the ICTY. I also think that it is fair to say that at the ICTY, at the beginning, the Defence was an afterthought. Very little planning seemed to go into how to deal with the Defence, how will it function within this Tribunal and that coupled with the perception of “well they are defending the bad guys, they may be undermining the mission of this Tribunal by trying to get the criminals off”, becomes a part of a institutional perception of the Defence

and that is something the ADC helped correct to a certain extent. And I will try to develop those points right now.

As Dominic Kennedy mentioned, the ADC was created and formalised in 2002 and at that point if we were not an organ of the Court, we certainly became a pillar. We had our membership, which was a requirement to practicing, we had a Code of Conduct and I am proud to say, I think, that as Defence Counsel, we had to abide by a Code of Conduct, contrary to Prosecutors and the Judiciary, who when they act inappropriately do not necessarily face the same sort of review and disciplinary actions that a Defence Counsel can face. Also, bear in mind that in 2002 we have had almost eight years of proceedings before the Court. So with the creation of the ADC, we had a unified voice that could meet with and discuss with other organs, the permanent organs of the ICTY and in particular the Registry. And I think it is worth noting that there was a lot of tireless time and commitment by many of our colleagues who sat on the Executive and on the different Committees, whose work by and large is taken for granted. When things go well, no one says anything. When there are problems, people tend to complain. So I wish to acknowledge all our past Presidents, all our past members of all our different Committees and Executives for their dedication, their commitment, and all the long hours that they put in.

Since 2002 you have seen growth in the composition of our organisation, considerable time has been spent trying to secure proper funding, the composition for the Defence teams, that is the example of the thanklessness when it works well, and the criticisms when it perhaps does not work as well. There has been recognition of the ADC as an institution outside the Court, outside the Tribunal, despite the fact that some emails are not answered at certain times, our membership has grown and we have trained people. We have had since probably early 2003-4-5 numerous trainings where we come together and share experiences among ourselves and with the future, younger people. I think the sign of the maturity of our organisation was the fact we had a Disciplinary Committee, which would self-regulate our conduct. We made *Amicus* submissions before the ICTY, again a sign of a maturity on our part. For better or for worse, we were part of the evolution, or the devolution, however you want to see it, of the Rules of the ICTY because of our membership in the Rules Committee. And indeed, I think it is worth noting that the Defence presence at the Rules Committee predates the ADC, it was a late Judge Richard May who insisted on Defence being present at the Rules Committee, prior to the ADC and he also insisted that OLAD or the Registry support our presence by ensuring that we could travel to The Hague to attend. And now, our most recent committee is the *Ad hoc* Post Tribunal

Matters Committee, and I think it is fitting at this point, this may be one of the last conferences we have, when there is a full-functioning ICTY and a full membership as we have today.

And can I ask everyone also to acknowledge in particular all the different Heads of Office we have had over the years, who have worked, I would say, more tirelessly than the past Presidents. I think all of our past Presidents, who are here today with us, will acknowledge that it is the Head of Office who made sure that the ADC was a vibrant functioning organisation. Let me end with two personal accounts of the importance of the ADC.

The ADC is, among other things, an important repository of information for those of us who have practiced here. It created a sense of collegiality, it provided assistance to us all. And the anecdote I would like to tell, Stéphane may remember this, there was a pre-ADC period, pre-Internet days, and remember there was no website, we had a great difficulty obtaining interlocutory decisions, pleadings, everything that was filed in the case other than your own. Everything was distributed to you as a Counsel by fax; and it was John Ackerman, his Honour Judge Morrison, then-known as Howard, and I, who came up with the idea that we would request from the Tribunal Registry a copy of each interlocutory order, decision, all jurisprudence, all the things we take for granted now by pushing a button. We would scan those documents and distribute them by email. Stéphane, who was the Chef de Cabinet of the President in those days, organised a meeting with the three of us, the President and the Registry. We explained our position, our request, it was agreed and as soon as the meeting ended, we were told by the Registry you are not getting any of those documents, you cannot have them. It was a completely deflating moment. They were not going to reconvene the meeting with the President, they were not going to do it, and it became the impetus for pushing for the creation of an organisation like this. And I do not think that is just a quaint historical anecdote. It is, I agree, but it also shows that from time to time there will be new challenges, new points that must be fought for and this is a never ending story where there are new situations, new technologies, new circumstances. We must always be vigilant and be pushing in the direction to improve our ability to do our work.

The last point is recruitment. And the intern programme I think is a huge success that has been led by the ADC. I would include legal interns and investigators and legal assistants. We now have a full-fledged community of people who came here six, seven, eight years ago, when the internship programme started, who are now junior lawyers and I am sure this room is full of people who have just arrived recently as well in the Hague and are keen to learn more about the

practice of international criminal law. It is hard to believe that there are several generations, ten years of people who have studied undergraduate programs of law, or coursework that includes international criminal law, graduate programs in international criminal law. Your work is invaluable. All Counsel who have had the opportunity to work with any of you are grateful and we will pass the torch to you, and I think it is your responsibility to continue doing the work.

I can see Judge Bonomy looking at me, squinting at me, he must be trying to stop me. One other major accomplishment of the ADC, I wanted to repeat it again, tonight at eight o'clock at the Hudson I believe, is the best Christmas party of the ICTY.

Thank you.

Stéphane Bourgon: Future of Defence Organisations in International Criminal Institutions

Lord Bonomy, Excellencies, Honourable Judges, Mr. President of the ADC Novak Lukić, Mr. Moderator, Dear Colleagues, Ladies and Gentlemen. Where to from now? Where do we go? You have heard about the ADC-ICTY, but the fact of the matter is, and I hate to be the bearer of bad news, but the ADC-ICTY is about to disappear. Why is this so? Well, it is a very simple equation. Less trials - less Counsel - less members - less dues - no Head of Office - no association. So, what is our problem? Problem is, and this we have been experiencing since the beginning of the ADC-ICTY, either you are a Counsel in trial and you have no time to get involved, or you are a Counsel back home and you are not interested. So what do we do? Well, the question is: is there a need for a Defence organisation? You will see from the title of my presentation that of course there is a need.¹⁰

Let us look first at the purpose of a Defence organisation.¹¹ If you are from the Judiciary or if you are from the Registry or from the UN, you see it from one point of view; you see it from the point of view of protecting the integrity of international criminal law proceedings; you see it as protecting the legal profession and protecting the public and of course the clients or the Accused, making sure they get good representation. If you are the Counsel, however, if you are

¹⁰ **Selected PowerPoint slides included in footnotes:** *Title:* "The Future of Defence Organisations in International Criminal Forums – A Plea for an Effective International Criminal Bar".

¹¹ *The purpose of Defence Organisations:* Protection of Defence Counsel vs. Protection of the integrity of ICL proceedings; the legal profession; the public/Accused.

the practitioner, what you want is the protection of Defence Counsel in what they do on a daily basis.

Let us take a look at both kinds of representation as to what a Defence organisation can and cannot do. Let us take a look, first of all, at the protection of the Defence Counsel.¹² The first thing a Defence Counsel, a practitioner wants is that he wants to be able to do his job. He needs the resources to do his job and he needs the time to do his job. If he is not given the time or the resources, he is not able to do his job. Nonetheless, I know from seeing my colleagues for the past ten years or so, no matter how many resources we get, no matter how much time we get, we always continue fighting to the end. But that is one of the protections we are looking for. Of course we want good working conditions, and of course Defence Counsel also want some kind of legal representation. What do I mean by legal representation? Well, I think in this room we all know right now, that something very special has happened a few days ago at the ICC, where you have four members of the same Defence Team being charged with contempt; they were arrested in four different countries, and now they are facing proceedings. It is not for me to speak on their behalf, that is not the point, but the point is that it is a major issue of having four members of the same Defence Team facing such proceedings, and there must be an organisation somehow, who will at least look and ensure that they will be treated with due process.

Then, another point is of course having a seat at the table. We never had a seat at the table. When I was President of the ADC we were invited at the plenary session and we could speak to the Judges a couple of times. It is a practice that since disappeared, or at least that is very limited and that is in my view plainly wrong. The Judiciary must hear from the Defence bar.

Now, looking at the other perspective,¹³ an important point is diplomatic representation of course. When I talk of diplomatic representation, I have mostly the ICC in mind. An Assembly of State Parties just finished a few days ago, I think yesterday as a matter of fact. Where is the input of the Defence into this big conference where you see hundreds of people, diplomats and the like coming together to discuss the future of the ICC? The Defence point of view is, if not ignored, treated very, very remotely.

¹² *The purpose of Defence Organisations*: Protection of Defence Counsel: ability to effectively represent persons accused; working conditions; legal representation; a seat at the table (Ref. Management).

¹³ *The purpose of Defence Organisations*: Protection of the Defence Function: diplomatic representation; discipline; quality control; training; a seat at the table (Ref. Rules).

My colleague Eugene mentioned that disciplinary mechanisms are a sign of maturity, when you can discipline your own, and I think that is very important to have an organisation that will be able to discipline its own. To have quality control there has to be some entry price, there has to be minimum requirements before you can practice before the Courts. Now, strangely enough, the Defence has those minimum requirements which we do not see on the Prosecution side, but that is a different issue all together.

Training: we need an organisation that will see to the training of Defence Counsel. We do not want Defence Counsel to be left on their own to do their training. There has to be some organisation that will look at and organise such training and see that Defence Counsel get the proper training.

And again, a seat at the table, which simply means of course, that we want to get involved into the creation of the Rules. This is one of the successes of the ADC-ICTY, where for the past years we have had some input at least in the rule-making process.

Let us take a quick look at a few existing models, now that the ADC-ICTY is about to go. Let us outline advantages and disadvantages of some, and let us first look at what happened at the ICTR. At the ICTR membership was voluntary. The association was not recognised and the association had no power whatsoever inside the Tribunal. Is it because of the choices this association made? I am not going to comment on this. However, it is certain that the Defence function completely fell under the umbrella of the Registrar, therefore removing independence of Defence Counsel, which was a very difficult relationship before that Tribunal.

What about the ICTY and the MICT? Well, in here we have the ADC model. It is a compulsory membership into an association that is recognised. We feel that this is a very good model and it has proved to be very successful. However, it also has its deficiencies where the Defence function still falls under the umbrella of the Registrar; and when you fall under the umbrella of the Registrar, you are but one of its concerns, and you are not what we should be, a pillar in the judicial process.

The next one is of course the ICC, where a new model has been created. You have an office called Office of Public Counsel for the Defence (OPCD) which is there to assist Defence Counsel, or to represent Defence Counsel. Then you have another office called Counsel Support

Section (CSS). These are two different sections that do not speak to one another. In terms of the work that can be provided by the OPCD, this is something that is puzzling and it is something that we need to learn to work with. I have always believed that any work done for a client I represent had to be done inside my team and I will not let anyone outside the team get involved in my case. But maybe that is something that can be developed.

As for the management of resources there has to be some input for all the people who are qualified and admitted on what we call the list of Counsel. There are more than four hundred members on that list. Four hundred Defence Counsel having more than ten years experience, Senior Counsel who want to work at the ICC. Yet, other than for the yearly reunion, or what they call the Defence Counsel seminar which must cost an arm and a leg, and I am not going to say it is a waste of money because it is always good to meet, but whether it is money well invested is a different matter. So we need some kind of an organisation to represent the Counsel before the Counsel Support Section. And of course the Defence falls under the Registrar again.

Now we get to the Special Tribunal for Lebanon, probably the best model so far, because the Defence is simply an organ of the Tribunal. If you talk about a seat at the table, the Chief of the Defence Office meets with the President, the Prosecutor and the Registrar in what they call Senior Management Board meetings. It is a model that works and it is probably the best model we have so far. But for some people who are working at the STL in the Defence, there are deficiencies that you would probably address. It is not a perfect model, but it is probably the best one we have so far.

A quick idea, when we look at this organisation, there is a dilemma that always happens: some Defence Counsel prefer to work alone, entirely alone and that say “I will fight with the Tribunal and I will get the resources because I know how to put a memo together, and I know how to do my time sheets, and I will get more resources than my buddies sitting beside me in the courtroom”. Other people take the view that for institutional matters we need the representation of an organisation. This is the view that I share, but it is difficult to get organised.

This is what we are looking for in terms of an organisation protecting the Defence, both the function of the Defence and the practitioners themselves:¹⁴ independence is number one; we need to be able to do our work without any pressure and without any fear of any pressure from the outside. The ability to represent, being able to do our job; the working conditions must be minimal to at least be able to play in the same field as the Prosecution. Legal representation in case of problems, diplomatic representation, discipline, quality control to ensure that we have good and qualified Defence Counsel, and of course, training and influence in the decision-making process or the rule-making process.

This leads to another question. From the ICC model we know that there are two types of Counsel, there are the Defence Counsel and there are the Counsel or Victims Legal Representatives. I am going to say very little on that, other than, and I know some people will disagree, but I think that for the work performed by Victims Counsel, I have some colleagues who do both Defence and Victims' legal representation, the priorities and the work done is very different. I think that if we are going to have an association that represents both types of Counsel, it should be divided in order to ensure that there are no conflicts between the aims of each.

A proposed model that we have, that exists today, is the International Criminal Bar. It was created in Montréal in 2002 and was a wonderful concept with many members. However, for a number of reasons, the influence of the International Criminal Bar has been greatly reduced over the recent years. Various reasons explain what happened to the International Criminal Bar, one is that it focused only on the ICC and not on other tribunals, such as the ICTY. Also, there were too many bars involved and not enough practitioners, and of course, the association was not meant to represent the practitioners.

I have a vision, I was going to say I have a dream, no a vision simply of an organisation: I think it is possible to have one type of organisation that could do everything, and I even have an organisational chart¹⁵ as former military: an international criminal bar that would take care of both functions and that would of course represent both the Victims Legal Representatives and the Defence Counsel, each having a separate representation between the two. Where training is

¹⁴ *Criteria Related to the Effectiveness of the Protection of the Defence*: independence; ability to represent; working conditions; legal representation; diplomatic representation; discipline; quality control; training; influence in the Rules making process.

¹⁵ This organisational chart is included as an annex to the publication.

provided, *amicus curiae* are included, external affairs, fundraising and publications, a communications committee, and of course, it would be taking care of all aspects of being a Counsel, whether it is for the victims or the Defence.

This morning, Mr. Lukić said that it was a pity that we sent a number of letters. I was on the Fundraising Committee for this conference and it was a total failure other than for one wonderful organisation, and I take this opportunity to say thank you again to the Erasmus University. This was wonderful of them to believe in the Defence because nobody else did, I think we should actually clap; they are the only ones who did it, everybody else said no. We need some kind of representation for external affairs and fundraising. I will stop here my time is up, thank you very much.

Questions and Answers

Moderator, Dominic Kennedy

I would now like to open the floor for any questions that anybody might have.

Question from the audience: Xavier-Jean Keïta, Principal Counsel of the Defence (OPCD), ICC

Good afternoon and thank you for this invitation, my name is Xavier-Jean Keïta, I am the Principal Counsel of the Defence, the OPCD at your quoting Stéphane. Just to correct something, because I was assisting Aimé Kilolo two days ago, who is presumed innocent and who is the *Bemba* Principal Counsel and just to correct that there were two members of the *Bemba* team, the Principal Counsel and the Case Manager. The others were external of the Defence team. This is a first correction.

The other thing I wanted to precise, that my feeling as a Defence Counsel is that I was shocked, of course, because some Counsel were arrested with a kind of violence if I may say, and I just imagine that the bazooka was used to kill a fly. The thing is, and I raised my concern two days ago, first of all, I wonder what was really the timing to do that at this moment just before finishing the case?

Secondly, what about the consequences? Because yesterday there was a status conference in the main case and the OTP was saying that the two Counsel remaining in the team may face a conflict of interest to continue the case.

And my third concern was two days ago. What about the role of the OTP being at the initiative, at the origin of this special investigation, even if it is allowed by ICC text? I think that there is the uncertainty of contempt. Because of fair trial, the OTP who is a party does not have to be involved at all with an external body. This is my concern. Of course, if they are guilty, they are guilty and nobody can support that. If they are not guilty at all, it will be difficult when you have been in prison, which completely kills your name.

So I appreciated your concern about the OPCD and your vision, you are very optimistic, and I think that it is a moment to help the ICC because we have a new Registrar and he is about to restructure the Registry, including perhaps my office and the Victims Office. So we will need your legacy and your experience to move forward. Thank you.

Question from the audience: Chris Engels, OSCE, Bosnia and Herzegovina

Thanks, my name is Chris Engels, I am currently with OSCE in Bosnia, formerly working for the Office of the Criminal Defence in the Court of BiH.

I just wanted to add a bit to what you were saying Stéphane, and more generally on the role and the legacy of the ADC and its members. And that is: in Bosnia we now have the Criminal Defence Office that is modelled on Sierra Leone and looks very much like what we see in Cambodia, and it has also contributed to this development of what we need and want to see in a Defence Office. The difference being there, that it is now a domestic institution that takes serious the role of the Defence and provides training and advice to Defence lawyers. So it is taking what are some of the best practices from these organisations that you mentioned and has applied them domestically and is now integrated and fully run by the Bosnian government.

And to the legacy of individuals who are members of the ADC, it is quite a big honour and pleasure to say that out of the four of you up there, two of you are actually instrumental in providing that training, Judge Moloto and Eugene, and in addition to that, several other colleagues here, members of the ADC have been incredibly helpful in coming to Bosnia to strengthen the capacity of Defence, taking the knowledge that they gained here, in the Tribunal,

and as members of the ADC and transferring that knowledge to Defence lawyers representing alleged war criminals in Bosnia and Herzegovina.

