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What precautions and remedies may a trial chamber exercise when defense counsel fails to appear?

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MEMORANDUM FOR THE INTERNATIONAL TRIBUNAL FOR RWANDA

ISSUES:

WHAT PRECAUTIONS AND REMEDIES MAY A TRIAL CHAMBER EXERCISE WHEN DEFENSE COUNSEL FAILS TO APPEAR? IF THE PURPOSE OF A DEFENDANT IS TO DELAY THE PROCEEDINGS, IS REPLACING COUNSEL TANTAMOUNT TO ACCEDING TO SUCH DELAY?

WHY ARE TRIBUNALS RELUCTANT TO RELY ON CO-COUNSEL SERVING AS LEAD COUNSEL? SHOULD DUTY COUNSEL BE APPOINTED? SHOULD THE INTERNATIONAL COURTS USE A PUBLIC-DEFENDER SYSTEM TO AVOID SUCH PROBLEMS?

DO NATIONAL BARS HAVE A DUTY TO HONOR PUNISHMENTS DOLED OUT BY THE INTERNATIONAL TRIBUNALS? IS THERE ANY PRACTICAL EFFECT?

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I. ISSUES AND SUMMARY OF CONCLUSIONS

A. Issues*

Defense counsel before the various international criminal tribunals will sometimes boycott proceedings in an effort to damage the credibility of the tribunal and cause delay.[1] Such tactics raise a myriad of issues, foremost among them is the scope of the tribunal's authority to sanction counsel while at the same time safeguarding the rights of the defendant.[2] This memorandum discusses the punitive measures available to the International Criminal Tribunal for Rwanda ("ICTR") when dealing with defense counsel who refuses to appear in order to delay proceedings. The fairness of using standard counsel, co-counsel, stand-by counsel, duty counsel, or a public-defender system to combat such delay tactics is also addressed.[3] Finally, the question

* What precautions/remedies does a Trial Chamber have when defense counsel fails to appear? And if a defendant's purpose is to delay the proceedings, isn't replacing a counsel tantamount to acceding to such delay? Why are Tribunals apparently reluctant to rely on co-counsel to serve as lead counsel? Should a duty counsel be appointed? Should the ICC use a public-defender system to avoid such problems? Do national bars have a duty to honor punishments delved out by the International Tribunals? Is there any practical effect?

[1] *Prosecutor v. Seselj*, Case No. IT-03-67, at para. 22, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with His Defence (ICTY Trial Chamber II, May 9, 2003) [hereinafter *Seselj*] [reproduced in accompanying notebook at Tab 20].

[2] The delays caused when counselors fail to appear cost international tribunals two of their most precious resources – namely, time and money. It is important to compare standard counsel with co-counsel, stand-by counsel, duty counsel and public defenders. Standard counsel is counsel hired by and paid for by a detainee. Co-counsel is secondary counsel hired by and paid for by the detainee. Stand-by counsel is a court appointed attorney who is to be involved in the preparation of the case, who is to assist the accused when necessary, and who is to be ready to take the place of standard counsel should the need arise. Duty counsel is used in situations where a detainee has not yet retained counsel nor has had counsel appointed. Duty counsel fills a temporary role and generally is involved in introductory stages such as explaining charges to a detainee and explaining pleas to a detainee. Public defenders would fill all of these roles. Public defenders function primarily as standard and co-counsel. In addition, public defenders render stand-by counsel unnecessary by preventing belligerent counsel from representing detainees. Finally, with a public defender system in place, duty counsel will also be unnecessary because the public defenders will be ready to represent defendants from the earliest possible moment.

[3] *See* Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, at Rule 44 *bis*, available at http://69.94.11.53/ENGLISH/rules/070605/070605.pdf (last visited Apr. 28, 2006) [hereinafter ICTR Rules] [reproduced in accompanying notebook at Tab 7].

of whether national bars have a duty to honor punishments delved out by International Tribunals is discussed.

