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INTRODUCTION

Defense counsel may dream about themselves as noble defenders of the innocent, who are the victims of zealous prosecutors. If that will not do, a call upon the principle of the presumption of innocence lends nobility to the profession. Nevertheless, in many cases, this will not do because the presumption is often taken for granted and thus only paid lip service by some. In reality, the presumption of innocence is effectively not worth a legal penny. The *vox populi* (general public) often considers criminal lawyers "criminal," as criminal lawyers defend crooks, villains, or worse in the case of international crimes.

Suspects and accused persons do not often fit in the usual group of persons who would be easily accepted as one's business associates or acquaintances. No one wants to be associated with an alleged criminal, and those who are, such as defense counsel, may well appall the public. Counsel defending individuals accused of genocide may find themselves in an even more compelling situation. The case may turn out to be the ultimate, if not the worst, challenge of one's career. Experienced lawyers recognize this—they have learned by trial-and-error to deal with it. They know that defending alleged criminals requires professional skills and a firm belief in the principles of law. Those familiar with the criminal justice system appreciate that defense attorneys do not defend the prosecuted act, but instead the individual, and therefore the individual's right to a fair trial. Acting as defense counsel is neither a torment of Tantalus nor a Herculean task. In reality, it is an honorable profession focused on the fair administration of justice. Nevertheless, defending persons who are suspected or accused of genocide should differ in significant ways from other types of defense work.

War crimes, crimes against humanity, and genocide have been internationally recognized over the course of the last century, and are usually described as international crimes. This area of law has been seen as a part of international criminal law since the international prosecution of these crimes

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began. Yet the term international criminal law is a bit confusing because it also includes different areas of public law. The classic meaning of international criminal law encompasses treaty law and state practices concerning law enforcement relations between states in matters of criminal law and related national law. After humanitarian law had been kissed awake again on an international level in the nineties, another meaning of international criminal law emerged that mandates the involvement of the international community to address violations of humanitarian law. This resulted in supranational prosecutions of such crimes and new forms of cooperation between states. In this article, the second meaning of international criminal law is used.

The trials before the Nuremberg[1] and Tokyo[2] Tribunals highlighted the revival of humanitarian law, but the Yugoslav and Rwandan conflict triggered a new interest that resulted in rapid development of the substantive law of international crimes and the introduction of new supranational procedural law. New procedural law resulted from the establishment of the International Criminal Tribunal for the Former Yugoslavia[3] (ICTY) in 1993, the International Criminal Tribunal for Rwanda[4] (ICTR) in 1994, and the International Criminal Court[5] (ICC) in 1998. Since then a number of quasi-international courts have been established (e.g., the United Nations Interim Administrative Mission to Kosovo courts[6] in 1999, the Special Panels for Serious Crimes in East Timor[7] in 2000, the Extraordinary

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[1] *See generally* Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, *available at* http://usa.usaembassy.de/etexts/ga4-trials.htm (describing punishment of the major war criminals of the European Axis countries).

[2] *See generally* Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (1968) (describing punishment of the major war criminals of the Far East).

[3] *See* S.C. Res. 827, paras. 2–3, U.N. Doc. S/RES/827 (May 25, 1993); *see also* S.C. Res. 1166, para. 3, U.N. Doc. S/RES/1166 (May, 13, 1998); *see* S.C. Res. 1329, paras. 4–5, U.N. Doc. S/RES/1329 (Dec. 5, 2000); *see* S.C. Res. 1411, para. 1, U.N. Doc. S/RES/1411 (May 17, 2002).

[4] *See* S.C. Res. 955, para. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994); *see also* S.C. Res. 1165, para. 1, U.N. Doc. S/RES/1165 (Apr. 30, 1998); *see also* S.C. Res. 1329, *supra* note 3, paras. 4–5; *see also* S.C. Res. 1411, para. 1, U.N. Doc. S/RES/1411 (May 17, 2002).

[5] Rome Statute of the International Criminal Court art. 112(9), July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

[6] *See* S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999); United Nations Interim Administrative Mission in Kosovo [UNMIK] Regulations 2000/24, U.N. Doc. UNMIK/REG/2999/24 (Apr. 21, 2000); UNMIK Regulations 2000/59, U.N. Doc. UNMIK/REG/2000/59 (Oct. 27, 2000).