So, I think that as there is definitely one aspect of the ADC, which has provided a model in a form to be expanded on the international spectrum. Also, the ADC and its members have done quite a lot and contributed significantly to what we now see as a role for Defence and a Defence Office within domestic institution. And I want to say thank you to all of you who contributed to that. Thank you.

Judge Bakone Justice Moloto

I have a question for Stéphane. Stéphane thank you very much for a wonderful presentation and I saw you have the bigger picture in terms of the future, which you presented there by an organigram. My very narrow question is, as the Tribunal, the ICTY is winding down and we do have now the ICTY and next to it we have the MICT, and I saw recently a filing that indicated that the ADC of the ICTY cannot necessarily represent the interest of Counsel within the MICT. The question to you is, what is the future of Defence Counsel representation in an organisation within the narrow sense of the ICTY MICT, if you have any thoughts?

Stéphane Bourgon

Thank you very much for your question Judge. It is actually something that we are presently working on, even though my colleague Lukić was saying I am not working enough on it, but it is something that we are working on, there are some proposals on the table Judge and that is, that we represent the MICT, both the component from ICTR and the component from ICTY; there are a total of six¹⁶ members and that is it. We are trying to get the six members together to create an association and the main proposal on the floor right now is basically, that that we would try to fall under the ADC-ICTY. Of course, I say this, nobody around knows this and it is good opportunity to say that, because we feel that the ADC-ICTY could represent the interest of all lawyers practicing before the MICT. But we definitely believe that there is a need, even more so because there will be, as time progresses, there will be a further need to ensure that lawyers practicing before the MICT are able to do their work.

¹⁶ Numbers as of November 2013.

Question from the audience: Michael Karnavas, Defence Counsel, ICTY

I just wanted to supplement to this. As I understand it, those who are on the ICTY list and have been practicing for very long time and are qualified, are now being required to re-register, to re-submit documents, to get documents from their bar associations that they are qualified to be at the ICTY or the MICT, which is the same organisation, the same people. Only at one moment they are ICTY and the next moment they are MICT, and the question is why are we having to do this? And that is why you only have six members. It is taking me a month to try to get all the documents, to show that I am qualified to practice before the very same institution that I have been qualified to practice for the last fifteen years. It is not the ADC's fault and it is not anybody's fault on the panel, but the Registry is making us go through this, through this hurdle that is unnecessary. I do not see why we have to do that. It would be my proposal because the ADC has functioned well over the years as a substantive player at the ICTY, that it continue to exist for this MICT, which is nothing other than a continuation of the ICTY under a different name as the cases move on to their finality. Those are my remarks.

Stéphane Bourgon

I do not know if there is anybody from the Registry present but Michael, I would like to echo your concern because that is something that I will just take the lead, because the President is sitting down, but simply, we were under the impression that being a member of the ADC-ICTY made you a member of the MICT if you simply express your interest in being a lawyer before the MICT. This was turned down, and I think I can tell you that this was a battle that was taken up by the ADC-ICTY and unfortunately the battle was lost. However, there are other concerns with the mixing up of two former Tribunals, which also created problems and that is one of the reasons why the present Registrar decided to go with a re-application process. But I fully echo your concerns, it took a number of papers to be sent, I was representing somebody who was charged with contempt and could not do anything because I was not on the list and I had to re-send all the documents in order to be re-admitted on the new list, when I have been practicing on here for twelve years. So I echo your concern and it is something that we should bring up to the Registrar.

Moderator, Dominic Kennedy

Any further questions? I think we are just exactly on time. I would like to thank all panellists for their valued contributions.

Panel IV: ICTY Legacy

Moderator:

Richard Harvey, Standby Defence Counsel at the ICTY

Speakers:

- Colleen Rohan, Defence Counsel at the ICTY
- Edina Rešidović, Former Defence Counsel at the ICTY
- Judge Howard Morrison, Judge at the ICTY

Moderator, Richard Harvey

Welcome, everybody, to this final session. We have an excellent panel for you. Before we start I just like to say in the words of *Bruce Springsteen*, “it’s been a long time coming”. And as far as legacy is concerned, I would also like to quote him and say to our successors: “if I had one wish for you in this God-forsaken world, kid, it would be that all your mistakes will be your own”. In other words do not repeat the errors but inherit the good side of the legacy and particularly that of the ADC.

The other thing I would like to say is please sign and ratify the Anti-Slavery Convention. Those of you who have been working here for nothing, for so long, know what I am talking about. This institution could not function, the Judges could not function, the Registry could not function, the OTP could not function, God knows the Defence could not function, but for the unpaid labour of our wonderful interns, to whom I would like to pay tribute. And, while we may laugh at that, the fundamental issue that everybody has to understand moving forward is, that if the project of international criminal justice has a future, then justice is only going to work if you pay the price for it. The money has got to be found to make these institutions work properly, work effectively and work honestly.

That said, thank you particularly to Isabel Düsterhöft and to all of those who have volunteered their time and energy to put this remarkable event together; and thank you to all who make the brilliant ADC newsletter possible, again with Isabel’s current editorship and of course before her Dominic, and all of the wonderful interns - most of whom were on my own team - who have

been absolutely brilliant in putting together one of most valuable resources in international criminal law, and now I think I have used up my time, so we thank you seriously for that.

Firstly, I will introduce and I will give all of the introductions now so you do not have me jumping up and down in between. Colleen Rohan who will lead off, who, when I was asked if I would become Standby Counsel for the *Karadžić* case, I said on one condition and that is that Colleen Rohan joins me because I cannot possibly do it without her. I have worked with Colleen for many, many years now. She has been a criminal Defence lawyer, appellate lawyer extraordinary in California for more years than she cares to number, she has been here now probably for more years than she cares to number; been Counsel in *Popović*, in *Haradinaj* and now with me in *Karadžić*, Legal Consultant on *Perišić*. She is a founding member of the International Criminal Law Bureau, former Vice-President of our wonderful institution the ADC, former Chairperson of the Disciplinary Council, currently the ADC representative to the ICTY Disciplinary Board and she edited the *ADC-ICTY Manual on Defence Developed Practices*, an invaluable resource. That is Colleen, she will speak first.

She will be followed by Edina Rešidović, who is a criminal litigator for more years than she would admit to and she and I, in fact, were called to the bar in the same year, I see in 1971. Oh, I should not have told you that, should I? She served as Deputy District Attorney in Sarajevo and as Secretary for Legislation of the Socialist Government of Bosnia and Herzegovina. Since 1991 she has been running her own firm in Sarajevo, she has been Lead Counsel here at the ICTY in the *Delalić*, *Hadžić* and *Boškoski* cases, she is a Defence Counsel in Bosnia and Herzegovina particularly in war crimes cases and has served as Secretary and President to the Red Cross of Bosnia and Herzegovina for many, many years. Co-founder of this institution, the ADC, she developed and drafted the ADC Statute and has been a member of its Training Committee, the Rules Committee, the Disciplinary Panel, the Advisory Panel and we are very privileged to have her here, especially today.

Now there is only one person that I know who has been Defence Counsel at the ICTR and at the ICTY and Chief Magistrate of Fiji, Senior Magistrate of Tuvalu, Attorney General of Anguilla, has done court martial work in the UK and Germany, has been a crime, civil and family practitioner for again more years, prosecuted and defended in the UK and was also Senior Judge on the sovereign-base areas of Cyprus, a Circuit Judge in the UK and has more judicial experience than most of us have ever appeared in front of. At the same time he is of course now

a Judge at the ICTY, before whom I appear every day so I have to be nice, and he has that ultimate distinction, a Judge in the ICC. We are very privileged to have, in looking to the future of international criminal justice, the man to carry it forward from the lessons that we have learned in this institution here to the ICC, to infinity and beyond, so that is Howard Morrison who will speak last and has to leave at five o'clock so I will shut up and let Colleen be the one to lead off.

Colleen Rohan: Expectations versus Reality

Hello everyone, I have been given kind of a strange topic, in my opinion, the “ICTY Legacy – Expectations versus Reality”, which is a bit of an amorphous topic. We all have different expectations. We all have different realities, that is for sure, and so it strikes me as being a very subjective, personal topic, although obviously the intention here is to draw on a larger experience. So I tried to think of how to go about doing this in a way that would work. To make a small analogy, when I give talks like this and when I am in court I tend to write down bullet points on a piece of paper and I type them out on my computer and it is all quite beautiful and it looks something like this [holding paper up], you know perfect, excellent and that is my expectation of what I will say. Then after I came here today and listened to everyone else speaking, now I am dealing with this kind of mish mash [holding paper up]. I do not know if you can see all the notes that I have written which are now the reality. So maybe one analogy here is that we have great expectations, but the reality sometimes turns out to be a bit messier and more difficult.

I think all of us with experience in the international courts, certainly in the Defence in international crimes trials, realise that that has been the case. It is important I think, also since we are looking forward here, to have some sense of what it is that we want with all of this and I think that my topic to some extent allows for a broader view which is: What is it that we want? Do we want to have war continuously so that we all have these jobs and cases and we have work with the free interns, do we want that? Do we want to develop individual legal systems that work for individual countries? Do we really want the International Criminal Court, which frankly scares me, quite seriously, it does scare me given how it functions and how things have been carried out there so far; although granted, it is been there for only ten years. The ICTY – an institution I am very proud that I have been associated with, remain associated with – was well beyond one trial after ten years of its existence. I hope that the legacy of the ICTY and the

achievements of the ICTY will be taken up at the International Criminal Court. To date I do not see much hope of that but we will see and that is also a work in progress.

I looked at the ICTY web page as well to see what the goals were when this institution was first developed years ago and they are quite lofty, at least as to some: efficient, transparent international justice, peace in the region, justice for victims, creation of an historical record. Those are just some, and I think it is important when we look to the future that we pay attention to these words that we use truth, justice, transparency, shared values, because these terms are not necessarily real.

In my mind I have a different definition of that perhaps than you do. I believe it is important that we learn to recognise our differences not to fight against them, not to criticise them but to recognise them so that when we sit down to speak with each other and to try cases together that we start out understanding that we do not understand each other. If we recognise that, then we can move forward and develop a mutual understanding, which certainly has happened with the people I have worked with at the ICTY. It has been a valuable experience from that standpoint. Rather than expectations, I would focus on what I see are the achievements of the ICTY. I think they are formidable and also, again looking at it broadly speaking, the ICTY has proved that international trials in complex cases are possible. That was something that people were unsure of; I know it was commented on earlier today, people were unsure of that when the institution started out. The ICTY has proved that that can occur, we have done it, we have various views about whether it is been done fairly, properly, but we have done it.

We have also proved, which I think is a more valuable lesson in some senses, that international trials are expensive and they are time consuming. I cite that as an achievement because that is also the reality and it is something that the international community has to face. If we are going to go forward with this kind of system, it is important to understand that you will get what you pay for and if you are unwilling to fund it properly you will have a system that suffers from that. It is something that is important that we all pay attention to and certainly the powers that be that are forming these institutions.

We have developed, and by we I say the ICTY as a group, as a community of people working together, a system of developing jurisprudence. This is a really important point but I think that we make a mistake if we assume that this will automatically be adopted by other institutions. It is

already obvious that it will not be. There are efficient procedures that have been put in place in the ICTY, rules and procedures. I do not agree with all of them but they certainly have been workable. The ICC again, and I am using the ICC as an example because this is the institution that, in theory, will adopt some of our lessons learned, appears to have turned their back on that, and there are difficulties because of that at the ICC. We will see how that develops.

We also, and it was interesting to me that no one has actually commented on it this morning in this sense, we have developed a functioning legal institution and as an institution, there is a Registry, there is the victims and witness programme, there are the court management people, there are translators, we could not function without the translators. We have amazing audio video technical people who have worked with us for years and I do not know if Rob Barsony is sitting in the background, yes, I see him. These people watch us every day in court, every day. They have seen all of us performing in court. The amount of institutional information in the minds of the AV people who work with us is phenomenal, the amount of information we could learn from them about what we look like; our trial process. This is a vast ocean of information and I hope that the AV people will come forward and tell us about their views and experiences in one form or another.

We have talked about the Defence function and since time is so limited I am not going to discuss that but I would mention that the existence of the ADC-ICTY is also a huge achievement. A group of lawyers coming from all over the world who do not know each other, who do not have many resources, who speak different languages, who were on different sides of a war, who do not know anything about the war perhaps, in the instance of some of us internationals, somehow managed to pull together and create an organisation. To me this shows hope for human kind to begin to overcome some of our more difficult differences and problems.

The reality now, to turn to the reality, the reality I think is that for any institution to develop and improve it has to be open to honest criticism and this is one of the concerns with the media case that was mentioned this morning, where a lawyer was disciplined for giving his opinion about the ICTY. Whether you agree with that opinion or not is beside the point, his opinion about this institution. We need to be open to honest criticism, and that includes the Defence function. We all make mistakes and I think that is an important lesson to learn in the sense of how any institution improves as it develops.

Another reality, again I am not going to spend a lot of time on this because you have heard much of this earlier today, but the Defence, for all it strides forward, is still excluded from many functions of the institution. There was an ICTY conference in Sarajevo this week that the Defence was not invited to attend, for example, an outreach conference; even after all these years at the ICTY. Perhaps we should not have been there, but I think the broad point is that the Defence is still excluded from significant activities. There is a continued lack of understanding of the function of the Defence and you see this, when you go and speak with people and they have no idea what you do as a Defence lawyer; if your client confesses to you, are you not supposed to tell the Judge for example? This does not mean people are stupid, it means that they are ill informed about what the role of the Defence lawyer is and it is something that we all have to take responsibility for in educating the community. When you see anger over acquittals for example, this is understandable in terms of people who are the victims of the crimes at issue; that is something we can all understand. But as a legal institution, an honest legal system will of course result in some acquittals. This is something that the broader community needs to understand and we need to do work there.

Ethical codes: we have had ethical codes as Defence Counsel since the early years, certainly at the ICTY. We still function in a world where Judges, who thank God have been for the most part, at least in my view, perfectly ethical, nonetheless function with no codes, no binding ethical codes. The Office of the Prosecution at the ICC enacted a binding ethical code for the first time on 5 September of this year. We all know that there have been issues at the ICC about Prosecution ethics. It is incredible to me that it took ten years for someone to figure out that there might be a need for a Code of Ethics for Prosecutors. We also, I believe, must face the reality that we do not necessarily agree on what the purpose of international criminal trials is. Some people believe that the purpose is to obtain justice for victims, reconciliation in a conflict area, to create an historical record, as mentioned earlier, to obtain peace. All these things are goals but the reality, at least from a Defence lawyer's point of view, is that the trial is to determine the guilt or innocence of the Accused who is in the dock. That is what the trial is about, that is what the legal system is about. The reality also, as a result of confusion as to the purpose of these trials, is that there are people who mistake international legal institutions, such as the International Criminal Court or the ICTY for institutions that should function in some way as an NGO or a human rights organisation. They are not. They are legal institutions and the rules and procedures that are attached to legal institutions need to be consistent and enforced consistently, just as they are in our domestic legal institutions.

One big gap in our international process, and again we are developing, we are in infancy, the ICTY has existed for only twenty years, obviously there will still be gaps, but it is in my strong opinion that we need a third level of review of cases; some kind of review when there has been a difference between appellate court findings in different cases or even perhaps between different Tribunals. If we are really going to create a system of international criminal law that is a proper system, then we need a third level of review to resolve inconsistencies between courts. Certainly the younger people in the audience, and I am privileged to meet them, who are coming into this world of practice very eagerly, looking at this new system of law, have the idea that we have a settled system but we do not. We need to understand that fact. Each tribunal, each court has a different system. We share similarities but procedures and rules are different and walking from one court to the next can be quite a learning experience.

Having said some negative and positive things I really would like to end on a positive note and that is a note of congratulations to all of my colleagues here, the Defence Counsel at the ICTY who I consider to be brave and committed and in many ways some of the finest people that I have ever worked with. I think we hope that we have achieved justice for clients, certainly that is something that we have worked toward. But you know justice, like beauty, is in the eye of the beholder and it is a very, very difficult concept for a large number of people to agree on. What is perhaps more to the point of our experience is that given the disparity in our recourses, the disparity in our training, the struggles that we have had as Defence lawyers to get together to work on our cases, the diversity in our backgrounds, the language difficulties, despite all of that, the reality is that my colleagues at the ICTY have set a very, very positive standard that I believe proves that a well-informed, well-funded Defence is the only way to assure that we have fair trials and equal justice. I hope that we have learned that lesson and I think that should be everybody's expectation and everyone's reality. Thank you.

Edina Rešidović: Perceptions from the Countries of the Former Yugoslavia

Good afternoon Honourable Judges and the Colleagues from Defence and Prosecution, Ladies and Gentlemen. My topic is the “Perception from the Countries of the former Yugoslavia” and before that I want to mention that on this day, 29 November, seventy years ago in the Bosnian town of Jajce, the grounds for what became known as Socialist Federal Republic of Yugoslavia were laid down. On this day, the decision was rendered to build the State on democratic and federal principles, as a state community of equal people. And this is the aspect of

equality that I would like to talk about today in relation to the legacy of the ICTY and the perception from the countries of the former Yugoslavia.