B. Summary of Conclusions

1. Under The Rule Of Procedure And Evidence Of The ICTR, Counsel Failing To Appear May Be Withdrawn, Refused An Audience Before The Tribunal, Or Suffer "Any Other Sanctions" That The Tribunal Deems Appropriate.

Under Rule 44 (B), as a condition precedent to appear before a Trial Chamber, counsel is subject to, among other regulations, any rules adopted by the Tribunal, the Code of Conduct and the code of ethics governing their profession.[4]

Under Rule 45 *quarter*, as insurance against counsel failing to appear, a Trial Chamber may assign one or more co-counsel to represent the detainee.[5] The initial counsel retains primary responsibility for the conduct of the defense; but should the initial counsel be unavailable or be replaced, the appointed co-counsel automatically assumes responsibility for the case.[6]

Under Rule 45 *ter* (B), when counsel fails to appear, a Trial Chamber may refuse audience, the Registrar may withdraw counsel, or the Chamber may impose "[a]ny other sanctions…".[7]

2. Replacing Counsel Is Not Equivalent To Acceding To Delay Tactics So Long As An Efficient Replacement Mechanism Is Established.

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[4] *Id*. at rule 44(B). Rule 44(B) reads: "In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel." This rule shows that it is imperative for Tribunals to create and enforce rules by which participants must abide.

[5] *Id.* at rule 45 *quarter*.

[6] Directive on the Assignment of Defence Counsel for the International Criminal Tribunal for Rwanda, at art. 15(E) & 20(E)(i), available at http://69.94.11.53/ENGLISH/basicdocs/defence/index.htm (last visited Apr. 28, 2006) [hereinafter Directive] [reproduced in accompanying notebook at Tab 1].

[7] ICTR Rules, *supra* note 3, at rule 45 *ter* (B) [reproduced in the accompanying notebook at Tab 7].

Whether replacing counsel is tantamount to acceding to an attempt to delay the trial depends on whether replacing counsel will cause an unreasonable delay in the proceeding. In order to replace counsel without violating the rights of a detainee to Due Process, a Trial Chamber must efficiently replace counsel.

Without an efficient replacement mechanism, granting a request intended to delay the proceeding will be equivalent to acceding to the tactics of the defense. With an efficient replacement mechanism, granting a request will not unreasonably delay the proceedings. Whether or not the request was intended to delay is then irrelevant because the tactic cannot produce the desired effect.

3. Tribunals Are Reluctant To Rely On Co-Counsel To Replace Lead Counsel Because Of Due Process Considerations And The Possibility That Co-Counsel May Continue The Delay Tactics.

Tribunals are reluctant to have co-counsel serve as lead counsel because it can easily infringe on the due process rights of the Defendant. International Criminal Tribunals are created to independently prove the guilt of those charged with war crimes, crimes against humanity and genocide. Only through an impartial Tribunal, which fully respects the importance of Due Process, will such truths be proven to the reasonable doubt standard required for a conviction.

Due Process is comprised of the procedural formalities by which all participants in a tribunal must abide in order to ensure that those who are charged are tried fairly. Without enforcement of Due Process rights, States may arbitrarily arrest, charge and convict anyone, of any crime. If an International Tribunal is unable to uphold the necessary standards established to

sustain convictions, then the Tribunal is illegitimate. For an International Tribunal, both respect for and adherence to Due Process are of the utmost importance.[8]

4. Duty Counsel Should Be Appointed To Protect The Rights Of The Defendant And To Enhance The Fairness Of The Tribunal.

The right to counsel begins with the First Geneva Convention[9] ("Geneva I"), is reiterated in the Third Geneva Convention[10] (Geneva III), and extends to any prisoner of war. Of all the rights retained by prisoners of war, the right to counsel is of paramount importance. It is with power exercised through counsel that a defendant is able to benefit from their full Due Process rights.