[7] *See* S.C. Res. 1272, para. 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999); *see also* United Nations Transitional Administration in East Timor [UNTAET], *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences,* UNTAET Reg. 2000/15,

Chambers in the Courts of Cambodia[8] in 2001, and the Special Court for Sierra Leone[9] in 2002). The most important developments of substantive law concerned the detailed definition of the elements of crimes, expansion of the various acts listed under crimes against humanity and diversification of the kinds of war crimes. Genocide, defined by the Genocide Convention of 1948, has not been developed dramatically, but rather has been refined by the international case law.[10]

Besides my usual work in white-collar criminal law, I have been involved in trials of persons prosecuted for violations of humanitarian law, war crimes, crimes against humanity, and genocide before international tribunals. I defended Duško Tadič, the first case before the ICTY in 1995–1997, and Alfred Musema before the ICTR in 1999–2000. I was also involved as *amicus curiae* in the Slobodan Miloševič trial in 2001–2002, and the challenge of the indictment and arrest warrant of Charles Taylor on behalf of the Republic of Liberia before the International court of Justice (ICJ) in 2003. After these engagements, I became involved in training programs on humanitarian law and fair trial procedures for the ICTY, the Iraqi Special Court, the International Criminal Court, and the Cambodia Tribunal.

PROFESSIONAL OBSERVATIONS

Domestic criminal justice systems in civilized jurisdictions are inspired to prevent justice from being merely an instrument of revenge or executive action. Many checks and balances are incorporated to achieve fairness in the criminal proceedings. Most domestic criminal justice systems have taken generations to evolve. Domestic trials are subject to the scrutiny of the society they serve, and those taking part are accountable for their conduct. The courts are situated within the State of their jurisdiction and are responsible for applying standards to all aspects of social behavior. Those that come before the court are part of the same society in which it operates.

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paras. 1.1 to 1.2, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) (*prepared by* Sergio Vieria de Mello).

[8] *See generally* Law on the Establishment of the Extraordinary Chambers of the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Aug. 10, 2001 (discussing the establishment of the Extraordinary Chambers); *see generally* Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Oct. 19, 2004 (discussing the establishment of the Extraordinary Chambers).

[9] The Secretary-General, *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone*, app. 2, *delivered to the Security Council*, U.N. Doc. S/2002/246 (Mar. 8, 2002) (discussing the composition of the Special Court for Sierra Leone and the appointment of judges).

[10] Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

Within this domestic system, defense counsel's role is not limited to ensuring that the innocent are acquitted, they must also ensure that any sentence passed is appropriate. No proper criminal justice system puts its faith solely in the prosecutor to get things right, or in the judges to understand perfectly the points for both sides in every case. In other words, the principle of the rule of law does not depend only on the way investigative, prosecutorial, and adjudicatory institutions fulfill their duties, but also on the proper fulfilment by defense counsel of his duties.

A number of issues in the performance of these duties in international cases are the same as in domestic cases. In both cases defense counsel represent defendants who are charged with crimes and prosecuted before a court of law. In both cases, defendants may plea not guilty and expect counsel to complete the impossible by getting them off the hook. On the face of it, the tasks counsel performs look the same in both cases. Defense counsel are trained to deal with all kinds of factual matters and issues of law to the benefit of the client. When we look a bit closer, however, we see that in international cases the magnitude, scope, and complexity of the facts is completely different. Moreover, counsel will have to deal with different cultures, different languages, and *loci delicti* in places far away. That unfamiliarity applies to the law as well because the crimes have a striking political component and usually have strong ties with local history. In international cases, one faces new systems of criminal law with different standards, procedures, and practices. The bench is different from the usual court at home. In sum, the dynamics of international trials are very different and offer unprecedented challenges. Unlike most domestic cases, international prosecutions have not primarily emerged from the need to administer justice, but rather from the firm belief that we should prosecute the perpetrators of those crimes we believe are the most heinous. The eagerness of the media, politicians, and some nongovernmental organizations to achieve convictions, not merely fair proceedings, puts pressure on international trials. The popular perception is that an acquittal is a failure. This is the reason why international prosecutors may well be inclined to play a creative trial game in order to secure convictions, rather than assisting the court in finding the truth.