This principle of equality, which was disregarded and walked over during the wars on 1990s, made me think about whether, and if so in what manner, this principle re-installed itself in the legal sense in what is now called “the region”, following twenty years of the work of the ICTY. Three major issues arise: equality pertaining to the application of the substantive law, equality pertaining to sentencing, and equality pertaining to access to evidences.

The ICTY legacy pertaining to the development and clarification of substantive international criminal law is by now a well-established fact and one that is not disputed even among its critics. For example, law pertaining to crimes against humanity has been recognised as forming part of international customary law and its content has evolved since World War II through the jurisprudence of the international criminal tribunals, mainly the ICTY. However, it is still only Bosnia and Herzegovina in the region that prosecutes crimes against humanity.

When trying cases arising from crimes committed during the conflict in the former Yugoslavia, both the courts in Serbia and Croatia apply their respective Criminal Codes applicable at the time of the commission of crime, which reflecting the Ex-Yugoslavia Criminal Code do not specifically provide for crimes against humanity to be prosecuted.

Therefore, no cases involving charges of crimes against humanity have been prosecuted to date either in Serbia or Croatia; and that is despite the fact that the Ex-Yugoslavia Criminal Code contained a blanket provision referencing the application of international law, which, as noted by the Commentary on the Ex-Yugoslavia Criminal Code, permitted legal recognition of every new development in international law without requiring a change in the Ex-Yugoslavia legislation.¹⁷ The *Artuković* case is a perfect example of that.¹⁸ Despite the jurisprudence of the international criminal tribunals, in particular the ICTY, people of the region, both the victims and the Accused, do not seem to be equal before the law.

¹⁷ **Selected PowerPoint slides included in footnotes:** Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code blanket provision: ““whoever, in violation of the rules of international law [...]”.

¹⁸ 1986 case against Andrija Artuković concerning World War II crimes - under the SFRY Criminal Code the principle of legality was not considered to be violated when a criminal act was not envisaged in the Criminal Code applicable at the time of the commission of crimes, but was envisaged as such under international law.

However, a recent decision of the European Court for Human Rights in the *Šimšić against BiH* case has a potential to set a new course for the judiciary in the countries of the former Yugoslavia and to accept the jurisprudence of that Court and of the ICTY. In that case, the European Court held that, while the acts in question had not constituted a crime against humanity under domestic law in BiH until the entry into force of the 2003 Criminal Code, those acts did constitute, at the time when they were committed, an offence defined with the sufficient accessibility and *foreseeability* by international law as crime against humanity, and found no violation of Article 7 of the European Convention.

The equality issues, both for the victims and the Accused, arise in relation to the sentencing as well. In the early 90s, both Serbia and Croatia abolished the *death sentences* prescribed by the Ex-Yugoslavia Criminal Code for genocide and war crimes, leaving thus the law applicable at the time of the commission of the crime with twenty years death sentences that existed under the Ex-Yugoslavia Criminal Code as a substitute for the death penalty.

In BiH, however, the death penalty was abolished only after the war. Therefore, as opposed to Serbia and Croatia, at the time of the commission of the crime, death penalty existed as an applicable sentence for war crimes and genocide.

While the courts at the BiH entity levels try war crime cases on the basis of the Ex-Yugoslavia Criminal Code, replacing the abolished death penalty with the twenty years of the sentence, the Court of BiH trying war crimes cases on the State level generally acted on the basis of the new BiH Criminal Code, which envisaged a maximum sentence of forty-five years for the gravest crimes. This was considered to be in line with the sentencing practice of the ICTY and with the view that a long-term imprisonment would be an appropriate substitute for the death penalty rather than a sentence of twenty years of imprisonment.

Although the Court of BiH did apply the Ex-Yugoslavia Criminal Code in several cases where it considered a minimum sentence for war crimes prescribed by the Ex-Yugoslavia Criminal Code to be more lenient to the Accused than the sentence prescribed by the new “BiH Criminal code”,¹⁹ it seems that this new practice might be followed by all cases concerning war crimes and

¹⁹ Cases when the Court of Bosnia and Herzegovina (BiH) applied the SFRY Criminal Code - when it considered that a Trial Chamber was leaning towards the minimum sentence for a war crime, it applied the SFRY Criminal Code as the law providing for lower minimum sentence (e.g. *Zijad Kurtović* case).

genocide. This shift is being triggered by the recent BiH Constitutional Court decisions, following the European Court for Human Rights Judgement in the *Makouf and Damjanović* case.²⁰ This could lead to some balance in equality, at least for the Accused, when it comes to sentencing practice for war crimes and genocide in the region. However, other forms of inequality could be deepened. First, the persons convicted by the ICTY would be considered as having much higher sentences than if they have been tried in the region. Second, a person accused or convicted by the Court of BiH, for example of deportation as a crime against humanity, would in accordance with the BiH Criminal Code and the European Court decision in the *Šimšić* case, be facing long time imprisonment up to forty-five years, while his inmate who is accused or convicted of genocide would not be facing more than twenty years. Third, satisfaction of the victims as well as other purposes of criminal sanctions, such as the rehabilitation or the other, would seriously be brought into question.

The third topic of that speech is equality pertaining to access to evidence. One of the ICTY's major legacies for all the countries of the former Yugoslavia is, for sure, the evidence and documents in general collected by the ICTY during two decades of its existence. This enormous collection represents a highly important source of documentation not only for historical and academic purposes but also to numerous current and future war crime trials in the region.²¹

Although it was far from easy for the ICTY officials to collect all this evidence, the ICTY had both authority and influence to obtain necessary documents from various sources including many states and international organisations. The local authorities and Defence in particular have nothing close to such a possibility. For example the Defence teams in Bosnia and Herzegovina do not have access to the ICTY Electronic Disclosure System directly, but only through the Criminal Defence Section (OKO), which not only has insufficient means and budget but also despite their best effort to assist the Defence, do not possess in-depth knowledge of the Defence

²⁰ European Court of Human Rights – *Makouf and Damjanović v. BiH*: Held: the applicants, convicted by the Court of BiH for war crimes under the new BiH Criminal Code and sentenced to term of imprisonment close to the sentencing minimum prescribed by the Criminal Code, could have received lower sentences had the SFRY CC been applied; Reiterated: its position taken in *Šimšić* case and the applicability of the new BiH Criminal Code in relation to Crimes Against Humanity. The BiH Constitutional Court - found violations of Art. 7 of the ECHR, even in cases where the applicants have been convicted to long-term imprisonment sentences for the crime of genocide (e.g. *Jakovljević et al.*). Although applicable only in the concrete cases before it, it seems that the BiH Constitutional Court held that the SFRY Criminal Code is to be considered more lenient in relation to the maximum penalty as well, drawing parallel not between the SFRY's death penalty and the new BiH long-term sentence, but between the SFRY substitute for death penalty, that is 20 years of imprisonment, and the BiH's long-term imprisonment.

²¹ According to 2008 data, in BiH: number of suspect/accused in various stages of proceedings = 9879, of that, in the BiH Office of the Prosecutor = 3819, and in the investigation phase = 5895.

case and thus, cannot do searches of the EDS the way the Defence team members could. That indirect access to the EDS is possible only for the cases tried before the Court of BiH and even that access is additionally restricted due to redaction of a statement of a person who did not testify before the ICTY but did provide the ICTY OTP investigators with the statements. Due to the redaction of such statements, OKO is not able to locate them through the EDS.

When it comes to access to various military, police and other official State document a two level problem arises: one concerning access to documents and archives with the one State, for example military archives in BiH, and one concerning access to archives of the different State for example from Bosnia to Croatia or Serbia or *vice versa*. For example, as a Defence Counsel in several war crime cases before the Court of BiH, I have been waiting for a year and a half now to gain access to archives of the Ministry of Defence. The Minister of Defence is refusing Defence access to such archives. He even did not follow the orders of the Court and they explained that it is confidential material. According to the law to protect confidential materials they refuse us. Finally, we need to raise the criminal report against the Minister of Defence for not respecting the court orders.

Given the problems to access the archives within one State you can imagine what kind of a mission impossible a team would have when one needs to gain access to State archives of other countries in the region. It is also important to note that some countries in the region possess official documents originating from military structures outside their own States, as for example the HVO archives which are not to be found in Bosnia and Herzegovina but in the Republic of Croatia. The Defence does not have means to access another State's archives. Not to mention access to NATO archives, UN archives with all its Brit Bats and Dutch Bats archives, EU and OSCE mission archives and the list goes on.

Therefore, in addition to questions of equality arising from the application of substantive law and sentencing practices, an important issue of equality pertaining to access to evidence exists as well. Enormous amounts of documents from all those archives are to be found within ICTY archives. It is thus of critical importance that the legacy of the ICTY is and remains available to the parties in war crimes proceedings conducted in the countries of the former Yugoslavia, and that is to both the members of the Prosecution and Defence equally. And finally, one of the major legacies of the ICTY, in my opinion, is therefore the respect of the principle of equality that is applied

both to the Accused and the Prosecution. It remains to be seen whether the same equality will be achieved in the region. Thank you.

Judge Howard Morrison: Future Challenges for Rights of the Defence in International Criminal Law

Research in California, where else, apparently indicated that ten per cent of you will remember what I say for forty-eight hours, twenty per cent will remember for twenty-four hours, but the remaining seventy per cent of any human audience simply sits there emerged in its own erotic thoughts. Now that is something of a comfort because what it means is statistically, whatever I say, the majority of you are going to be enjoying yourselves. Future challenges? Actually the future challenges are pretty much the same as the ones we have at the moment and the ones we have had from the beginning. The big one is going to be for Defence, as ever, austerity, and I look at the UK and I see that in a time of austerity legal aid is one of the first casualties. The implications of cutting legal aid are simply not just budgetary, they of course go to the core of the importance of the Defence and the importance which is given to the Defence in criminal proceedings, and no doubt that the Crown Prosecution Services in England will also be suffering budget cuts, but that does not help.

The other big problem, which I think it is actually going to get worse and not easier for Defence is co-operation with or by hostile States and institutions when it comes to seeking witnesses or documentation. It has never been easy and sometimes it has been downright difficult, and I experienced that myself, particularly at the ICTR, trying to get documentation out of some reluctant governments. But to resolve those issues there is no magic wand, it requires two things for Defence Counsel, the first is an ethical determination to get the job done properly and the second is professional persistence. Do not take “no” for an answer, just keep on going. You do, as I found out, get there in the end.

But I foresee some new challenges and indeed opportunities. What are the big challenges that we face? It is not so much going to affect me at my age but it is going to affect some of you; it is the increasing world population, because the increasing world population is going to have a knock-on effect on international criminal law. Why? Because it is going to lead to more conflicts. We have always had religious wars, ideological wars, territorial wars. We have probably had an oil war. I suspect we are going to have water wars, food wars, diminishing mineral resources wars other than oil, and space wars. What do I mean about space wars? I do not mean outer space, I

literally mean space. While we have always had territorial wars it has not been generally so that one population can move *en masse* into the territory occupied by another population. It has happened but I think, as the population expands, that the pressures on those countries which have large unoccupied areas and I am just taking this as an example, Australia is going to come under pressure as it is already under pressure in some ways, of immigrant populations wanting to move down from an overcrowded Asia. Those things are going to become more acute. As those things become more acute, conflicts, both internal and external, will become more acute; and any resolution is going to be by law, either international law applied domestically for instance under the complementarity provisions of the ICC, or by international courts and tribunals. I do not think the age of the *ad hoc* tribunals is dead, I think it is dormant. The fact that it is still being talked about in terms of Syria, I think is an indication of what may come in the future.

Now, the other thing, which I think is going to be problematical is that the euphoria that was around in 2002 when the ICC was set up, and the honeymoon period that followed, is over and we are now into the realities of marriage and fifty per cent of marriages end in divorce. There is a lot to be done to maintain the ICC marriage. The problems with the ICC and the African Union come as no surprise to me, there were always going to be some problems. What was the biggest surprise to me, and I was at the Prep Coms back in the early 2000s in New York advocating for the Defence to become an organic part of the ICC, was that so many States that one did not expect to sign up for the Rome Statute did at such an early stage. That was very encouraging but it was inevitable that sooner or later people were going to sit back and contemplate and realise what they actually signed up for. And no immunity means just that. I think that is sinking in, it is not simply in Africa that it is taking time to sink in, it is sinking in other places, too. There are parallel illustrations of that, even in my own country the UK. Ten years ago if anybody had suggested that members of government might seriously be talking about withdrawal from the European Court of Human Rights I would have fallen about laughing, I would have said it is never going to happen. Well today people are seriously talking about it.

The realisation that there are these human rights, which are becoming unpopular on an “individual” basis is setting in. I do not say that there are not faults in the European Court of Human Rights, there are faults in any judicial institution and some of the reasoning, some of the judgements may not appeal to everybody. But the point is this: that once you have signed up for something, which is in itself of merit, then it seems to me that you adapt the society to the merit, you do not attempt to adapt the society to the demerits of making life easier. The move I

perceive will be one away from human rights and towards community-based rights and more narrow nationalistic perceptions of things like extradition and immigration, which are going to create real challenges for international lawyers in the future.

But as I say, that means opportunities and it seems to me that two of the big things that are going to arise in the future, and if I was a young international lawyer I would be looking at this very carefully, are environmental crimes and transnational corporate crimes, and often those two will be interlinked. I am not going to say that they will necessarily reach the level of a crime against humanity, although one could see how they might, but they are going to be areas which are going to be both national and international and I think should excite the academic interest of young lawyers. There are a limited number of opportunities for young lawyers at the moment in, for instance the ICC, but look sideways, there are also the NGOs. There is also an enormous amount of international work now in government, which there never used to be. International law was hardly a feature of government departments twenty years ago, now it is a significant factor and it is something that the young bright people should be looking at. Now, some of us here are the past and they are still here in the present, but not many of the older ones are the future; the younger people here are the future. You can do it; you can do whatever you want to do. Just keep going, do not take “no” for an answer and if at the first hurdle you fall, pick yourself up, dust yourself off and go for the second one. Do not give up; you can have an extraordinary career through international criminal law.

I came across it almost by accident and I am very grateful that I did. I lost all academic interest in law until I came into international law, it was simply a method of earning a living. It was only when I got back into law through international criminal and humanitarian law that I realised how important it was and how important it is going to stay that it grabbed me again, and it has obviously grabbed most of you and that is a very good and healthy thing. You do not have to have done everything by the time you are twenty or twenty-five or thirty-five or forty-five, there are no time limitations on success, you just go out there and do it. I am always astonished about the quality of the young people that interface with me at the ICTY and the ICC, people with enormous talent and enormous brains. You are going to make a difference because you are going to have to. This world is getting increasingly difficult and now we learn about it increasingly quickly. Twenty years ago, if something really bad happened in Syria, we might have heard about it three months later. Now we hear about it like that. Ideas spread quickly, trouble spreads

quickly, it is going to be international lawyers like you, and Defence lawyers in particular, who are going to make the difference. So go out there and make a difference. Thank you.

Questions and Answers

Moderator, Richard Harvey

Thank you to all three of our excellent and very provocative speakers, I do not know how much energy all of you have left, I do know how much time we have left, which is that at five minutes past five we get off the stage and hand over to Mr. President. But I think you will agree with me that we have had some very interesting issues raised here. Howard has demonstrated that you do not have to have done it all by twenty-five, in fact he is not yet done it all and he is not yet sixty-five so he has got a bit of a way to go in the field of international criminal law. When we, as a small group, sat down to say; well is it not about time that we had a Defence perspective on the legacy of these Tribunals instead of everybody else going off and having their little parties around the place? We said, well we should plan big. We should not simply aim to do one conference in the Hague which will basically appeal to an audience of a few of us who have done it, a few of us who have had the experience, and a bunch of really enthusiastic interns who were wondering “how the hell am I actually going to get a job”.

What we should do if we really are concerned about the legacy, is not just look at what have we done, what contribution have we made to the development of international criminal law, but we should look at what Edina has said: what have we done to “the Region”, as we generally call it these days, the former Yugoslavia, what has been the impact there? How has it been received there? Colleen touched on this and Edina gave us some very interesting assessments. And what we said when we sat down over a year ago, the plan was: well, we should not just do it here, we need basically a travelling road show. We need to take this conference to the people who it most affects, who this law most affects. Well, as you have heard, we could not raise the money with the exception of the Erasmus University. We could not raise the money to do anything more than this. Now, I think that is a tragedy, because money can be found to send other organs of this institution to the region and talk about the legacy there, but the pit of misunderstanding into which so many people fall when they see people being acquitted that they do not want to see acquitted, and they do not have any kind of sounding board to discuss with us and to hear back what the reasons for that might be, so that they can say “ok, alright I can understand that”.

The fact that that is not going to happen, I think, is a minor tragedy in all of this. So equality, even within those countries most affected, equality of approach, is not experienced in relation to war crimes, crimes against humanity. Austerity, what is going to be its impact on justice as a whole, not just on the Defence function? The future criminal areas that we all need to be thinking about as Howard says: environmental crime, transnational corporation crimes, territorial conflicts, resource conflicts; what contribution do we as international criminal lawyers have to make to that?

So with all that, questions, questions. The microphones, you know where they are, in the centre. Please, bring it on.

Question from the audience: Xinyue Wang, Defence Intern at the ICTY

I have a specific question for Judge Morrison, but first I will introduce myself. I am a Master student from the University of Groningen and now doing an internship in the *Karadžić* Standby Defence team and my question would be: I am curious about, we have Judges from different countries, with different backgrounds of jurisdiction, do you ever meet some you have conflicts with in deciding on some of the issues? And where meeting such conflicts, maybe this is not really a conflict but just different ideas, what do you think of that and how do you deal with that? Thank you.