Under Rule 44 *bis* (D), duty counsel must be appointed "as soon as practicable" whenever a person who qualifies for duty counsel is unrepresented by counsel.[11] Under Rule 45 *bis*, Rules 44 and 45 apply to any person detained under the authority of the Tribunal.[12] The combination of Rule 44 *bis* and Rule 45 *bis* force the Registrar to summon duty counsel any time a person detained under the authority of the Tribunal is unrepresented.

However, duty counsel is only a temporary solution to a continuing problem. Without effective representation, a detainee can neither be adequately informed of his rights nor exercise

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[8] *See* Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 1 (2005), at 7 [hereinafter Scharf] [reproduced in accompanying notebook at Tab 25].

[9] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950), available at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3 (last visited Apr. 28, 2006) [hereinafter GCI] [reproduced in accompanying notebook at Tab 2].

[10] *See* Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950), at http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68 (last visited Apr. 28, 2006) [hereinafter GCIII] [reproduced in accompanying notebook at Tab 3].

[11] ICTR Rules, *supra* note 3, rule 44 *bis* (D) [reproduced in accompanying notebook at Tab 7].

[12] *Id*. at rule 45 *bis*.

them in any meaningful way. Representation by counsel ensures that a detainee has at least one person working for their best interests, defending them zealously until the end of the proceedings, and ensuring that every possible legitimate avenue of defense is explored entirely. Duty counsel must be appointed for any detainee who is not represented by counsel.

5. A Public-Defender System Will Benefit The International Tribunals And Serve As An Efficient Solution To Problems Raised By Misconduct Of Counsel, But Only If It Is Carefully Organized And Well Funded.

A public defender system will only solve such problems if: public defenders are well trained and experienced; the public defenders are well funded; and the public defenders are able to coordinate their defenses. Appointing an attorney as defense counsel who is not adequately trained and versed in the appropriate international law must impede the proceedings.[13]

At present, the Office of the Registrar is charged with the duty of assigning counsel to indigent detainees before the Tribunal for Rwanda. This is in direct conflict with the duty of the Registrar to control costs. An independent and financially autonomous Office of Defense will serve to better protect the Due Process rights of detainees. An Office of Defense, fully funded and independent from the Registrar, must be created to overcome this systematic violation of Due Process.

6. International Tribunals Must Recommend Sanctions To Neither Bar Associations Nor Universities; However, Bars and Universities Have Discretion To Investigate Matters Referred To Them.

[13] The realm of international war crimes prosecution is a relatively new, unexplored and uncharted area of customary international law. The difficulties encountered by defense counsel are compounded by the fact that lawyers must refer to cases and statutes from around the world, some nearly 60 years old. Judges are reluctant to attempt to piece together these conflicting and disparate clues, explicitly refusing to rule on procedural or substantive questions until the final judgment is presented, further compounding the difficulties faced by defense counsel. Some counselors are wholly unfamiliar with the procedure used in hybrid courts like the Tribunal for Rwanda. The Tribunal for Rwanda utilizes a fundamentally adversarial approach during witness cross-examination, a tactic with which civil law professionals may find themselves unfamiliar, whether professors or counselors.

On 8 November 1994, the International Tribunal for Rwanda was created by the U.N. Security Council ("UNSC"). Exercising authority derived from Chapter VII of the U.N. Charter ("Charter"), the UNSC passed Resolution 955 providing for the Statute of the Tribunal.[14] Obligations under Chapter VII of the Charter only apply to States. As a general rule, Bar Associations and Universities are not State organs. Because independent non-State administrative agencies are not under the direct control of a State they are therefore not required to enforce punishments recommended by international Tribunals.

The decision in *Blaskic* defines some of the limits of the jurisdiction and authority of International Tribunals vis-à-vis States and State organs. Tribunals are created by the U.N. Security Council and are in a special position of power. However, the sanctioning authority of Tribunals is limited to reporting misconduct to the Security Council; Tribunals are required to neither recommend nor merely suggest sanctions. The determination and enforcement of sanctions is strictly under the dominion of the Security Council.