Building an effective defense team while running a case before an international court requires a specific approach. It is striking that all the Statutes of current tribunals hardly pay any attention to the role of defense counsel. Defense counsel is only mentioned within the context of the court in passing, as an option for an accused where the interests of justice so require. An accused may waive the right to legal assistance if he wishes to represent himself. The few cases where the accused waived—if not resisted—the right to legal assistance because he preferred to represent himself are notorious examples of the corruptive effects of absence of defense counsel.

The requirement of a fair trial fascinates us. Although the public may not agree, defense counsel has no difficulty in agreeing that criminals should be prosecuted. Defense counsel merely states it differently: "Yes, these people need to be prosecuted, but in a fair way." As domestic criminal justice systems are not all the same, the question is always "What does fair trial encompass?" Fair trial is not an unequivocal concept. Defense counsel working in accusatorial systems may say things about the requirement of a fair trial that may differ from what defense counsel who work in inquisitorial systems would say. International defense counsel understand that the concept of a fair trial is ambiguous and that it should be understood in the context of the system in which they operate.

Defense counsel must have rights conferred specifically on him or her. Which rights are necessary to safeguard the defendant's interests will depend upon the system of law in which the prosecution is taking place. Defense counsel is obliged to properly and adequately make use of these rights, to punctiliously perform his duties, and to fulfill his task in a strictly independent manner. This not only serves the subjective interest of the defendant, but also the public's interest in the fair administration of criminal justice.

Most defense counselors in the international courts and tribunals do one or two cases before an international court and then return to their domestic work. Unlike prosecution at the tribunals, most defense counsel do not have accumulated specialist knowledge, but are instead reinventing the wheel in each case. The reality may well be that the working conditions for most defense counsel are disappointing compared to cases at home. There needs to be a corps of experienced defense counsel to run cases before the international tribunals. Competent counsel who either have a team available or who know how to build one. The usual view is to have lawyers from both common law and civil law jurisdictions on one team to be able to address the challenges of the international systems most effectively. This is in order to compensate for an initial lack of knowledge of the new system, but practice has shown that a very experienced defense team from only one of these jurisdictions may be effective as well. Legal skill and experience in the law of the court, more specifically in the case law and the day-to-day practices, is needed to match—or even better to top—the experience of the prosecution.

It makes sense to distinguish between engineering the law and operating in the courtroom. It is very helpful to be a smooth courtroom operator with smart skills in grilling witnesses, but this is not enough. The capriciousness of the new international legal systems combined with the occurrence of events in a case requires superior skills to anticipate and address all kinds of issues of procedural law. This requires more than careful preparation and an exhaustive knowledge of the relevant case law; it also requires the ability to deal in a creative way with legal issues where the rules are

silent. What a defense team needs is the ability to step back from its domestic legal system to deal with issues from a different perspective. Article 21 of the Rome Statute, for example, makes it very clear that one has to do more than look to the Statute and the Rules of Procedure and Evidence.[11] Where appropriate, one has to study applicable treaties, principles, and rules of international law, including the established principles of international law of armed conflicts. When necessary, one has to endeavor upon a more comparative approach by looking at general principles of law deriving from national legal systems, as appropriate, national laws of States that would normally exercise jurisdiction over the crime. All this comes with the proviso that findings must not be inconsistent with internationally recognized norms and standards.

Engineering the law focuses especially on issues of substantive law. How do the elements of the charged crimes relate to the facts disclosed to the defense and evidenced in court? What is required to prove each of the elements in the instant case? And what kinds of arguments are required to show the prosecution has failed the test of providing convincing evidence? The same goes for issues of criminal responsibility and defenses to exclude, limit, or mitigate such responsibility. Such an ongoing analysis of the case is necessary for a thorough understanding and effective preparation of the case. It also encompasses preparation of the strategy and tactics of the case and, where appropriate, keeping in mind what co-defendants may do.