Judge Howard Morrison

The short answer is: yes. I mean, you get people from different backgrounds. When I first came to the ICTY as Defence Counsel I wanted to do it the English way. People who were trained in Scotland wanted to do it the Scottish way, people who were trained in America wanted to do it the American way and so on and so forth. And civil law practitioners looked at things rather differently; oral advocacy was subservient to written opinions. So yes, of course it is a difference when it comes to the Judges too. In the early days the common law Judges perhaps were reluctant to enter the arena as readily as the civil law Judges, and the civil law Judges did not really understand cross-examination. In fact some of them did not like it at all, I remember a Judge from a civil jurisdiction going to watch a rape trial in the Old Bailey in England and left after ten minutes, shaking his head and saying: “trop brutale, trop brutale”. A pity, because he had only actually been watching the evidence in chief, he had not seen the cross-examination. And that is a true story; I was there. But yes, of course you do, but what is one of the great things about the system is that you learn from each other and the approaches, and as it is well

known I sit with Judges from South Korea, from Trinidad and Tobago and from Italy and we all have different approaches and we all learn from each other and we sort of feed off each other's experiences, so if it is a problem, it is a very valuable problem.

Question from the audience: Michael Karnavas, Defence Counsel at the ICTY and ECCC

The question will be to Judge Howard Morrison but anybody else feel free to jump in. Those of us who have been around for a fairly long time in these cases see that Judges not only come from different legal traditions but some of them, although professional Judges, have never judged a case before in their life. They may have been to court one time, perhaps to get a divorce, but other than that they were never in the court; they are diplomats or they are academics, coming from different legal traditions. I remember once asking Judge Moloto when he came, what sort of an orientation that he received, I recall him saying: well, I was given a robe, the Statute, the Rules and shown the courtroom and said ok, there you go, start.

My question is: after all these years why is it that you see this disparity in experience in the judging, what can we do at least it is for the ICC or other Tribunals to ensure that when you go to one courtroom versus the next courtroom you are going to see the same process, the evidence is going to be adduced in the same fashion? We did not see that at the ICTY. There is a perception, an unattended perception that has emerged over the years at the ICTY. We see one ethnic group being tried by one particular set of Judges from one particular legal tradition and then, say another ethnic group and what have you, and the perception was that you get different standards of judging. Somebody watching back home may be thinking: well this group of people is getting more rights than that group of people. Now that is not the case, it was never intended, but what can we do, what can we learn from the ICTY and pass on to our brothers and sisters of the ICC so that we can have some standard judging and a better approach to selecting Judges who are real Judges, real professional Judges as opposed to an academic, or historian, or a diplomat?

Judge Howard Morrison

Well, as it was addressed to me, I agree with you Michael. You get different standards of Judges in domestic jurisdictions as well of course. I mean, I sat in the UK in Birmingham Crown Court, it was a twenty Court building and you go from one courtroom to the other and you get a rather different impression depending on the nature of the Judge and the nature of the case. So I think

unless all the Judges are made in the same factory, that is what is going to happen. But you are right, the selection of Judges for international courts and tribunals needs to be tightened up and there is a committee to do that for the ICC to investigate those who have been nominated. I mean there are some Judges who come with the wealth of coalface experience and some who do not and when I was out – it was in public, I do not mind repeating it – when I was in the elective process for the ICC, which is a pretty miserable process, I can tell you, to go through, I figured out I would have done more cases in the criminal court than all of the other eighteen Judges combined. And it should not be like that, it really should not be like that. So you get people with hardcore experience of criminal cases such as Lord Bonomy, such as myself, but you get a lot of people that have not. It is the selection process that has got to be looked at very carefully and then a training process thereafter. And one of the things that I am involved in is looking at a potential of training for ICC Judges, but you have to be very careful, you know, there are egos out there.

Question from the audience: Judge Bakone Justice Moloto, Judge at the ICTY

Just on a little point that Michael touched on, with respect to the ICTY on disparity in justice, the conflict between Judges coming from different jurisdictions. When I first came to the Tribunal it was an observation I made that no Trial Chamber was composed entirely of common law Judges or entirely of civil law Judges, there was always a mixture. I must confess now, lately, I have noticed that there is, seems to be, a departure from this little practice, perhaps because we are winding down, again it is not just a civil law thing that comes in, but it is also language, English and French, as official languages of the Tribunal. I say this because, if you look at for instance Judge Antonetti's Chamber, it is all civil law. Now that is the change that one sees, but in the beginning, and who am I to talk of the beginning, I am a baby at the Tribunal, when I came into the Tribunal that was not the case, that is all I wanted to say, thank you.

Question from the audience: Brianne McGonigle Leyh, Assistant Professor at Utrecht University

Thank you, my name is Brianne McGonigle, Assistant Professor from Utrecht University. Thank you for all the presentations, not just in this panel but for the entire day. I think I can speak on behalf of everyone here saying it is been a really wonderful conference. But the title of the conference is 'ADC-ICTY Legacy Conference' and that is what my question is about. This has been a wonderful conference and we have heard that there was not enough money to take it to the region but what other alternatives have been thought of so that there is a legacy of this

conference? Are there ideas that panellists will be able to write something up and that perhaps something can be put on open access journals online, or even newsletters? I am interested in knowing what is the legacy of today, because I think that is really important that if you guys cannot make it out there, that somehow the information can get translated, thanks.

Colleen Rohan

To the extent that I am aware there will be a publication created that is essentially every word that is uttered while we were here today. Everyone I think notices that the AV people from the ICTY have been here filming every moment of the conference, I am assuming those films will be available although perhaps the AV people are in a better position to say exactly where and how, what the access will be. There has been a discussion of expanding on the publication of the word for word aspect of the conference to include papers on the particular topics that were presented, so various ideas have been developed, two of which I think are pretty much absolutely certain to occur, definitely the legacy publication.

Question from the audience: Viviane Dittrich, PhD Researcher at London School of Economics

Viviane Dittrich, London School of Economics. I would like to come a little full circle and come back to President Meron's keynote speech and the closing he made. So he said that: "I hope you know that the 'Tribunals' legacy is very much your legacy as well", referring to the legacy of the Defence and I would just be curious to have your impressions and experiences to how much you see that there is overarching legacy in terms of the homogeneity between parties before the proceedings, different actors, and in what way you see, also within the Defence community, within the Association of Defence Counsel given different experience, is there dissonance or consonance about their own experiences and the work of the Tribunal as a whole? Thank you.

Question from the audience: Joris van Wijk, Professor at the Free University of Amsterdam

Hi, I am Joris van Wijk from the Free University Amsterdam (VU). Well, something I want to share and get your view on, I am doing a research project on the question what happens to people once they are convicted and for that we also looked into early release decisions and I have talked to some lawyers and what I actually find striking, is that it seems that all the lawyers who represent their clients in early release procedures do so on a *pro bono* basis, and I wondered if we can foresee any changes at the ICC in that regard? Because I was completely shocked by that fact

that years later, on a *pro bono* basis, you will represent your client. So if there are any views on that, I would like to hear them, thanks.

Colleen Rohan

I have a view. I have a really strong view. That is that the Defence is ridiculously under-funded and this is one of the many areas. There are lawyers sitting in this room who have spent hundreds of hours dealing with post-conviction issues for zero money. And that includes expenses out of their own pocket to go visit their client wherever they may be incarcerated and other issues, translation, a series of other things. If anyone here is aware of a case in which someone is paid for that I would like to know about it, which is why I have to say the commitment of the Defence in this particular world, the international criminal law world, to me, is breath-taking at times because we do a huge amount of work for no money. It does not mean that we have not asked for it, part of it is a budgeting issue, part of it is a failure on the part of those powers that be to appreciate that these issues exist: for example, that there will be post-conviction problems, ageing Defendants who need medical care, things like that. This has not been thought through. I am sure there are other people in the audience who will have comments on this who have had to deal with this in their world. I know some are here, but if you are shocked, we are shocked too, because we have to do it for free. This is something that should be rectified. If the trials are so important to the world, the international community that we are going to put them on video and broadcast them around the world, they are going to have political influence, have had political influence, to me, this is an absolute scandal that there has been a refusal to budget them properly.

Moderator, Richard Harvey

The other question that was asked was about how the legacy of the Defence as the ADC is, I think that really has been addressed fairly substantially throughout the day. Due to my court commitments I was not here for much of the day.

Colleen Rohan

The legacy of the Defence? I mean if the question was, if the Defence could not be entwined with the legacy of the ICTY, was that the question? I mean we had to publish our own Manual. We were at one point to be part of the Manual the ICTY published and essentially so many restrictions were put on the Defence that we ended up, silver lining, creating, I think, a better product than we would have had we been limited to one chapter in the ICTY Manual. We

created our own. That is just one example of what I see as the Defence Bar's willingness to participate in an overall legacy but our exclusion from that legacy. I am not suggesting people are malicious or there is a grand conspiracy, I just think that there is a lack of understanding of the importance in the Defence function and the Defence contribution. I think if that understanding was there, some of this exclusion would no longer be occurring.

Moderator, Richard Harvey

I think that is to a great extent our legacy. It is that we have, with varying degrees of success, put that message across. I think generally speaking everybody gets it as long as they do not have to go into their pocket and pay for it. And, literally, it is clear that all of the Judges, irrespective of their background and what they are used to in a domestic context, all of the Judges see the value of Defence advocacy and good quality Defence advocacy as being integral to the public perception of this as a valuable institution. Because frankly, I have sat through now three trials, and I will sit here and I will tell you, Defence rocks! Quality cross-examination time and time again, and you do not see that in the same degree always on the other side.

Edina Rešidović

I want to say something from my own experience. When I am finished here, all these things that I learned here, that I acted upon here, I take with myself to my country; and the legacy of that Tribunal is my fight for the substantial law, for the procedural standard, for the right of my client in my courtroom, and my colleagues learned through my experience. That means, that this is also one of the very important things that I can do as a Counsel from that Tribunal to my own country, to my colleagues in Bosnia and Herzegovina; that is something that I wanted to add.

Question from the audience: Alan Yatvin, Former ICTY Defence Counsel

My name is Alan Yatvin. I am a Philadelphia lawyer and I just want to mention, before we close, that this presentation today was developed very much by the Scientific Committee, which is made up of Richard and Colleen and Stéphane, who has left, and Annie O'Reilly, who did an amazing amount of work, ...

Moderator, Richard Harvey

And you...

Alan Yatvin

...and me, to think through this programme, to think through these topics, to recruit speakers, all of whom have been wonderful today, and I just wanted to let you know that, in addition to Isabel being our ramrod in helping us to get this through, that these people put in dozens and dozens of volunteer hours on Skype, usually cutting in and out at the most important moments, and I want to thank my colleagues on the Scientific Committee.

Moderator, Richard Harvey

With that I think we are dead on time to hand over to Mr. President.

Closing Remarks

Novak Lukić, ADC-ICTY President

Dear Guests and Dear Friends, I can now say after so much time spent together, I think. I made one mistake this morning, having listened to everything that is going on from my own perspective and from my own experience. I said that the purpose of this conference is to share our experience with you. But I learned so many things today, even though I spent fourteen years in this Tribunal. I got some new experience today and this is something, which shows what international justice is and what the experience in international justice is. I want to first of all to thank all speakers again; I want to thank all of you who participated in oral questions and giving your comments; I even want to thank you, who confronted your will and your thinking with us in your mind and did not want to use, or did not have the opportunity to use the microphones.

And that will be some kind of last observation related to this conference: if any of you, especially young lawyers, somewhere in the future use one sentence or one thought of anything that you have heard today, somewhere in your preparation, in your thinking, or in performing your acts somewhere in a courtroom, whatever position you take in a courtroom, then I think that we have materialised the idea of this conference. I am really happy if you remember one thing that you have heard for the first time here in this room and you use it.

I want to thank the ones who I forgot at the very beginning, the guys from the technical support from the Tribunal, who spent all day with us here and not in the courtroom, I do not know how boring this was for them, but please say one thanks for the guys. And at the very end we mentioned one name three times and I think it is fair to mention one more time, Isabel, I know I have a problem with her last name. So I just want Isabel to have one small present. I want you to see her. So, I think I am the one who, among other members of the Executive Board and also the Committee, who worked on the preparation of this conference, we are all aware how many days, I do not know for nights, how many hours and days and months she spent trying to organise this thing to work. And at the very end, I am really happy and I think we did a good job because of her, first of all. You want to say something?

Isabel Düsterhöft, ADC-ICTY Head of Office

I want to say thank you to everybody who is here today, you have made this day today very, very special. I have had a great time organising this conference with an incredible Legacy

Committee, more volunteers than we could hope for and wonderful people. I have had an excellent time and I hope you had as well. Thank you so much for everything.

Novak Lukić

And the last sentence, which you expected, I hope not for a long time: I pronounce the end of this conference. I invite all of you to join us this evening after eight o'clock at our annual party which we have every year and we really want to share this evening with you at a bar just a few hundred metres from here. You are welcome to have a drink with us and to join this evening. Thank you very much again, we hope to see you there!

Additional Article – The Rights of the Accused

**By Michael G. Karnavas*

Question: *How can you represent these mass murderers, war criminals, human rights violators, genocide perpetrators?*

Answer: *If one of your nearest and dearest was charged with any of these crimes – or any crime for that matter, where there is the possibility of being locked up for years or maybe even a lifetime – what sort of representation would you want and what sort of trial would you expect? And what if your nearest and dearest professed his or her innocence but the evidence – at least from reading the indictment – seemed otherwise? What then? Would you not want a vigorous defence that left no stone unturned, challenged all of the evidence, raised every conceivable legal issue, took advantage of every weakness in the prosecution’s case, and so on?*

A common answer to a common question – at least for those of us who defend.

I. Introduction

It is amazing how most demand the very best of a Defence, expect the highest quality of substantive and procedural justice and are willing to give the benefit of the doubt to their loved ones, even when faced with overwhelming evidence pointing to guilt. But when it comes to the *others*, they are incapable of mustering even a modicum of understanding or tolerance. The *others* are just guilty. None more so than in international criminal cases, where in the court of public opinion, as soon as an Accused is under investigation, he or she is guilty until proven innocent. A fair trial for *them* is a quick, inevitable conviction. Almost without exception, these fair minded individuals seem to have the need to prove their *bona fides* as unbiased advocates for human rights, so they follow up with the faux caveat: *but they should get a fair trial!* Understandable. In the court of public opinion, it is natural to believe what is reported in the press or to simply accept that where there is smoke there must be fire; if someone is indicted, it is because he or she *did it*.

Ask anyone what sort of rights they think they should have if they, or their loved ones, were accused of a crime. The first thing you may hear is the *right to a good Defence*. Press further and you hear a usual refrain as if it were a mantra (as it should be): having an open and transparent trial, enough time and resources to investigate and challenge the Prosecution’s evidence and to gather Defence evidence, access to all of the Prosecution’s evidence, a fair opportunity to question

Prosecution witnesses thoroughly, to have Defence witnesses heard, and to be judged fairly and impartially – having the Judge follow the procedure and apply the law correctly and even-handedly. And so on.

Instinctively, most, if not all, understand what sort of rights are fair trial rights, were the Accused in the dock. So why the dilemma when it is someone else? Perhaps it is the sheer nature of international crimes that evoke such passions and prejudices that impede one's ability to look beyond the mere accusation. Perhaps it is too much to expect from the average individual to suspend forming a judgement that naturally flows as part of human nature when hearing the charges, and to vacate the assumption that the Prosecution would not charge someone unless there was evidence that he or she *did it*.

In this lot, I also include the international tribunals' Judges. Yes, they may be "professional" Judges (per the parlance at the international tribunals) to the extent they studied law or meet the criteria to be appointed as Judges to the Court. I would even go one step further. Even career Judges – those who come to the international tribunals as experienced Judges in their national jurisdictions, with an appreciation for the strict application of fair trial rights, such as the presumption of innocence – are not immune from the natural human affliction of pre-judging an Accused, simply based on the charges in the indictment. That said, good Judges are mindful of this inherent inclination, and make concerted efforts to reserve forming any final opinions until all the evidence has been received and properly reviewed, without passion or prejudice. Of course, there is always the risk that this is a mere formality, that a guilty verdict is predetermined and the process of achieving it result-oriented. Therein lies the rub. This is why all fair trial rights are predicated on a having a resourceful Defence Counsel who will robustly defend the case, ensuring that his or her client is afforded all fair trial rights – both procedurally and substantively – not just seemingly.

II. Fair Trial Rights

When I think of the rights of the Accused, I think of due process, or even better, *the process that is due*. Where better to look for an expression of the rights that enable the process that is due to be afforded – both domestically and internationally – than *the International Covenant on Civil Rights and Political Rights* (ICCPR). These rights, commonly referred to as *fair trial rights* are found in other prominent legal instruments such as *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, *The American Convention on Human Rights*, and *The African Charter on Human*

and Peoples' Rights. But in the international criminal tribunals, it is the ICCPR that takes centre stage.

Fair trial rights come in two categories: general and specific. The general rights go to the overall aspects of the proceedings and deal primarily with their integrity. The specific rights are those discrete rights that must be afforded on a personal level. Both are essential in ensuring a fair trial.