7. With Recourse To Neither Bar Associations Nor Universities, International Tribunals Must Punish Misconduct By Counsel According To Their Own Rules and Procedures.

A Trial Chamber must punish counsel of its own accord with jurisdiction and authority inherent to every court. With recourse to neither Bar Associations nor Universities, an International Tribunal must utilize methods of discipline available internally. Without the power to internally enforce the rules of procedure, a court is not a legitimate fact-finding body. Due Process concerns require all parties involved to respect and abide by the rules. Without enforcement of internal regulations a court cannot possibly hope to be recognized as a legitimate International Tribunal.

[14] U.N. CHARTER, art. 7, available at http://www.un.org/aboutun/charter/ (last visited Apr. 28, 2006) [hereinafter Charter] [reproduced in accompanying notebook at Tab 9].

Under Rule 46(B), after a warning, a Trial Chamber may, and only with approval of the President, report misconduct of counsel to their regulating body, be it Bar or University.[15] Under Rule 46(A), after a warning, a Chamber may impose sanctions against counsel if their conduct "remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice."[16] Rule 45 *ter* (B) allows a Chamber to impose "any other sanctions…"[17] but is limited by Rule 77.[18]

II. FACTUAL BACKGROUND

A. Since the beginning of his trial, Slobodan Milosevic received treatment far more lenient than that provided to the average defendant. Partly because of concerns for the health of Mr. Milosevic, the ICTY held proceedings three time per week (instead of five) and for only four hours per day (instead of eight). In addition, the prosecution was ordered to reduce the number of witnesses to hasten the trial. On Saturday the 11th of March, 2006, after three years of trials and within three months of the scheduled completion date, Mr. Milosevic was found dead in his cell in The Hague. The ICTY will never have its crowning conviction.

B. Saddam Hussein is currently being tried before the IST. Since his trial began, Mr. Hussein has been belligerent to nearly everyone in the court; he has insulted judges, intimidated witnesses, and behaved with the conduct typical of a child. If Mr. Hussein is allowed to continue, it can only lead to disastrous consequences. If

[15] ICTR Rules, *supra* note 3, rule 46(B) [reproduced in accompanying notebook at Tab 7].

[16] *Id*. at rule 46(A).

[17] *Id*. at rule 45 *ter* (B).

[18] *Id*. at rule 77.

appropriate action is not taken to restrain him, Mr. Hussein will continue to disrupt proceedings, creating a cloud of doubt hanging over the legitimacy of the IST.

C. Mr. Seselj, a defendant before the ICTY, was appointed stand-by counsel over his objection. The court reasoned that Mr. Seselj presented a looming threat to the proceedings. It was clear to the Tribunal that Mr. Seselj intended to use the proceedings to further his own political agenda. As such, the Tribunal assigned stand-by counsel to assist Mr. Seselj with the preparation of his defense and offering advice. In addition, stand-by counselors were intended to step-in and efficiently replace him should such action be necessary to safeguard a fair and expeditious trial.[19]

III. LEGAL ANALYSIS

A. Under The Rule Of Procedure And Evidence Of The ICTR, Counsel Failing To Appear May Be Withdrawn, Refused An Audience Before The Tribunal, Or Suffer "Any Other Sanctions" That The Tribunal Deems Appropriate.

All courts have inherent jurisdiction to hold contempt proceedings for anyone appearing before them.[20] The power to create and enforce rules of procedure and evidence strengthens the appearance of, and argument for, the legitimacy of a court.[21] The power to enforce internal regulations shows the world that a court is not merely a soap-box from which baseless accusations will be hurled. By requiring compliance with strict rules of procedure and evidence, a court ensures that Due Process is observed and respected both by prosecution and defense. Without power to enforce rules of procedure and evidence, a court is merely a circus.