What is needed to build such a team of professionals? To start with, it is essential to have a competent and experienced lead counsel who is able to run the show, to structure the strategy, to manage the members of the team, to lead the legal engineering, and to take care of the most important witnesses and experts. It is understood that lead counsel must have a good record of accomplishment and speak the language of the court. The selection of the right candidates to join the defense team is a crucial element in ensuring that all the issues mentioned are professionally dealt with. The rules of the court should support such selection, rather than complicating it, or worse, interfering with it. Ideally, lead counsel has a competent defense team available. Others in the team will be full time co-counsel, able to assist and, when necessary, replace lead counsel. There is no clear threshold level of experience, but it would be reasonable to select lawyers who have at least five years' experience in criminal cases and are able to lead investigations of the factual issues of the case. Other members of the team would be consultants, researchers, and investigators, and would probably only be needed on a part-time basis. A consultant may be engaged for a particular legal issue or to assist in specific forensic issues. A researcher would be required to deal with large and complex issues, such as analysis of all materials dis-

[11] Rome Statute, *supra* note 5, at art. 21.

closed by the prosecution, specific issues of evidence, or matters of comparative law. Investigators will be necessary to do discovery on location, to track down specific witnesses, or to dig up documents. Sometimes an interpreter will be required for specific confidential issues.

SPECIFIC CHALLENGES

A typical challenge is working outside one's own jurisdiction without the benefit of the infrastructure and facilities available in national trials. Counsel will have to deal with another language and visit troubled areas where it is difficult to travel. Working abroad in domestic criminal cases usually occurs in a setting of legal assistance between States. In these situations, defense counsel can participate in discovery while abroad through a Commission Rogatory—court officials usually deal with the logistical issues and liaise with the foreign authorities. The functioning of the defense in this respect is only supported to a limited extent in cases before international tribunals. Sometimes discovery on location is simply not possible because of an ongoing conflict in the area. In many cases counsel are left on their own to deal with all kinds of practical issues.

People who may have relevant information are difficult to locate. When they are officials, civil servants, and police or military forces, the hurdle to approach or to depose them may be their superior. The same kind of problems may arise with documents, as most documentary evidence will be official documents that are hard to locate and collect, and there might not be local remedies for compulsory release. Comparable issues with witnesses and documents may arise with the prosecution as well, but this office is an organ of the court with legal facilities to make foreign officials comply, such as invoking the possibility of exerting political pressure. Defense counsel do not have such standing. They may petition the court to issue compliance orders, but such time-consuming procedures would hardly remedy the powerless position of the defense.

Trials before international courts are not trials around the block, but cases with a high profile. These cases are not about ordinary manslaughter, but rather reflect twisted political emotions and aspirations. This factor is an element of the crime and therefore an issue of law that must be addressed in a proper way. The political motivation of the defendant must be presented in such a way that fits into the strategy on criminal responsibility or to sever political aspirations form alleged criminal actions. Politics is also factor to consider because of the profile of the defendant—some of them are heroes at home with substantial political influence. Their support in the homeland and the inherent mass media attention may raise specific challenges for defense counsel to protect his professional independence when dealing with media attention. Prosecutors are in a better position in this respect as they have a spokesperson, or even a public relations office, available. Such facilities protect them from direct contact with the media and helps prevent

slips of the tongue and other unfortunate utterances defense counsel may well suffer.

Language is an issue in different ways and the assistance of interpreters may slow trial preparation during pre-trial or damage the quality of the trial itself. Before the ICTR, examination of Rwandans, who only speak Kinyarwanda (the local language of Rwanda), was not easy if the witness was to be deposed before an English-speaking Trial Chamber. Because of the lack of interpreters, situations may arise when questions asked in English need to be translated from English into French, and subsequently from French into Kinyarwanda, and then back into French and then back into English. Language is one of the means to evaluate the veracity of a witness and things may become even more complicated when the answer given by a Rwandan takes about a minute, for example, but according to the translation it was only a simple "yes." In these kinds of trials, there are permanent risks of losing grip on relevant information.

CHALLENGES OF GENOCIDE CASES

In genocide trials, defense counsel will have to face specific challenges in relation to the law and the defendant. From a defense counsel's perspective, the most important legal characteristic of genocide is the requirement of specific intent or *dolus specialis* to destroy a specific group. Therefore, the paramount issue is the test to be applied. Defense counsel should be creative in interpreting the test and how to approach the issue. Where possible he may try to narrow the test as much as one can, hoping that it will not fit on the defendant, or he can try to create some room to maneuver, allowing him to argue that after analysing all the ins and outs of the evidence the test does not fit.