1. Right to a Fair Trial

How fair is *fair*? For ourselves, a fair trial is a perfect trial. This is not only unrealistic, but beyond the meaning of the right to a fair trial. In the national context, one can think of fair trials in relative terms. What may fall short of a fair trial in a well-functioning judicial system may be more than fair in a developing country, where resources are sparse and the cultural understanding (or expectations) of human rights are less sophisticated. While this should not be countenanced, considering that justice and the contours of human rights are not dependent on serendipity, it is reality. At the international tribunals, however, there is no excuse for the quality of justice and fairness to be governed by cultural relativity or other extraneous factors, such as the financial and human resources the international community is willing to devote to a tribunal carrying out its mandate.

A fair trial is about much more than resources. It is about the entire process from the investigation of the case leading up to the arrest of the Accused, all the way to the end of the trial, and through the entire appeal process. Fairness is not a moment, but a continuum. Also, trials are organic. At every stage of the proceedings there are substantive and procedural requirements, which if not met, lead to unfair trials. So in answering the question of how fair is *fair*, it is necessary to ascertain whether an Accused is *actually* afforded the general and specific rights being discussed. Most of the specific fair trial rights are qualified rights, though there are thresholds that dictate how far Chambers can derogate from the letter and spirit of the conferred right before the right is effectively denied.

My measure of a fair trial is when a Chamber is even-handed, respectful, flexible, competent and patient. This means I am allowed to make my trial record, so all potential errors are properly preserved; I am provided sufficient time to examine and cross-examine witnesses; all submissions are decided transparently with reasoned opinions based on the applicable law and procedure, and not by fiat; and the Judges are not behaving as the midwife for the Prosecution in

delivering a guilty verdict by acting as the Second Prosecutor in bolstering the Prosecution's case or in weakening the Defence case. A fair trial is the sort of trial the Judge would want for himself or herself.

2. *Right to be Presumed Innocent*

It is a bit of an oxymoron when you think about it. Here is an Accused, charged with serious crimes confirmed by a Pre-Trial Judge, and the Trial Judges are to presume that the Accused is innocent. Precisely. Judges by and large seem to have an appreciation for this fair trial right, though it also appears that a few Judges find the presumption of innocence to be an indulgent pretence.

This right is the cornerstone of the adversarial systems adopted by the international tribunals. There can never be any excuse for denying this right. Whether the Judges of the Trial Chamber actually presume the Accused innocent cannot be easily discerned, if at all. One can, however, look at the decisions and legal reasoning of the Trial Chamber, the Judges' behaviour during the proceedings, and the quality of their "fairness" during the proceedings to get an inkling. Occasionally, an unexpected email to friends or an indiscreet comment at a cocktail party serendipitously comes to light, exposing a Judge's inability or unwillingness to afford the presumption of innocence to the Accused over which he or she sits in judgement.

3. *Right to an Independent and Impartial Tribunal*

This is rather straightforward. The term "tribunal" encompasses the institution itself, the Chambers, and the Judges that compose the Chambers. The staff associated with the tribunal, Chambers, and Judges, are effectively agents and therefore should be bound by the same ethical constraints as the Judges.

The term "independent" means that the institution, Chambers, and Judges should not be under any extraneous influence when carrying out any functions associated with the tribunal in general, and any case or party specifically. Judges should not be taking their cues from the governments, the UN, NGOs, and so on. It also means not taking their cues from fellow Judges, Prosecutors, or Defence Counsel; though it is expected that Judges will discuss and deliberate and even lobby positions they hold to be correct. What is inappropriate is for a Judge to cave in and abandon – or better yet, 'sell out' – an honestly held principled position for the sake of going along to get along or in exchange for a favour or reward. Politics and international criminal justice are

intertwined. It should not come as a surprise that there may be instances where a particular result is desirable to assuage a particular interested party or cause. Sad, but true.

The term “impartial” simply means check your prejudices and passions at the entrance of the tribunal. Easier said than done. We expect (though it is not right) the Prosecution to be partial, doggedly pursuing an agenda it may believe in, though one that is not necessarily fair and impartial. The Prosecution is an independent and adversarial party. Experience shows that at the international tribunals the Prosecution is only interested in winning the case. This may appear as a perversion of justice – at least in civil law systems. Considering that the Prosecution in the international tribunals is not a magistrate or judicial officer but an adversarial party, it is almost understandable that the Prosecution would seek to win. This runs contrary to the ideal expected of the Prosecution in national and international settings. Their mandate is to do justice, not to convict – let alone convict by questionable means if necessary. Sadly, this ideal often disappears in the heat of battle or during some misguided career-advancing quest. Seeking to do justice may occasionally require the courage and intellectual integrity of confessing error for putting someone through the judicial meat-grinder.

This being reality, we expect Judges to be scrupulously fair and even-handed throughout the proceedings. This does not mean that Judges should balance the rights of the Accused against the rights of the victims. Judges should not short-change an Accused of his or her rights to make up for any impediments that victims may face in a particular case. Judges are akin to referees and should not take on the role of a player for one of the sides to assist in achieving certain goals. This does not mean that Judges cannot ask questions when necessary, but in doing so, they must be circumspect and such questioning should be limited to clarifying matters for the record. Anything more, particularly if in intervening a Judge is predominantly (and routinely) assisting one of the parties, is unfair and prejudicial. A victim is a victim of a crime, not the victim of a presumably innocent Accused. That only comes with a conviction based on proof beyond a reasonable doubt. This is too frequently muddled or ignored.

4. Right to a Public Hearing

The saying “nothing disinfects like sunlight” is particularly true in the courtroom. Transparency and public scrutiny motivate the Judges to ensure that the trial proceedings are fair. It is not a given that matters which deserve public scrutiny will always see the light of an open and public courtroom. When Judges know they are being watched, they tend to be measured and perhaps

more even-handed. If nothing else, those watching the proceedings can conclude for themselves whether justice is being done.

In national courts there are a few, carefully circumscribed, rare proceedings that would be closed to the public, which are usually dictated by criminal procedures which set out the high bar for closed hearings. Unfortunately, in the international tribunals the use of closed hearings is all too common and not necessarily always in keeping with the right to a public hearing. Witnesses are often heard in closed sessions, particularly Prosecution witnesses, when there is no need for such secrecy. The result is that witnesses are less restrained and more likely to embellish or confabulate, knowing that their testimony will not be seen or heard by others who may know the actual truth or have a more accurate recollection of the events. This tool envisioned to promote justice by obtaining evidence which might not otherwise be available, has transmogrified into an overly employed device that all too often thwarts justice. This is basically due to over-reaching by the Prosecution; seeking a conviction rather than seeking to do justice. It is very difficult for a Judge to deny a Prosecution request for a closed hearing since the responsibility is shifted from the Prosecutor to the Judge simply by the request. A much more stringent burden should be placed on the Prosecution to achieve a closed hearing of any sort.

The same goes with documents and submissions. To the extent possible, everything filed or used before the proceedings should be public. It is easy – and it occurs with some regularity – that submissions of a non-confidential nature are filed or treated as confidential. This prompts confidential decisions to be issued, which, unsurprisingly, are often based on suspect authority and dubious legal reasoning. Of course, there is the matter of embarrassment or the inconvenient truths that occasionally result from transparency. Instinctively, many Judges and prosecutors are quick to descend into a bunker mentality: best to keep these embarrassments or inconvenient truths under wraps, lest the integrity of the tribunal come into disrepute. Nonsense. Judicial institutions benefit by exposing, not hiding, weakness and irregularities. Though it is difficult to guard against bogus reactions, Defence Counsel are not entirely powerless – making the record and preserving these errors is the sword and shield of due diligence. If nothing else, the record is the historical memory of the proceeding. It is necessary for appellate review, but also for public scrutiny should the confidential material be declassified – and this does occur. The record exposes the true legacy of how a Chamber behaved and whether matters it handled in a non-public fashion during the proceedings were legitimate and fair.

5. Right to be Tried Within a Reasonable Time (Expeditious Trial)

This right seems rather straightforward, though I view this right as comprising three different (and not mutually inclusive) components. All three must be respected.

The first component is to ensure that the investigation and the charging of a crime occur within a reasonable period, to ensure that the Accused is not hampered in defending himself or herself as a result of the loss of evidence. In other words, when there is a case to prosecute, it should be done promptly and without undue delay. In the national context, especially given that the cases tend to be relatively small and the factual matrix rather discrete, the impediments for investigating, charging, and trying an Accused expeditiously are modest and few. In the international context however, save for the ICC, it often is the case that the tribunal was established many years after the fact. This component of being tried within a reasonable time is rarely important in the international context, and if raised, is not likely to get much traction.

The next component is to be tried reasonably quickly once charged. In other words, an Accused should not be languishing away for years in a detention facility waiting to be tried. But how quick is quick? It depends. There are good reasons for the Accused to want extra time to prepare his or her Defence. The Prosecution would have had years putting a case together. It would be unfair to rush the Accused to trial without providing for time to file all necessary legal challenges, to thoroughly review the case file, to investigate and gather evidence, and to prepare for all aspects of the trial diligently. Too often Judges use the Accused's right to a speedy trial to force an Accused who is not asserting that right to trial before Counsel has had time to adequately prepare.

The third component is to ensure that the trial does not drag on. But here again, what does having an expeditious trial mean? Some Judges are of the opinion that once the Accused has spent three, four, or even more years waiting for trial, an expeditious trial means truncating the proceedings by adopting modalities that limit the parties' abilities – especially the Defence – to challenge the evidence or put on evidence. In other words, to these Judges, an expeditious trial is a quick trial, even at the risk of denying other fundamental fair trial rights, such as the right to examine witness and to put on a Defence. This sort of rush to *get it over with* is perhaps Defence Counsel's dominant challenge at trial. It is supremely duplicitous to, on the one hand, keep an Accused years in detention waiting for trial, then trample over his or her rights by rushing the trial proceedings to get it over with, only to have the Accused wait in a detention facility for a year or more while the Judges casually draft the judgement. At least at the ICTY, the Chambers

finally got around to provisionally releasing Accused while judgements are being written. This modicum of respect for the rights of the Accused only came after numerous Defence challenges of decisions by the Appeals Chamber, which had departed from the ICTY Statute, imposing virtually insurmountable criteria for provisional release without any legal basis. So much for the presumption of innocence.

Suffice it to say, the right to be tried within a reasonable time must be viewed in conjunction with other rights; in particular, the right to have adequate time and facilities to defend against the charges, the right to confront witnesses, and the right to present witnesses.

6. Right to be Informed of Charges

In Franz Kafka's novel *The Trial*, the protagonist, Josef K is unexpectedly arrested by two unidentified agents from an unspecified agency for an unspecified crime on his 30th birthday. For two years Josef K tried to find out the charges against him. On his 32nd birthday, two other unidentified agents from an unspecified agency stab him to death – and as Josef K put it –*like a dog*. If only he knew the charges, perhaps Josef K would have been able to mount a Defence. Those familiar with *The Trial* know that it was not for want of effort that Josef K never learned the charges. I cannot think of a better example for all the reasons why it is important for an Accused to know the charges he or she is facing.

Indictments are vetted by a Pre-Trial Judge (generally at the ICTY it was more of a rubber stamping process), so there should be no dilemma in an Accused being afforded the right to know the charges against him or her. In theory perhaps, but not always in fact. The indictments at the ICTY and other *ad hoc* tribunals suffer from having all sorts of “background” information, which on its face appears non-essential, but which requires repudiation nonetheless because the narrative promoted by the Prosecution was either overly simplistic or outright inaccurate. Also, while it might be easy to identify the crime being charged by its nomenclature, the alleged activity associated with the crime would often be framed in an ambiguous or tangential manner. Then there are the modes of liability: the proverbial kitchen sink approach, charging everything under every conceivable mode of liability, irrespective of the evidence; the “something is bound to stick” approach. Not to mention the ICTY invention of joint criminal enterprise (JCE); especially the extended version, JCE III, where an Accused would be liable for anything and everything that an imagination can conceive as being a natural and foreseeable consequence of the initial agreement to carry out certain activity – which may not even have been criminal *per se*.

While the indictment would list alleged crimes, trying to figure out what exactly was being alleged and charged was a bit of a guessing game. Preparing a Defence for a case based on an opaque charging documents is akin to driving at night in heavy fog: not knowing when you are on the road heading in the right direction, and when you are slightly off or way off and about to hit something or go off the edge. Even after submissions on the scope of the indictment, issues of notice of the actual charges and modes of liability would persist.

So being informed of the charges does not just mean being presented with the charging document. It actually means having a charging document that is clear and concise, and where the crimes charged along with the predicate facts are obvious. There is no need for the Prosecution to take a Kafkaesque approach so as to gain an advantage by cleverly arguing at the close of the evidence that some mode of liability or some act is implicitly stated or was to be understood.

7. *Right to Adequate Time and Facilities - Equality of Arms*

The right to adequate time and facilities basically means that an Accused should not be forced to show up to a gunfight with a pocketknife. The principle of equality of arms is effectively part and parcel of the right to have adequate time and facilities. The Prosecution has enormous resources available in comparison to what is allocated to the Accused who are often indigent and dependent on court-appointed Counsel. Also, the Prosecution has an enormous advantage in that it has spent years putting a case together, often with the cooperation of and the assistance from foreign governments, humanitarian agencies, NGOs and others who are normally not inclined to assist the Accused, or are simply out of reach.

The right to adequate time and facilities, including the right to equality of arms, is all about giving the Accused a fair chance to defend himself or herself against the charges. It is not about applying a mathematical formula to a set of values in order to come up with a ratio such as: $\Delta = x\% \left[\frac{\text{funds and resources allocated to the Defence}}{\text{funds and resources allocated to the Prosecution}} \right]$.

Naturally, the Prosecution has the burden of proof and must also put a case together, so it is understandable that the time and facilities available to the Prosecution will be greater to those available to the Accused. But the Accused and his or her Defence team must be afforded sufficient time and facilities to mount a credible Defence. This means having enough time to review and digest the disclosure material, to conduct a proper investigation, to file relevant and

necessary submissions and to generally prepare for trial. Once in court, time and facilities must be relatively equal. This means that in a multi-Accused case, the Trial Chamber should not be imposing strict time limitations on the Accused – as if they are a monolithic group – in ensuring equal time with the Prosecution. Each Accused must be viewed separately.

At the ICTY, the Registry employed a formula for the amount of funding it would make available to an Accused, dependent on the level of complexity of the case (not on the amount of resources allocated to the case by the Prosecution). Overall, the funds allocated were moderately sufficient for a very basic Defence. As for time and facilities allocated by the Trial Chamber to the Defence, it appeared that it all depended on the quality and experience of the Judges, often giving rise to unintended perceptions that some Accused enjoyed more rights than others – simply on the basis of how the trial proceedings are conducted. Considering that the cases were ethnically driven because the alleged crimes were associated to particular ethnic groups, the disparate treatment of the Accused at trial, based in part on the makeup and experience of the Trial Chamber, resulted in undermining the credibility of the ICTY as a fair and impartial tribunal.

8. *Right to Defend Yourself or be Defended by Competent Counsel*

Slobodan Milošević, the former President of Serbia, learned the hard way the limits of the right of an Accused to defend himself as his own Counsel. This is a qualified right, which means that the Trial Chamber can and will intervene and appoint Counsel to assist or take over, if an Accused is unable to meaningfully act as his or her own Counsel. The ICTY has been relatively creative in fashioning remedies that strike an appropriate balance of allowing an Accused to conduct his own Defence and to protect the Accused from his own inability (or recklessness) to properly defend himself. Generally this has been achieved by appointing Stand-by Counsel, as well as providing the Accused with legal consultants to help prepare the Accused for the examination of witnesses and for the filing of submissions. It has also led to abuses, but the blame there rests squarely on the Trial Chambers; a Presiding Judge (and his Wing Judges) ought to know how to control courtroom proceedings.

As for being represented by competent Counsel, all this means is that you have a Defence Counsel who meets the qualifications to be on the list of appointed Counsel. Of course, it is also difficult to judge the quality of lawyering without presuming to know the instructions of the Accused to his or her Defence Counsel and whatever strategies and tactics have been selected.

There may be very good reason not to go down a particular path that under normal circumstances would be expected. Suffice it to say, this right is about providing the Accused with a gladiator who will do his or her utmost in defending the Accused. This includes thoroughly preparing the case for trial, doing a comprehensive investigation, challenging all legal and factual issues, fearlessly battling the Prosecution during the trial, and, when necessary, standing up to the Judge and making the record, i.e., preserving all errors for appeal. This is also required of Defence Counsel during the appeal process.

9. Right to Confront Witnesses

Cross-examination has been characterised as the greatest legal engine to get to the truth. Confronting a witness means *to have a go* at the witness through a series of leading and non-leading questions to expose nuances, omissions, inconsistencies and lies. This right cannot be fully enjoyed by an Accused if his or her Defence Counsel is not provided with sufficient time and leeway to ask all relevant and necessary questions. This does not mean that witnesses should be abused, but likewise, they should not be shielded from a thorough test of their testimony. It is not a matter of tearing into witnesses to break them down, for that rarely ever happens outside of television and movie trials. It is about challenging the source of the evidence, the quality of the perceptions, the purity of the memory and any latent agenda (bias, interest in the outcome, etc.) that may influence the weight to be afforded, if any, to the witnesses' testimony. If a witness gives evidence for one side, the other side is entitled to test it. Simple.