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[19] *Seselj*, *supra* note 1, at para. 28 [reproduced in accompanying notebook at Tab 20].

[20] *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 33, (ICTY Appeals Chamber, Oct. 29, 1997) [reproduced in accompanying notebook at Tab 13].

[21] Scharf, *supra* note 8, at 7 [reproduced in accompanying notebook at Tab 25].

As a condition precedent to appearing before the Tribunal, under Rule 44 (B) counsel are subject to, among other regulations, any rules adopted by the Tribunal, the Code of Conduct and the code of ethics governing their profession.[22]

Under Rule 45 *quarter*, as insurance against a counsel failing to appear, a Trial Chamber may assign one or more co-counsel.[23] The initial counsel retains primary responsibility for the conduct of the defense; but should initial counsel be unavailable or be replaced, the appointed co-counsel automatically assumes responsibility for the case.[24] Under Rule 45 *ter* (B), when counsel fails to appear, a Trial Chamber may refuse audience, the Registrar may withdraw that counsel, or the Chamber may impose "[a]ny other sanctions…".[25]

A Trial Chamber, with the approval of the President, may report misconduct of counsel to their domestic sanctioning body.[26] Under the decision of the ICTY in *Blaskic*[27], a Trial Chamber is only allowed to report misconduct.[28] The Chamber went on to say that, in order to fully respect customary international law and sovereignty of States, a Tribunal has neither authority nor jurisdiction to request a particular type of sanction.[29] Specific penalties are to be doled out by the Security Council.[30] In rare cases, where the misconduct of counsel is of such a level that

[22] ICTR Rules, *supra* note 3, rule 44(B) [reproduced in accompanying notebook at Tab 7].

[23] *Id*. at rule 45 *quarter*.

[24] Directive, *supra* note 6, at art. 15(E) & 20(E)(i) [reproduced in accompanying notebook at Tab 1].

[25] ICTR Rules, *supra* note 3, rule 45 *ter* (B) [reproduced in accompanying notebook at Tab 7].

[26] *Id*. at rule 46 (B).

[27] *Blaskic*, *supra* note 20 [reproduced in accompanying notebook at Tab 13].

[28] *Id*. at para. 33.

[29] *Id*. at para. 36.

[30] *Id*. para. 35-37.

it qualifies as a continuing threat to peace and security, it is possible for a coalition of States to take action.[31]

The combination of these rules outlines the basic remedies available to a Chamber. There are five basic remedies that a Chamber may exercise. A Chamber may refuse audience.[32] The Registrar may withdraw counsel.[33] A Chamber may impose "[a]ny other sanctions…"[34] deemed appropriate.[35] A Chamber may report the misconduct of counsel to their domestic regulating body.[36] Perhaps most importantly, more than one counselor may be assigned to a detainee.[37]

International Tribunals have exercised these remedies in response to misconduct of defense counselors. In *Musema*[38] before the ICTR, the Trial Chamber withdrew and replaced the appointed defense counsel after repeated attempts to gain her attendance. Contempt proceedings were not held; but the matter was referred to the Geneva Bar.[39] The ICTY exercised authority granted by the phrase "[a]ny other sanction…" to impose fines on counsel who violate rules of

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[31] *Id*. para. 36.

[32] ICTR Rules, *supra* note 3, rule 45 *ter* (B) [reproduced in accompanying notebook at Tab 7].

[33] *Id*.

[34] *Id*.

[35] *Id*. at rule 77. Rule 77 provides some guidance for Chambers in the application of their authority to sanction under the phrase "interests of justice'. Rule 77 limits the penalties and sanctions that a Chamber may implement should a counselor be held in contempt of court. Rule 77 limits the fine that may be imposed to Ten-thousand U.S. Dollars. Rule 77 also limits the amount of time for which a counselor may be incarcerated for contempt to not more than 5 years.