To start with, the test of intent has two components, knowledge and intent. As far as the component of knowledge is concerned, there is little or nothing to structure the test. It is driven by evidence and not by interpretation because the theory is extremely clear. The same applies for weaker forms of knowledge, like awareness of circumstances that exist, or consequences that may occur in the normal course of events. In most cases, there is hardly any room to argue how the test should be applied. Knowledge and awareness are not legal, but rather factual issues; save rare exceptions, it is a matter of evidence only. Now, knowledge or awareness should be connected to what could be described as a plan or a project. This is usually more or less a matter of evidence as well.

The other component of intent is more interesting, because in genocide cases a special intent is required. The usual test in common cases is sufficient proof of the willful conduct of the defendant, who actually had the purpose to engage in the conduct or to cause the foreseeable consequences. Intent is related to the defendant's behavior and not to the purpose of the defendant's actions. In this respect, the intent required for genocide is prin-

cipally different. The starting point for special intent is the combination of the performance of the act and the purpose for the performance of that act. Thus, the focus is on the question of whether or not the defendant clearly aimed to produce the act—to destroy a specific group.

Some room for argument may be found in categorizing special intent to be a direct neighbor of general intent. Defense counsel may argue that there is some space in between and by putting the prosecuted actions in that gray zone, counsel may argue that it does not fit within the special intent test. Defense counsel realize that there is a very thin line between negligence and omission, and may argue that the destruction of a specific group resulted from recklessness as to the consequences of the prosecuted actions. Or in the case of an individual who intentionally omits to perform an act and thereby is supposed to participate in the results, defense counsel lawyers may argue that the thin line between intent and special intent was not deliberately overstepped. Alternatively, they may argue that it is not a matter of omission but negligence, and in that case, the special intent test fails. The problem may be that omission can also be the result of negligence, in which case no genocide can be proven. Another interesting issue to argue is the applicability of the test of special intent to others than the principal defendant. Are there any limits, and how does the test apply to accomplices? If the test does apply to accomplices, what if the principal offender has no special intent? These are examples of issues defense counsel will focus on in genocide cases.

Some aspects of the person of the defendant have been mentioned before, such as his political influence, the home support, and the inherent media attention. These issues may affect the professional independence of defense counsel, as the person of the defendant may also affect his independence. In genocide cases, defendants are usually persons with a strong personality—powerful people. These kinds of defendants have strong opinions, and there is often an ethnic or religious issue. Their victims belong to another group, which is believed to be inferior, dangerous, or a threat to the defendant's people. Most defendants deny any loathing for members of the other group or deny any personal involvement in attacking the other group. When such involvement cannot be denied, the mechanism is usually to falsely rationalize why members of the other group caused the problems that prompted the prosecuted actions. Defense counsel face problems because his or her approach to the case, actions, and representations are derived from or based on the defendant's instructions. Counsel has to balance establishing a relationship of trust with the defendant, and maintaining his professional credibility and independence. Counsel and defendant may differ on many issues, yet counsel will have to satisfy the genuine needs of the defendant and uphold his own position of *dominus litus*.

Witness selection, for example, may raise an issue in this respect. In most cases, it is not that difficult to convince the defendant that counsel will

not call witnesses to make false statements. But how should you deal with witnesses who are supposed to support the political views of the defendant? On one hand, it may be helpful to produce evidence that explains the motives of the defendant's disputed actions in order to rebut the alleged special intent. On the other hand, the trial should not be a forum for dispensing political views. Defendants are inclined to put in every possible political argument, but counsel will consider the objective effect on the case, and the defendant and defense counsel will have to find common ground.

CONCLUSION

The performance of defense counsel in genocide cases does not principally differ from other cases. What defense counsel essentially does is translate the subjective goals of the defendant into an objectivized representation that fits into the legal framework of the court. Different though, is the international component, the specific law, the different proceedings and practices, the complications of working in a foreign jurisdiction, the political factor, and the person of the defendant. Nevertheless, whatever the case may be, it takes pride to be an international defense counsel.