To some Judges at the international tribunals, cross-examination is viewed as a game, associated with legal television shows, with all the melodrama played out in courtroom scenes. In the civil law system, the Judges ask the questions and generally, the Prosecution and Defence are restricted to non-leading questions. This may be fair in that system, where the Judges have access to the case file and are expected to have reviewed it carefully before the trial begins. In the adversarial systems, however, the Judges do not have access to the file and are certainly not in a position to know what is salient to the Defence case, and are thus incapable of appreciating some lines of the cross-examination. While Judges are entitled to ask questions, they certainly should not interfere with the cross-examination by jumping in and disrupting the flow of the questioning. But they do. There was a conflict at the ICTY from the very beginning due to civil law system Judges' lack of familiarity with the adversarial system chosen by the Tribunal at its inception. As a result we saw an effort to "combine the best of both systems", an effort that the

two systems had not accomplished for about 200 years for good reason. A combination does not work; they are separate and distinct systems with very different approaches.

10. Right to Present Witnesses

If the Prosecution is going to bring witnesses to prove the crimes that the Accused is alleged to have committed, then the Accused should have an equal opportunity to call witnesses in defending against the allegations, and in support of his or her theory of the case. Sauce for the goose is sauce for the gander.

Witnesses called by the Accused, as those called by the Prosecution, can only testify to what is relevant and necessary. The Trial Chamber must provide sufficient time for the Accused to present his or her evidence through the Defence witnesses. With large war crimes cases, some Trial Chambers try to control the proceedings by allocating specified hours to the parties to put on their cases. While it may sound reasonable, unless flexibility is shown – which is not always the case – the artificial time limits imposed by the Trial Chamber can effectively amount to a denial of the right to present a proper Defence case.

11. Right to Understand the Proceedings in one's Language

Josef K would not have fared any better if he had been accurately informed of the charges against him and if all proceedings were properly followed, if he did not understand the language in which the charges were drawn and the proceedings held. Having a right to be presented with the charging document or having the right to be present during the trial is meaningless unless the Accused is capable of understanding the charges and proceedings in a language he or she can follow. The Accused must be able to communicate with his or her Defence Counsel in order to receive advice and to provide instructions. The right to participate in one's Defence does not mean simply being present, it means having the capacity to participate meaningfully. To this end, it merits questioning the wisdom of not providing the trial transcripts in the language of the Accused. How can an Accused before the ICTY or any other international or hybrid tribunal expect to fully participate during all of the proceedings if he or she does not have actual access to the trial transcripts? This, in my opinion, has been a major shortcoming at the ICTY and one that calls into question whether some of the Accused who have decided to represent themselves enjoyed the same rights as those who selected to have Defence Counsel represent them. And what of the appeal proceedings: should the Accused not be afforded the opportunity to review the trial record in order to determine potential errors of fact? Is this also not an infringement on

the right to equality of arms? The Prosecution certainly benefits by having the trial transcript in a language that is not understood by the Accused.

12. Right Against Self-incrimination

The right not to answer questions that are likely to be incriminating is sacrosanct. Put differently, no one should be compelled to testify against himself or herself. Another way of putting it is the Prosecution, with all its resources and authority, must not only prove accusations beyond a reasonable doubt, but must also do so without coercing the Accused into being a witness for the Prosecution. Suffice it to say, the right against self-incrimination belongs to the Accused, as does the right to waive or not to waive this right. Before the international tribunals where the facts are voluminous and complex, the wiser course of action is for Defence Counsel to advise the Accused not to waive this precious right during the investigative stage, and only with the utmost care and deliberation, advise the Accused to take the stand.

13. Right to Appeal

The purpose of making a record of errors and being duly diligent during pre-trial and trial proceedings is to make sure all errors are properly preserved for higher court review. This right has its limits. Not every error can be appealed and not every error found to have been committed by the Trial Chamber will result in a reversal of the trial judgement. Appeals Chambers are reticent to second-guess a Trial Chamber's factual findings. Nonetheless, a good record will often expose a Trial Chamber's failure to consider relevant evidence which, had it been properly considered, might have resulted in a different outcome.

One drawback at the international tribunals is that there is no third instance appeal or *en banc* review. This means that the Accused is deprived of the opportunity to have a third instance review to reconcile inconsistencies in decisions, to provide big picture analysis and correct policy errors. It also means that there is no scrutiny of the Appeals Chambers. This, in my opinion, has led to a loss of confidence in some of the outcomes of the Appeals Chambers – which are often considered or perceived to be politically driven results.

14. Right Against Double Jeopardy

Unlike in some common law systems, where the Prosecution has no right to appeal against the acquittal at trial, the international tribunals, following the civil law system, do permit such appeals. Double jeopardy, i.e., not to be tried twice for the same offence, applies after the

conclusion of the second instance proceedings. The fact that an Accused has been tried and acquitted in national proceedings does not necessarily mean that he or she may not be exposed to criminal proceeding before an international tribunal. Generally this depends on the quality of the proceedings at the national court (bogus trials do not count as trials) and the actual charges that were tried.

15. Right to Provisional Release

The statutes of the international tribunals provide for provisional release while awaiting trial. At the ICTY, it is now even possible to be provisionally released while awaiting the trial judgement, even in the absence of any humanitarian reasons. During the first few years of the ICTY, it was an inevitable conclusion that no one would be provisionally released save for humanitarian reasons. However, with governments putting up guarantees for their citizens detained on charges of crimes against humanity and war crimes, the Chambers at the ICTY came around and began provisionally releasing Accused, albeit under some very strict conditions.

One new development that seems to be emerging at the ICC is to not arrest some Accused who voluntarily surrender, and thus to allow them to act as totally free citizens while awaiting trial. In other words, there are no provisional release conditions placed on them at all. This fully respects the presumption of innocence and allows the Accused to enjoy all civil and political privileges, including running for political office.

16. The Right to be Compensated if Wrongfully Arrested, Tried and Convicted

What of those Accused who spend three or four years in detention waiting for trial, a couple more years in trial, another year or so waiting for the judgement, and are acquitted with no appeal following, or convicted with a reversal of the entire judgement on appeal? Where do these Accused go to get back the years spent in detention? Where do they go to re-gain the loss of their personal dignity, not to mention the physical and emotional price paid during the meat-grinding pre-trial, trial, and appeal process? Where do they go for compensation for the pain and suffering and humiliation they and their families have had to endure? Nowhere. No accountability for such errors. With no accountability, there is no incentive for Prosecutors and Judges to ensure that such errors do not occur. The flip side is that were compensation to be had, Judges might be more inclined to convict all. A dubious possibility.

III. Conclusion

In a nutshell, these are the basic rights of an Accused. The legacy of the ICTY shows that for the most part these rights have been afforded to the Accused, albeit not always consistently, and occasionally begrudgingly. Were it not for dedicated Defence Counsel pressing for the fair trial rights of their clients, there is no telling what the ICTY legacy would be. Certainly it would be far worse.

Additional Article – Transparent Justice: The Defence Experience

**By Suzana Tomanović*

I. Introduction

Referring to openness and transparency, U.S. Supreme Court Justice Louis Brandeis, famously noted, “*Sunlight is the best disinfectant*”. Indeed, it is, or at least it should be at international criminal trials. Convictions are legitimate only when based on credible evidence presented in public trials. Witnesses are more, not less, likely to be forthcoming and truthful in open proceedings where there are testifying under the watchful gaze of the public: less room for confabulation.

Yet, one pervasive conflict throughout the existence of the ICTY has been that of transparency concerning witness testimony and the production and use of certain documents in public hearings. Balancing the rights of an Accused to a fair and public trial against the safety of the witnesses and victims of war crimes is an unavoidable consequence. In fact, we see this every day in our national courts, where our domestic rules of evidence and procedure temper the questioning of certain witnesses or use of certain evidence before the public gallery. When considering that *the truth* in court is based – for the most part – on perceptions (how, and based on what, has this witness testified), when, how and for whom protection measures are used, and the extent to which they are used, is critical for future international criminal tribunals.

Article 21 of the ICTY Statute tells us that “*in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute*”. Article 22 calls for “*the International Tribunal [to] provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity*”. The challenge is reconciling these two articles: achieving a balance so that measures taken for the protection of witnesses do not infringe on the fair trial rights of the Accused.

An appropriate equilibrium between Articles 21 and 22 of the Statute cannot be achieved through the application of some sort of formula or the rigid application of the Rules. The unique circumstance of a particular witness is the determinative factor; a case-by-case analysis is merited. The question we must now try to answer in examining the ICTY legacy is whether ICTY Trial

Chambers have successfully achieved this balance. In my opinion, not always, and certainly not consistently.

II. Witness Protection Measures

It is widely accepted that many victims and witnesses to crimes find the criminal justice process stressful. This is understandable; addressing this stress is essential. Much of the stress results from fear – real or otherwise – that their safety is at risk if they give evidence. If there is any common factor between Prosecution witnesses and Defence witnesses, it is *fear*. This is not just at the ICTY, but at all international tribunals. For this reason, rules have been enacted and modalities implemented to ensure that both Prosecution and Defence witnesses are afforded protective measures. Defence Counsel for the most part do not object to witnesses having reasonable protective measures based on a showing of a legitimate need for protection. But the level of protection should be proportionate to the actual need. For the sake of transparency, the least restrictive protective measures necessary should be imposed.

The legal framework of various protective measures is prescribed in Rule 75 and Rule 79 of the Rules of Procedure and Evidence. Rule 75 authorises the Judge or a Chamber to provide measures that are consistent with the rights of the Accused. The Judge or Chamber can initiate these measures, *proprio motu*, at the request of either party, at the request of the victim or witness concerned, or at the request of the Victims and Witnesses Section. The measures available to the Judge or a Chamber to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness are: a) expunging names and identifying information from the Tribunal's public records; (b) non-disclosure to the public of any records identifying the victim or witness; (c) giving of testimony through image, or voice, altering devices or closed circuit television; and (d) the assignment of a pseudonym.

Chambers are also authorised to hold *in camera* proceedings to determine whether to order protective measures. Chambers can decide whether to order that closed sessions be held for some witnesses in accordance with Rule 79. Chambers can also order appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. Considering the character of *in camera* hearings, it is impossible to assess the development of Rule 75 through the case law from the Chambers' decisions rendered in such proceedings. Because the entire process of arguing submissions for protective measures is

confidential, most often the decisions are rendered in closed sessions. Chambers are obliged to make public the reasoning for their orders for closed session. However, because the very essence of these decisions is about confidentiality and protecting the image and identity of witnesses (and/or substance), such decisions are generally opaque: short and without sufficient substance to permit public scrutiny. Moreover, these pithy decisions often lack sufficient justification, which, invariably impacts of the Defence's need for legal certainty and guidance. As such, making a comprehensive outline of the case law on the subject of witness protection is not only challenging but also subject to a dose of guess work. Nevertheless, there are a few interesting examples worth exploring.

Example 1

Following a request from witness Yusushi Akashi that his witness testimony be given in a closed session, Radovan Karadžić submitted a motion requesting that the testimony of witness Yusushi Akashi should be held in a closed session.²² Mr. Karadžić included a communication from the witness to the Defence team that his request to testify in a closed session is “not based on any specific security concerns”, but rather “stems from his negative experiences in media reportage which has frequently distorted the true intent of his statements”. Witness Yusushi Akashi stated that in order for him to make “full and honest expressions of his views”, it is highly desirable that his testimony be heard in closed session.²³

The Chamber denied the Request.²⁴ In its reasoning, the Chamber stated that it was clearly established in the Tribunal's jurisprudence that pursuant to Rule 75 of the Rules the party requesting protective measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness' family, should it become publicly known that the witness testified before the Tribunal. The Chamber considered that based on the information before it, there was no objectively grounded risk to the security or welfare of the witness or that of his family should it become publicly known that he had testified in this case before the tribunal.²⁵

²² *Prosecutor v. Karadžić*, Motion for Protective Measures for Witness KW492, IT-95-5/18-T, filed publicly with a confidential annex on 7 November 2012

²³ *Id.*, para. 1.

²⁴ *Prosecutor v. Karadžić*, Decision on Request for Closed Session for Yasushi Akashi, IT-95-5/18-T, 17 April 2013.

²⁵ *Id.*, para. 6.

Example 2

In the same case, Mr. Karadžić sought protective measures by way of a pseudonym, image distortion, and face distortion for Witness KW492 on the grounds of security and welfare of the witness's family, which would be at risk if he testified publicly. The witness stated that there would be retaliation against his parents, who would be in great danger if he were to testify publicly as a Defence witness. According to the witness, his parents were the only Serbs living in a particular settlement in the Federation of Bosnia and Herzegovina (Settlement), and he has not returned to the Settlement due to fear of retaliation against his parents because of his service as a soldier in the Army of the Republika Sprska (VRS). In order to express his fear of retaliation, the witness referenced two incidents from 1996 and 2001.

The Trial Chamber denied the Request. In its reasoning, the Trial Chamber recalled that it had recently decided that a direct threat to the life of a witness, which had occurred in the wake of the conflict in Bosnia and Herzegovina, did not itself prevent an individual from testifying before the Tribunal without protective measures.²⁶ The Trial Chamber also found that there was a lack of contextualisation regarding the incident in 2001, and that the fact that the witness's family was one of very few Bosnian Serb families in the Federation of Bosnia and Herzegovina, without more, did not constitute objectively grounded risk to security or welfare.

But in a different case based on similar circumstances (*see*, Example 3), another Trial Chamber made a different ruling.

Example 3

In *Mladić*, the Prosecution filed a Motion requesting the protective measures of facial distortion and pseudonym for Witness RM-254.²⁷ The Prosecution submitted that those measures were necessary and objectively justifiable to protect the safety and security of the witness and his family, who at the time lived in Republika Srpska and could be subjected to retaliation as a result of the witness's testimony.²⁸ The Prosecution added that the witness had testified in two trials before the State Court of BiH and in one trial before the Bijeljina Court. He had testified with face distortion before the BiH State Court, but had not been provided any protective measures

²⁶ *Prosecutor v. Karadžić*, Decision on Accused's Motion for Video Link Testimony and Consideration of Protective Measures for Witnesses K533, IT-95-5/18-T, 9 November 2012, para. 15.

²⁷ *Prosecutor v. Mladić*, Urgent Prosecution Motion for Protective Measures for Witness RM-254, IT-09-92-T, 10 June 2013 (Confidential).

²⁸ *Id.*, para. 1.

before the Bijeljina Court.²⁹ The Prosecution also stated that the witness did not suffer any negative consequences as a result of his testimony before the Bijeljina Court.

The Trial Chamber granted the request and ordered the protective measures for the witness.³⁰ The Trial Chamber held a hearing in order to establish more details regarding the Prosecutor's Request.³¹ Witness RM-254 testified before the Chamber in a closed session. In its Decision, the Trial Chamber explained:³²

The Chamber noted that the witness's anticipated testimony would address killings allegedly carried out by Serb soldiers in close proximity to an area of Republika Srpska, where he and his family currently reside, and would identify some of the victims thereof. While the witness testified in 2010 before the BiH State Court without protective measures, it was established that he was subsequently recognised as a Prosecution witness by a passer-by on the streets of Srebrenica. The Chamber noted that the witness considered this to be an implied threat. The Chamber also noted that it was pointed out to the witness by his prospective employer how ethnic tensions between Serb and Muslim employees previously affected the work environment, which made it clear to the witness that he would not be hired if it became known that he had testified against Serbs. The Chamber considered that the witness's anticipated testimony could antagonise persons not only in his prospective workplace, but also in the vicinity of his village. The Chamber concluded that there were objectively-grounded risks to the safety and welfare of the witness and his family which justified the granting of the requested protective measures of facial distortion and pseudonym.

When analysing examples 2 and 3, one can clearly see the differences: in *Karadžić*, the actual threats were posed to the witness in 1996 and 2001, and in *Mladić* the witness had already testified about the same subject in the Court of BiH with no protective measures in 2010 and did not suffer any negative consequences as a result of his testimony. Yet, the Trial Chamber in *Mladić* found that Prosecution Witness RM-254's testimony could antagonise persons in his prospective workplace and in the vicinity of his village, thus granting the request. Conversely, the Trial Chamber in *Karadžić* found that there was no objectively grounded risk to security or welfare to the Defence Witness' family, thus denying the request for protective measures.

²⁹ *Id.*

³⁰ *Prosecutor v. Mladić*, Reasons for 4 July oral decision granting protective measures for witness RM-254, IT-09-92-T, 20 September 2013

³¹ *Prosecutor v. Mladić*, Transcript, IT-09-92-T, 4 July 2013, pp.13789-13804.

³² *Supra* note 28, para. 6.

Safe Passage

One of the most significant witness protection measures from the Defence perspective is the *safe passage* of witnesses. Persons testifying as Defence witnesses usually have a heightened level of anxiety and fear to travel to The Hague and give evidence before the ICTY. This should not be understood to mean that Defence witnesses are usually perpetrators of war crimes. Put differently, because Defence witness will be giving evidence *against* the Prosecution, a UN organ which, to their understanding has extraordinary power to arrest and prosecute with few if any limitations, these witnesses legitimately fear retribution: that they will be arrested in The Hague if *their truth* does not coincide with *the Prosecution's truth*. Even when protection measures are offered on top of safe passage, the fear of some witnesses is not diminished. In such situations it is not unusual for the Defence to be deprived of a valuable witness in possession of exculpatory evidence. It does not matter whether this fear is justified; it is a reality, which, undoubtedly, all Defence Counsel have had to deal with during the course of a trial.