[36] *Id*. at rule 46 (B).

[37] Directive, *supra* note 6, at art. 15(C) [reproduced in accompanying notebook at Tab 1].

[38] *See Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Decision to Withdraw Assigned Counsel and to Allow the Prosecutor Temporarily to Redact Identifying Information of her Witnesses, (ICTR Trial Chamber, Nov. 18 1997) [reproduced in accompanying notebook at Tab 18].

[39] *Id*. at Disposition.

the Chamber. In *Aleksovski*[40], a Trial Chamber fined defense counsel for his alleged "knowing revelation" of the identity of an anonymous witness. An Appeal Chamber ordered the Registrar to repay the fine upon presentation of evidence that counsel did not have actual knowledge of the protected identity.[41]

Detainees must be represented by multiple counselors throughout the proceedings against them. This initial redundancy ensures that, regardless of the behavior of individual counsel, it will be possible to immediately replace them with an equally prepared and appropriate counsel. Swift replacement will allow the smooth progression of proceedings while ensuring the Tribunal does not infringe upon the due process rights of the detainee.

While an indigent detainee has a right to an assigned counsel, a Trial Chamber is still allowed to assign further counselors in the interests of justice.[42] Assignment of additional counselors can only serve to enhance the protection of the due process rights of detainees. Assignment of multiple counselors substantially increases the likelihood that detainees will always have counsel available to represent them until the end of the proceedings against them. Multiple counselors also protect the innocent accused facing an otherwise unnecessarily protracted trial and the victims suffering an unimaginable agony while awaiting the outcome of it all.

B. Replacing Counsel Is Not Equivalent To Acceding To Delay Tactics So Long As An Efficient Replacement Mechanism Is Established

Whether replacing counsel is equivalent to acceding to an attempt to delay the trial depends on whether replacing counsel will cause unreasonable delay in the proceeding. In order

[40] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, (ICTR Appeals Chamber, May 30, 2001) [reproduced in accompanying notebook at Tab 12].

[41] *Id*. at Disposition.

[42] Directive, *supra* note 6, at art. 15(C) [reproduced in accompanying notebook at Tab 1].

to replace counsel without endangering the due process rights of a detainee, a Trial Chamber must efficiently replace counsel.

Without an efficient replacement mechanism, granting a request intended to delay the proceeding will be equivalent to acceding to such delay. With an efficient replacement mechanism, granting a request will not unreasonably delay the proceedings, whether or not the request was intended to do so.

Defense counsel may be replaced by the Registrar upon a good faith request by the detainee.[43] Defense counsel may also be replaced on the initiative of the Registrar.[44] Whether there was an ulterior tactic of delay beneath a legitimate request for replacement should be irrelevant. In such limited situations the legitimate purpose of enforcing the due process rights of the defendant outweighs the fact that technically the tactic of delay was allowed to succeed.

The perceived legitimacy of the Tribunal is of the utmost importance[45] to ensure valid convictions of only those who are guilty of crimes within the jurisdiction of the Tribunal. The ICTR will be a legitimate Tribunal, whose convictions will be respected by future historians, only if it respects and enforces the Due Process rights of detainees.

British Prime Minister William E. Gladstone once said, "Justice delayed is justice denied." In addition to serving 4 terms as the Prime Minister of Great Britain, in 1896 he openly condemned the massacre of the Armenians by the Ottoman Empire.[46] Widely regarded to be the

[43] ICTR Rules, *supra* note 3, at rule 45(H) [reproduced in accompanying notebook at Tab 7].

[44] *Id*.

[45] Scharf, *supra* note 8, at 7 [reproduced in accompanying notebook at Tab 25].