In these cases, the Defence can avail itself of the possibility to file, based on Rule 54, *in camera* and *ex parte* submissions for safe passage for certain witnesses. Effectively, the Defence is requesting the Trial Chamber to order that witnesses, while in The Netherlands to give evidence in cases in which they have been summoned or agreed to appear in, will not be detained or subject to any other restriction of their personal liberty for acts or conduct falling within the jurisdiction of the Tribunal. In other words, these witnesses will be free to return to their country of origin, irrespective of the nature of the evidence (including self-incriminating) they give. In most cases, Trial Chambers would grant safe passage submissions, especially in accordance with Rule 90 (A), which sets out the principles for witnesses appearing before the ICTY to give evidence.³³

III. Some Thoughts on Public Trials at the ICTY

Rule 79 provides for closed sessions: the barring of the press and public from watching or listening to testimony. In virtually every case before the ICTY, the Prosecution has requested protective measures for a substantial number of its witnesses. Those requests have virtually all been granted by the Trial Chambers. It should come as no surprise that there have been trials at the ICTY where more than 50 per cent of the witnesses testified under pseudonym or with face and / or voice distortion, or in closed session.

³³ *Prosecutor v. Blaškić*, Order granting safe-passage to defence witness “DE”, IT-95-14-T, 7 September 1998.

Throughout the proceedings, and in the final judgements, protected witnesses are referred to by their pseudonyms. Trial Chambers go in and out of closed sessions, with considerable annoyance to the viewing public and press. They do so to shield the identity of witnesses or to discuss matters of a so-called confidential nature – some of which may merely be discomforting or inconvenient, and not confidential at all. If these deviations (or diversions – depending on how you view it) were merely limited to one or two witnesses per trial, it might not raise any serious question as to whether the trials adhered to the statutory guarantee of holding public trials. But what is often seen and experienced at ICTY trials, is that almost 50 per cent of the hearings were closed from the public. Indeed, it would appear (from the collective experience of Defence Counsel), the most important witnesses incriminating the Accused usually testified in closed sessions.

Is a trial really fair, open and consistent with the ICTY Statute and the international principles and standards reflected in the ICCPR where more than 50 per cent of witnesses testify under protective measures so as to ensure the witnesses' anonymity – or even existence? It is not difficult to envision a point at which so much of the testimony comes from secret or disguised witnesses, that the trial becomes a distortion.

Pseudonyms and closed sessions also complicate the reading of judgements; judgements are peppered with concealed identities of key witnesses, making the judgements impossible to be scrutinised by the public. This can – and often does – lead to the questioning of the validity of what is represented in the judgement as facts supposedly established beyond reasonable doubt. Are trials really *fair* when not transparent?

Protective measures for witnesses participating in proceedings must be balanced with the rights of the Accused to a fair trial. There is a general principle that a conviction cannot be based solely, or to a decisive extent, on the testimony of a protected witness. Also, an Accused has a right of confrontation: he or she must be able to meaningfully put questions to a protected witness giving evidence.

Typically, the Defence is not allowed to approach protected witnesses without informing the Prosecutor, who then ascertains – objectively, supposedly – if the witness wants to talk to the Defence. Most Defence Counsel would never even dare to entertain the notion of contacting a

protected witness in preparation of their case; too many obstacles for too little in return, fraught with the risk of witness intimidation or witness tampering.

Rule 66 dealing with disclosure is subject to Rule 69: dealing with witness protection. Under the disclosure rules, the Prosecution must disclose all prior statements in its possession for witnesses it intends to call, as well as all materials submitted to the Judge who confirmed the indictment. Where witness protection measures have been imposed, much of this material must be restricted for distribution, or even redacted to avoid undue disclosure of witness identities. These non-disclosure rules complicate the Defence's pre-trial preparation and in-trial preparation, especially in instances where the Prosecution is asking – and the Trial Chamber grants – protective measures for a large number of witnesses. These complications directly impact the equality of arms that Accused are entitled to enjoy. Concretely, it is questionable whether an Accused through his Defence team - with its limited resources represented by court-financed Counsel - will have sufficient time and facilities to effectively prepare his or her Defence.

IV. Accused's Right to Examine, or Have Examined, the Witnesses Against him

In *Tadić*, the first ICTY case, the Trial Chamber granted the Prosecution's motion to keep some witnesses' identities anonymous not just from the public, but from the Defence too, because they had a fear of retaliation and, as the Trial Chamber explained in its Decision,³⁴ there was a "strong likelihood" that witnesses would decline to give evidence if the disclosure of their identity was a condition of their testimony. The judgement of the European Court of Human Rights found this was impermissible, but the majority of the Trial Chamber, with Judge Stephen dissenting, held the jurisprudence of the ECHR only applied to "*ordinary criminal*" jurisdictions.³⁵ This decision was much criticised and discussed. No other Trial Chamber after *Tadić* imposed such a restriction on the Defence.

This issue recently cropped up again through the Report on witness protection in the Balkans in June 2010, drafted by Parliamentary Assembly of the Council of Europe.³⁶ The Report highlighted the plight of witnesses in the former Yugoslavia who have been murdered, threatened, and had their identities revealed by parties intent on obstructing justice. It was

³⁴ *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, IT-94-I-T, 10 August 1995, para 81.

³⁵ *Id.*, Separate Opinion of Judge Stephen; see also Monroe Leigh, *Witness Anonymity Is Inconsistent With Due Process*, 91 AM. J. INT'L L. 80, 81 (1995).

³⁶ Report: The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, Parliamentary Assembly of the Council of Europe, *Doc. 12440*, 29 November 2010.

concluded in the Report that many witnesses were reluctant to testify, believing they would be marked as traitors for doing so. In light of this, the Assembly criticised the ICTY's current practice of disclosing the identity of anonymous witnesses to the Defence prior to the trial. In cases where revealing the identity of a witness is disproportionate to the risk of harm to that person, the Assembly contends that such a policy is not in the interest of justice. The Assembly encouraged the ICTY to consider amending the Rules to allow witness anonymity to the Defence, as has been established by the European Court of Human Rights in several cases, and to consider using a "special advocate", functioning independently of the parties, to analyse the evidence, and act as an intermediary between the witness and the Defence.

The ICTY's reactions to this recommendation, if any, are unknown. Whatever additional measures for witness protection the ICTY or the MICT take to address this criticism, balancing such a measure against the Article 21(4)(e) rights of the Accused "*to examine, or have examined, the witnesses against him*", remains daunting.

V. Victims and Witnesses Section (VWS)

A few final words are merited to highlight the professionalism of the VWS. VWS is the special unit of the ICTY established to support and protect all witnesses called to testify at the ICTY. VWS provides various services to witnesses who come to The Hague to give evidence: arranging travel and lodging, supervising their visits, and ensuring their health, safety, and security.

VWS is perhaps the unsung hero of the ICTY. Those working for VWS have over the years proved to be highly professional, patient and understanding toward witnesses, Defence Counsel and Case Managers.

Surprisingly, at the Seminar of Counsel at the ICC held on 21 and 22 October 2013, Mr. Simo Väättäinen, the Rapporteur commissioned to evaluate the Victims and Witness Unit of the ICC,³⁷ presented an assessment which basically concludes that the Victims and Witness Unit of the ICC is an unmitigated disaster: low morale, poor services, and atrocious mismanagement. One has to wonder why the good management practices of the ICTY VWS were not taken in consideration by the ICC. This is for certain one part of the ICTY legacy which should be taken under serious

³⁷ Presentation on the evaluation of the victims and witness unit commissioned by the Registrar, Simo Väättäinen, the Rapporteur, Seminar of Counsel at ICC held on 21 and 22 October 2013.

consideration not only by the ICC, but by all international and national tribunals dealing with the war crime cases, and handling witnesses in criminal proceedings.

Conclusion

**By Marie O'Leary*

"It ain't over 'til it's over". – Yogi Berra

It was quite remarkable how simply re-reading these words transported me back to that cold, grey November day — seeing the sideways rain on the windows, hearing the familiar voice of each speaker, recognising the faces in the crowd and feeling what can only be described as ‘reunion’. While there are many reasons to remember that day, for me, these details form a part of that instant legacy that has been created by both the ADC-ICTY and the ICTY.

It is difficult not to personalise such experiences that draw upon memories of remarkable years. Regardless of his or her date of arrival to a Defence team at the ICTY, the many lawyers, legal assistants, case managers, investigators and interns have often likened his or her initial experience to ‘being thrown in the deep end’. For me, I vividly remember telling my parents that I had been selected to fill the position as the ADC-ICTY’s Head of Office and, to best explain, sending them the job description; my mother’s immediate, well-meaning response was simply: “*Do you know how to do all of that?*” While I cannot remember now what that posting required, I can remember that I learned immediately that anything you did not know how to do was something you learned fast; it remains that way eight years on. Practicing Defence at the ICTY, in the international courts, requires a combination of principle and creativity, planning and spontaneity, and, above all, dedication. Ethics lessons have served as a beacon forming the basis of the work of the Defence before the ICTY - whatever you do not know, you must learn or associate yourself with someone who does know. Indeed, it is the ADC-ICTY’s dynamic success is in the association itself - in the ability to create itself out sheer will, to build upon the efforts and resources of its members and to support itself and the Defence practitioners in this field in numerous ways to fight for fair trials thereby creating a solid legacy of the institution. [After all, as a near-mantra, it is the “*fairness of its trials*” by which the Tribunal will be judged.³⁸] This “*important responsibility*”, as defined by Novak Lukić, has been achieved to date by, as Colleen

³⁸ *Prosecutor v. Slobodan Milošević*, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003), IT-02-54, 21 October 2003, para. 22: “*This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials*”.

Rohan rightly described, “*Defence Counsel at the ICTY who I consider to be brave and committed and in many ways some of the finest people that I have ever worked with*”. I could not have said it better.

While the Tribunal has come far and the end is within sight, the Defence’s work is not over. It is hard to divine in the individual motions filed day-after-day, the visits to UNDU, the appearances in Court, the team meetings, or the review of another batch of seemingly endless disclosure; however, every decision of every day of every actor at the ICTY continues to compile the legacy that will remain. It is the daily work that constructs passages of weeks and months to bridge years and decades, all building what will eventually become how we are judged. For many, “legacy” is the “what comes after”, an evaluation after something is over; even Merriam-Webster defines legacy as “*something transmitted by or received from an ancestor or predecessor or from the past*”. However, today is also the future’s past, and we must continuously ask ourselves what we can do to ensure that we stay the right direction. Taking a lesson from Telford Taylor, we must assess the cumulative effect as not only “*what actually happened*”, but also “*what people think happened*”.³⁹ From the writings herein, it is evident that such was an opportunity last autumn and the wider achievement of the ADC-ICTY Legacy Conference.

Ten months following the Conference, it is easy to see how Judge Howard Morrison rightly, though somewhat dispiritingly, predicted that: “[...] *the future challenges are pretty much the same as the ones we have at the moment and the ones we have had from the beginning*”. The process of developing international criminal law itself, while moving quickly each day, is a glacially-paced process that requires continued efforts on the same themes. The varied topics raised in the Conference - issues of disclosure, victim/witness protection, the ability to question the institution, and the Defence function within the structure of a court itself - are all issues that have been tackled by the international courts in this very week and will likely be seen again in another ten months time. As touched upon by many speakers at the conference, the idea of what the Defence does, why it is necessary, and answering the ever-asked question as recalled by Michael Karnavas of “*how can you represent these people?*” is something that does and will remain a challenge indefinitely. It is not the issues that will be solved individually, but a larger battle to ensure that progress, not regress, is the standard for future institutions and future practitioners; that the legacy that has been created is a legacy preserved and improved upon. Recalling that ‘it’s not over until it’s over’ means that the Defence has the opportunity to improve and go so much further in this field of

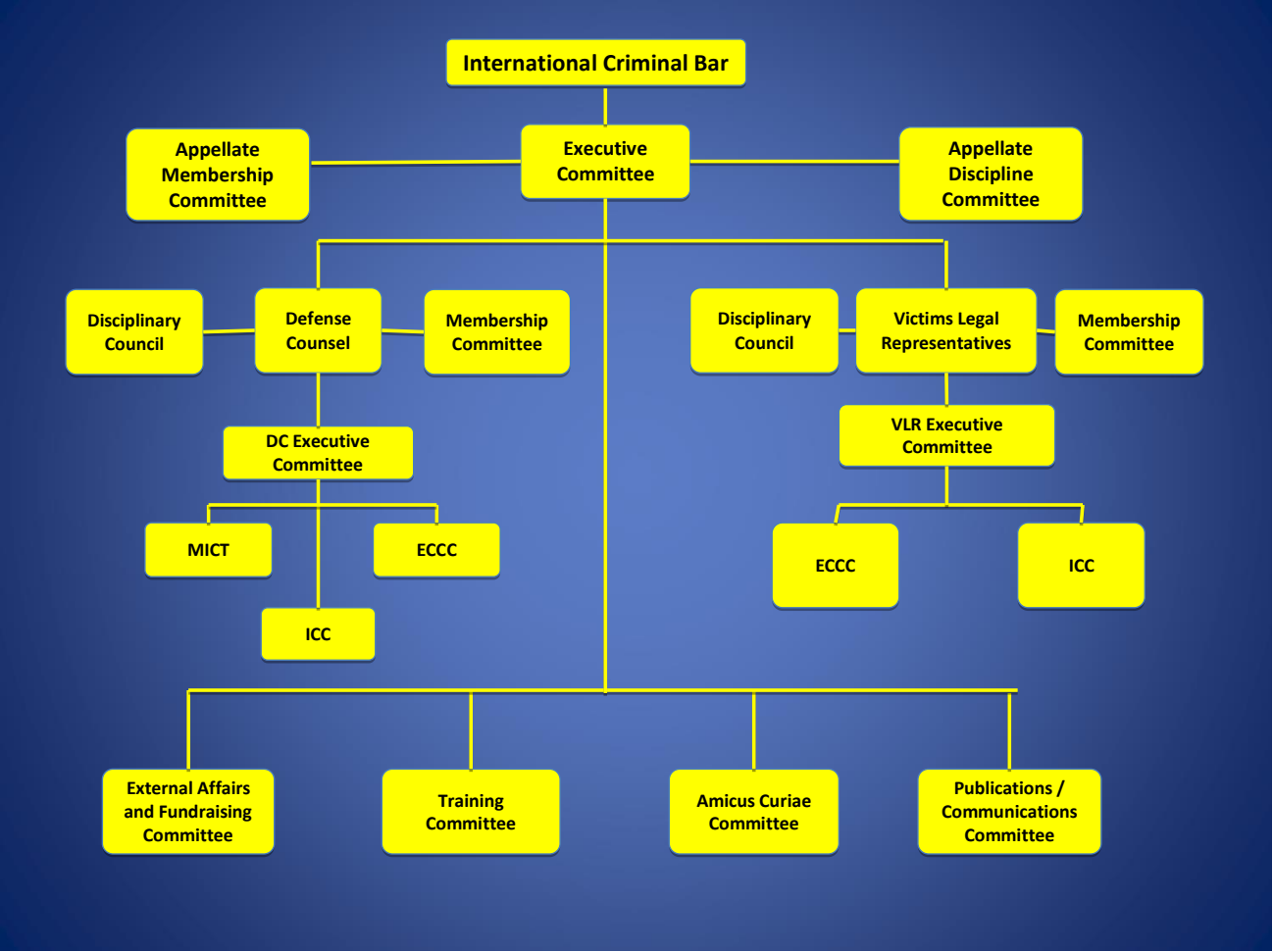
³⁹ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), pp. 13-14.

international criminal justice; at the same time, there remains the responsibility of ensuring that momentum is not lost. As Judge Justice Moloto advised, we may sleep peacefully only when we can say “*I could not do it any better*”. For this, I remain at peace knowing that on this very day, even as you read this, tireless legions (including those very persons who took time to participate in the Conference) are working to ceaselessly advocate for their own clients, for the rights of the Accused, generally, and for the recognition of the Defence before the international courts. This “*committed engagement and considerable efforts of Defence Counsel in service of their clients are crucial not just to the functioning, but to the credibility of both the Tribunal and its work*”;⁴⁰ happily, this enduring drive is, and will continue to be, the legacy of the Defence and the ADC-ICTY.

⁴⁰ Judge Theodor Meron, *supra*.

Annex I

Organisational Chart - Stéphane Bourgon's speech:



Annex II

Biographies of the Speakers:⁴¹

H.E. Judge Theodor Meron

His Excellency Judge Theodor Meron is the current President of the ICTY and the Mechanism for International Criminal Tribunals (MICT). He has served as a Judge on the Appeals Chamber since 2001. Judge Meron received his legal education at the Universities of Jerusalem, Harvard and Cambridge. Since 1977, he has been a Professor of International Law and, since 1994, the holder of the Charles L. Denison Chair at New York University School of Law. Between 1991 and 1995 he was also Professor of International Law at the Graduate Institute of International and Development Studies in Geneva and he has been a Visiting Professor of Law at Harvard University and at the University of California (Berkeley). Between 2000 and 2001, he served as Counsellor on International Law in the U.S. Department of State and in 1990, as a Public Member of the United States Delegation to the CSCE Conference on Human Dimensions in Copenhagen. In 1998, he served as a member of the United States Delegation to the Rome Conference on the Establishment of an International Criminal Court and was involved in the drafting of the provisions on crimes, including war crimes and crimes against humanity. He has also served on the Preparatory Commission for the establishment of the ICC, with particular responsibilities for the definition of the crime of aggression. Judge Meron has served on several committees of experts of the ICRC. He is a frequent contributor to the *American Journal of International Law* and other legal journals and has published more than 100 articles and books.

The Right Honourable Lord Iain Bonomy

The Right Honourable Lord Iain Bonomy has been practicing as a solicitor, advocate, and Queen's Counsel since 1968 and has served as senior prosecutor in the Supreme Courts of Scotland between 1990 and 1996. He was appointed judge of the Supreme Courts of Scotland in 1997 and has sat in civil and criminal cases at first instances and in appeals. Between April 2004 and August 2009, he was a permanent judge at the ICTY and member of the Trial Chamber in the case of Slobodan Milošević. He was presiding judge in the trial of Milan Milutinović and five other Serbian political, military and police leaders on charges relating to ethnic cleansing in Kosovo in 1999 as well as pre-trial judge in the case against Radovan Karadžić between 2008 and 2009. He served as judge of the Court of Appeal of the Supreme Courts of Scotland between 2009 and 2012 and retired in October 2013. He currently holds a part-time appointment as Surveillance Commissioner for the UK, supervising the deployment by policy and other law enforcement agencies of intrusive and sensitive surveillance techniques. He is Chairman of Working Groups both at the ICTY and in Scotland considering what improvements might be made in practice and procedure for serious international criminal proceedings, resulting in various reports and recommendations.

Stéphane Bourgon

Stéphane Bourgon is a military academy graduate, former officer and military legal advisor. Called to the Bar in 1993 (Québec), he has been practicing before the ICTY for more than 14

⁴¹ Biographies used for the ADC-ICTY Legacy Conference, 29 November 2013.

years. He initially worked in the Office of the Prosecutor, moving on to Chambers where he held the position of Chef de Cabinet in the Office of the President. Since January 2002, he has been assigned a Defence Counsel to represent, amongst others, Enver Hadžihasanović, Rasim Delić, Dragomir Milošević, Veselin Šljivančanin, Drago Nikolić and Momčilo Perišić. Recently, Bourgon also represented Ange Félix Patassé as well as Laurent Nkunda before the ICTR. In 2003 and 2004, he was elected President and in 2011 Vice-President of the ADC-ICTY. He is current member of the Disciplinary Committee and the Rules Committee of the ADC-ICTY. He is on the Executive Board of the International Criminal Defence Attorneys Association and is a member of the International Criminal Bar. In parallel to his international legal practice, Bourgon recently held the position of a Senior Director at the International Center for Human Rights and Democratic Development.

Christopher Gosnell

Christopher Gosnell is current ADC-ICTY Vice-President and has also served as a member of the Amicus Committee. He was Legal Officer in the Chambers at the ICTR between 2003 and 2006 as well as for the Office of the Prosecutor at the ICTY between 2006 and 2008. He has been Defence Counsel at the ICTY since 2008 and acted as Lead Counsel for Ljubomir Borovčanin (2006-2010). He is currently Co-Counsel for Goran Hadžić and Legal Consultant for Stojan Župljanin. Gosnell has further acted as Counsel for the Office of Public Counsel for Victims at the ICC in 2011 and as Co-Counsel for Charles Taylor at the SCSL.

Gregor Guy-Smith

Gregor Guy-Smith is a founding member of the International Criminal Law Bureau undertaking international legal cases and providing advice, consultancy and training services to governments, international organisations and private clients. He has lectured on international criminal law at universities in the United States and Europe and has provided training to lawyers in the United States and the Balkans, and at the ICTY, the STL and the ICC. Guy-Smith has been practicing as a Defence Lawyer at the ICTY since 2004 and has tried four cases being involved in the first retrial of a case in the history of the ICTY. Between 2006 and 2007 he was President and between 2009 and 2010 Vice-President of the ADC-ICTY. He is former Chairperson of the Disciplinary Board, the Rules Committee and the Training Committee, and Chairperson of the Constitutional Review Committee of the ADC-ICTY. He is presently a member of the Advisory Panel to the President and Registrar of the ICTY and the MICT.

Richard Harvey

Richard Harvey, a barrister in England and Wales (1971), is a member of Garden Court Chambers, London, where he chairs Garden Court International. He was admitted to the New York bar in 1982. He specialises in international human rights, international humanitarian law, criminal law and environmental law. Past Chairman of the Haldane Society of Socialist Lawyers, he is also a member of Bureau of the International Association of Democratic Lawyers (IADL). During 20 years of human rights work in Harlem, New York, he was an IADL delegate to the United Nations, Counsel to the African National Congress (later the government) of South Africa, conducted human rights investigations in Haiti and in Northern Ireland. He returned from New York to work on the Bloody Sunday Tribunal in Derry, Northern Ireland. He is also a legal advisor to the National Democratic Front of the Philippines in their peace negotiations with the Philippine Government. Harvey worked as Co-Counsel at the ICTR in 1999 and joined

the ADC-ICTY in 2004, as Co-Counsel for Haradin Balaj (2004 – 2007), Lead Counsel for Lahi Brahimaj (2005 – 2012) and currently Lead Standby Counsel for Radovan Karadžić.

Michael G. Karnavas

Michael G. Karnavas is an American trained lawyer. He is licensed in Alaska and Massachusetts and is qualified to appear before the various international tribunals, including the ICC. Practicing law for over 30 years, Karnavas has appeared before State and Federal Courts in the U.S., the ICTY, the ICTR and the ECCC. For over 20 years, Karnavas has taught trial advocacy skills to lawyers and law students, has lectured extensively on international criminal law and procedure, has authored trial advocacy practice manuals, articles and book chapters on international criminal law and procedure, and has been engaged in a variety of development projects in Europe and Asia dealing with issues related to the Rule of Law. He served as the President of the ADC-ICTY (2005 to 2007), continuing as Vice-President until 2009. He was also a Chairman of the Rules Committee and the Training Committee for many years.

Steven Kay QC

Steven Kay QC of 9 Bedford Row Chambers, London is a leading international criminal lawyer. He was called to the Bar in 1977, appointed Queen's Counsel in 1997 and appointed a Recorder of the Crown Court the same year. At the ICTY he served as Defence Counsel in the first trial, being that of Duško Tadić (1996-1997), was *amicus curiae* and assigned Defence Counsel in the trial of Slobodan Milošević (2001-2006), and finally Defence Counsel to General Ivan Čermak (2007-2011). At the ICTR he was Defence Counsel to Alfred Musema (1998-2001). He is currently representing at the ICC the President of Kenya, Uhuru Kenyatta (2010-date). Since 2010 he has also led the international Defence team representing members of Jamaat e Islami charged with crimes arising from the 1971 war of liberation at the Bangladesh International Crimes Tribunal. Recent human rights involvement has been as the representative of 450 applicants in the case "Beslan Victims Complaint v. Russia" before the European Court of Human Rights. He has also advised the governments of Syria and Sudan on international criminal law issues. In 2012 he wrote with David Hammond the 100 Series Rules for the Use of Force at Sea which has since been adopted by the IMO for an ISO. Steven is a founder member of the European Criminal Bar Association and of the International Criminal Law Bureau. He currently co-chairs the International Bar Association's War Crimes Committee.

Dominic Kennedy

Dominic Kennedy is currently the Administrator at the Permanent Court of Arbitration and former Head of Office of the ADC-ICTY. He is a Magistrate in England and Wales and Trustee and Company Director of the Jumbulance Trust, a UK registered charity. He holds a LL.M in International Humanitarian Law from the Geneva Academy of International Humanitarian Law and Human Rights and a LL.B in English Law with European Law from the University of Leeds, United Kingdom and Katholieke Universiteit, Leuven, Belgium. He authored a chapter in the *'Manual on International Criminal Defence: ADC-ICTY Developed Practices'*, published in 2011.

Novak Lukić

Novak Lukić has been working as a lawyer since 1996, registered with the Bar Chamber in Belgrade. Between 1990 and 1996 he served as judge of the First Municipal Court in Belgrade in the civil law department, investigation department, criminal department and the international

legal aid department and was President of the municipal committee for the return of the unjustly nationalised land. Lukić acted as Lead Counsel before the ICTY for Miroslav Tadić in the Šamac Case, for Veselin Šljivančanin in the Vukovar hospital case and for Momčilo Perišić. He has been repeatedly elected a member of the Executive board of the ADC-ICTY and the Disciplinary Committee and currently holds the Presidency of the association for the one year mandate 2012-2013. He has been appointed assistant/consultant for the team of the state “Republic of Serbia” in the case Serbia v. Croatia before the ICJ on various instances. In 2013 he worked as a lecturer for the OSCE in Belgrade and Sarajevo on several occasions.

Judge Bakone Justice Moloto

Judge Bakone Justice Moloto commenced practice as a lawyer in 1976. From 1987 to 1992 he acted as executive director of the Black Lawyers Association – Legal Education Center. From 1995 to 2005 he was a Judge at the Land Claims Court of South Africa hearing disputes arising from laws underpinning South Africa’s land reform initiative. Between 2003 and 2005 he served as a judge at the Transvaal Provincial Division of the High Court of South Africa focusing on constitutional matters and reviews of proceedings taking place in lower courts. Judge Moloto is a member of the Legal Aid Board and Trustee of the Black Lawyers Association – Legal Education Trust. Additionally, he acts as Chairman of the National Archives Advisory Council. He has been Member of the ICTY since 2005 and is member of the Trial Chamber in the case of Ratko Mladić.

Judge Howard Morrison

Judge Howard Morrison commenced practice on Midland and Oxford Circuit in 1977, working on crime, civil and family cases including Court martial work in the UK and Germany. Between 1986 and 1988 he served as Chief Magistrate of Fiji, concurrently as Senior Magistrate of Tuvalu and as Coroner. In 1987, he was called to the Bars of Fiji and the Eastern Caribbean Supreme Court until he was appointed Attorney General of Anguilla. In 1989, he returned to private practice in crime, both as Prosecutor and leading Defence Counsel. Between 1993 and 2008 he was appointed a Recorder and Silk, and served as a Circuit Judge and a Senior Judge of the Sovereign Base Areas of Cyprus. From 1998 to 2004 he served as a Defence Counsel at the ICTY and ICTR and became member of the ADC-ICTY. Judge Morrison has been member of the ICTY since 2009 and is currently member of the Trial Chamber in the case of Radovan Karadžić. He is a member of the Advisory Board of the Journal of International Criminal Justice and a member of Race Relations Committee and Equal Opportunities Committee of the Bar Council. Additionally, he was appointed Commander of the Most Excellent Order of the British Empire in 2007 for services to international law.

Eugene O’Sullivan

Eugene O’Sullivan was admitted to the Law Society of the Province of British Columbia in 1989 and to the List of Defence Counsel of the STL in 2009. He has previously been authorised to appear before the ECCC as a foreign lawyer and was admitted to the list of Defence Counsel before the ICTY in 1996. He defended Milan Milutinović, former President of the Republic of Serbia, and he acted as Defence Counsel in the cases of Mićo Stanišić, Miodrag Jokić, Biljana Plavšić, Milojica Kos and Zejnil Delalić. O’Sullivan has been member of the Rules Committee of the ADC-ICTY since 2004.

Edina Rešidović

Edina Rešidović is an Attorney-at-law specialised in criminal litigation. Called to the Bar in 1971, she served as Deputy District Attorney in Sarajevo and as Secretary for legislation of the government of the Socialist Republic of Bosnia and Herzegovina. Since 1991, she has been an Attorney-at-law running a law firm in Sarajevo. She has acted as Lead Counsel before the ICTY for Zejnil Delalić, Enver Hadžihasanović and Ljube Boškoski. She also served as Defence Counsel before the courts in Bosnia and Herzegovina, particularly in war crime cases. As a member of the Red Cross of Bosnia and Herzegovina since 1965, she served as Secretary and President of the organisation. Being a co-founder of the ADC-ICTY, she was engaged in developing and drafting the ADC-ICTY Statute and was member of the ADC-ICTY Training Committee, the Rules Committee, the Disciplinary Panel and the Advisory Panel of the ICTY.

Colleen Rohan

Colleen Rohan has been practicing criminal defence for over 30 years. She was Counsel at the ICTY in the Popović *et al.* case (Srebrenica), and Haradinaj *et al.* case (Kosovo). She is legal consultant to the Standby Counsel in the case Prosecutor v. Karadžić and previously legal consultant in Prosecutor v. Perišić. She is a founding member of the International Criminal Law Bureau, former Vice-President of the ADC-ICTY, former Chairperson of the ADC-ICTY Disciplinary Council and current ADC-ICTY representative to the ICTY Disciplinary Board. She was editor for the *ADC-ICTY Manual on Defence Developed Practices* published in October 2011.

Mira Tapušковиć

Mira Tapušковиć was Vice-President of the ADC-ICTY between 2003 and 2004 and has been working at the ICTY since 1996. She was Legal Assistant and Co-Counsel for Zdravko Mucić (1996-1997), Co-Counsel for Miroslav Radić (2003-2007) and is currently Co-Counsel for Vujadin Popović before the ICTY. Furthermore, she has represented Jelena Rašić as Lead Counsel in her contempt trial between 2010 and 2013. In addition to having been a member of the Executive Committee, Tapušковиć has also been a member of the ADC-ICTY Disciplinary Council and the Amicus Committee.

Suzana Tomanović

Suzana Tomanović is a Lawyer/Advocate from Bosnia and Herzegovina, educated and trained in the former Yugoslavia. Having practiced law for over 27 years, she is licensed to appear before all courts in Bosnia and Herzegovina. Tomanović is currently residing and practicing primarily in Bosnia and Herzegovina, though she also maintains an office in The Hague, where she has been actively engaged in international criminal cases before the ICTY since 2001. Recognised as an expert in international criminal defence, she served as an expert consultant to the Ieng Sary Defence at the ECCC. Tomanović is qualified to appear before various international tribunals, including the ICC. She was repeatedly elected Vice-President of the ADC-ICTY and acted as Chairperson of the Membership Committee and the Disciplinary Committee.

Slobodan Zečević

Slobodan Zečević has acted as Lead and Co-Counsel in various cases before the ICTY, including Simić *et al.*, Brđjanin and Talić, Deronjić, Milutinović *et al.* and Stanišić and Župljanin. He was a member of the Executive Board of the Belgrade Bar Association between 1991 and 2002, acted

as Chairman of the Ethical Committee of the Belgrade Bar Association between 1994 and 1998 and was Chairman of the Foreign Relations Commission of the Belgrade Bar Association. He was founder, first Vice- President and, between 2009 and 2011, President of the ADC-ICTY. Furthermore, he acted as a representative of the Serbian Bar in the Association of South- East Europe Bar Associations, a body established by Council of Europe in Strasbourg. He has been a member of the ICTY Rules Committee as one of the representatives of the ADC-ICTY between 2006 and 2008 and from 2011 to the present day.

Annex III

Programme of the Conference:

09:00-09:30	Registration – Bel Air Hotel, The Hague
09:30-09:40	Opening Remarks – Novak Lukić, ADC-ICTY President
09:40-10:00	Keynote Speech – H.E. Theodor Meron, ICTY President
10:00-11:15	Panel I: Rights of the Accused
10:00-10:05	Introductions by Panel I Moderator – <i>Michael Karnavas</i>
10:05-10:15	Topic 1: Equality of Arms – <i>Mira Tapuškević</i>
10:15-10:25	Topic 2: Right of Confrontation at Trial – <i>The Right Hon Lord Iain Bonyon</i>
10:25-10:35	Topic 3: Right to Appeal – <i>Christopher Gosnell</i>
10:35-11:15	Audience Participation
<i>11:15-11:35</i>	<i>Coffee Break</i>
11:35-12:50	Panel II: Transparent Justice: The Defence Experience
11:35-11:40	Introductions by Panel II Moderator – <i>Slobodan Zečević</i>
11:40-11:50	Topic 1: Witness Protection Measures – <i>Suzana Tomanović (Michael Karnavas)</i>
11:50-12:00	Topic 2: Rule 70 – <i>Steven Kay QC</i>
12:00-12:10	Topic 3: The Ethics of Talking to the Media – <i>Gregor Guy-Smith</i>
12:10-12:50	Audience Participation
<i>12:50-14:15</i>	<i>Lunch Break</i>

14:15-15:30	Panel III: Role of the ADC-ICTY
14:15-14:20	Introductions by Panel III Moderator – <i>Dominic Kennedy</i>
14:20-14:30	Topic 1: Importance of Defence Function – <i>Judge Bakone Justice Moloto</i>
14:30-14:40	Topic 2: Role of the ADC – <i>Eugene O’Sullivan</i>
14:40-14:50	Topic 3: Future of Defence Organisations in International Criminal Institutions – <i>Stéphane Bourgon</i>
14:50-15:30	Audience Participation
<i>15:30-15:50</i>	<i>Coffee Break</i>
15:50-17:05	Panel IV: ICTY Legacy
15:50-15:55	Introductions by Panel IV Moderator – <i>Richard Harvey</i>
15:55-16:05	Topic 1: Expectations v. Reality – <i>Colleen Rohan</i>
16:05-16:15	Topic 2: Perceptions from Countries of the Former Yugoslavia – <i>Edina Rešidović</i>
16:15-16:25	Topic 3: Future Challenges for Rights of Defence in International Criminal Law – <i>Judge Howard Morrison</i>
16:25-17:05	Audience Participation
17:05-17:15	Closing Remarks – Novak Lukić, ADC-ICTY President
20:00-open end	ADC-ICTY Annual Party at Hudson Bar & Kitchen