[46] Wikipedia, *William Ewart Gladstone*, at http://en.wikipedia.org/wiki/William_Gladstone (last visited April 28, 2006) [Reproduced in the accompanying notebook at Tab 30].

greatest British Prime Minister, even Winston Churchill cites the Right Honorable Gladstone as his inspiration.[47]

Justice delayed is indeed justice denied for all parties involved: for the innocent accused; for the rightfully convicted; and for the survivors. The negative effects of delays in applications of justice are most obvious for the innocent accused and for the survivors; but the impact of delays should not be discounted when applied to those who are eventually rightfully convicted.

For the wrongfully accused, a delay of justice amounts to nothing less than extended periods of their life being forcibly taken from them. It is widely known that international critics of the American capital punishment system frequently remark that one of the critical flaws is the prolonged period that a convict must remain in custody during the extensive mandatory appeal process. This protracted period of incarceration and delay is widely considered to be a form of cruel and unusual punishment. This outcry stems from a person who has been properly convicted and sentenced to death, whose life is effectively over. The negative ramifications of unnecessary delays for a person who will not necessarily be convicted, but must still suffer through such extensive procedures, must necessarily be greater than those who are already legitimately convicted.

For the survivors of these heinous atrocities, the delay of justice is an unnecessary extension of the anguish they are suffering. International tribunals are created to deal with the aftermath of the most disturbing crimes; war crimes, crimes against humanity, and genocide. One of the functions served by International Tribunals is to alleviate the suffering of the survivors by demonstrating that the prime movers of the atrocities will not be allowed to escape

[47] *Id.*

punishment. Every moment the prime movers are allowed to walk free is another moment the survivors' suffering is extended.

Even those who are properly detained and indicted under the authority of an International Tribunal have a right to a speedy trial. In *Barayagwisa*, a detainee of the ICTR was held for two years before his trial. Because of this long delay, the Appeals chamber dismissed the charges against Mr. Barayagwisa with prejudice to the prosecutor and ordered an immediate release of Mr. Barayagwisa. The case against Mr. Barayagwisa was renewed after the prosecution presented newly discovered evidence.[48] The President of the ICTY has proposed a system whereby any defendant who is unjustly detained or prosecuted would be compensated.[49] Allowing defense counsel to implement a tactic of delay is utterly unacceptable. Tribunals must exercise any measures available, while respecting Due Process, to ensure that unnecessary delays do not occur.

C. Tribunals Are Reluctant To Rely On Co-Counsel To Replace Lead Counsel Because Of Due Process Considerations And The Possibility That Co-Counsel May Continue The Delay Tactics.

Tribunals are reluctant to have co-counsel serve as lead counsel because it can easily infringe on the due process rights of the Defendant. Clearly, one of the primary interests of a State is to prosecute criminals, those who violate the laws of the State. Established as well, criminal courts exist to independently prove the truth of allegations to the reasonable doubt standard to support such prosecutions.

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[48] Richard J. Wilson, *Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach*, 2 INT'L CRIM. L. REV. 145 (2002), at 189 [hereinafter Wilson] [reproduced in accompanying notebook at Tab 27].

[49] Speech by His Excellency, Mr. Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, June 20, 2000, at http://www.un.org/icty/pressreal/p512-e.htm (last visited Apr. 28, 2006) [reproduced in accompanying notebook at Tab 27].

International Criminal Tribunals are created to independently prove the guilt of those who commit acts spanning international borders or too devastating for domestic courts to deal with adequately. By determining who is responsible for the planning and execution of war crimes, crimes against humanity, and genocide, International Tribunals serve the important function of fostering reconciliation[50], instead of allowing prejudices and misconceptions to fester. In addition to pinning responsibility on those most responsible[51], International Tribunals serve several other important functions.

Principally, Tribunals will create an historic record of the atrocities.[52] This record will educate future generations not only about the atrocities committed, but also about the consequences for those who commit such heinous acts. Furthermore, the Tribunals will provide an ever-improving model as an example of how to properly conduct proceedings against perpetrators of such grievous crimes.[53] In addition, the Tribunals serve to show the world that in the aftermath of unimaginable destruction and grief, the rule of law will remain supreme, based on principles of justice, reason, fairness and due process.[54]

Only through an impartial Tribunal, which fully respects the importance of Due Process, will such truths be proven to the reasonable doubt standard required for a conviction.[55] Perhaps

[50] Scharf, *supra* note 8, at 6 [reproduced in accompanying notebook at Tab 25].

[51] *Id*.

[52] *Id*. at 7.

[53] *Id*.

[54] *Id*.

[55] The reasonable doubt standard is quickly becoming solidified in customary international law as the standard of proof to be used in criminal trials. Both the ICTY in article 87 of the ICTY Statute, and the ICTR at 87 of the ICTR Statute require proof to the reasonable doubt standard.

more importantly, without the perception that International Tribunals are legitimate and fair, none of these goals can be achieved.[56]

Due Process is comprised of the restrictions by which all participants in a tribunal must abide in order to ensure that those who are charged are tried fairly. Without enforcement of Due Process rights, States may arbitrarily arrest, charge and convict anyone, of any crime.

Two-Hundred years ago, customary international law recognized no such Due Process rights. Since then, as described below, Due Process rights have grown to include, but are not limited to: a presumption of innocence;[57] an impartial judiciary;[58] assistance of counsel;[59] cross-examination of witnesses[60]; a presentation of a complete defense;[61] and the right to an appeal.[62]

The right to counsel before International Tribunals, and before State courts, is a relatively recent phenomenon. As late as the 1870's, very few States in Western Europe recognized a right to counsel. For example, Russia did not recognize such a right until 1917. Prior to the atrocities

[56] Scharf, *supra* note 8, at 7 [reproduced in accompanying notebook at Tab 25].

[57] Statue of the Int'l Criminal Trib. for Rwanda, at art. 20(3), U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., U.N. Doc. S/RES/955 1994, available at http://69.94.11.53/ENGLISH/basicdocs/statute.html (last visited Apr. 28, 2006) [hereinafter ICTR Statute] [reproduced in accompanying notebook at Tab 8].

[58] Universal Declaration of Human Rights, at art. 10, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. pt. 1, U.N. Doc. A/810 (1948), at http://www.unhchr.ch/udhr/lang/eng.htm (last visited Apr. 28, 2006) [reproduced in accompanying notebook at Tab 10].

[59] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171, at art. 14(d), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR] [reproduced in accompanying notebook at Tab 5]

[60] ICTR Statute, *supra* note 57, at art. 20(4)(e) [reproduced in accompanying notebook at Tab 8].

[61] *Id*. at art. 20(4)(b).

[62] *Id*. at art. 24.

committed by every State involved in World War I, a right to counsel rarely, if ever, appears in statutes governing prisoners of war.[63]

Geneva I[64] is the first international document to recognize the right of a prisoner of war to be represented by defense counsel during judicial proceedings.[65] Geneva I contained several of the same provisions of prior international agreements, such as the detaining State retaining jurisdiction over a prisoner, and the detaining State being able to try prisoners in a military tribunal modeled on the national tribunals of that State.

After the stirring reminder of how horrifically people treat each other provided by World War II, States convened again to redraft the Geneva Conventions, ending with the publication of the Geneva III.[66] Articles 82 through 108 of Geneva III expanded and clarified the rights of prisoners in judicial hearings. Article 105 of Geneva III grants a prisoner of war, who is accused of a crime and does not exercise his right to select counsel, the right to have counsel assigned without regard to the financial status of the prisoner.[67]

In addition to the updated Geneva III, the International Military Tribunal (Nuremburg), and the International Military Tribunal (Tokyo), establish several minimum standards for international military trials. For example, in every case before these two Tribunals, every accused person was represented by counsel. These two Tribunals establish the right to be

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[63] Major Joshua E. Kastenberg, *The Right to Assistance of Counsel in Military and War Crimes Tribunals: An International and Domestic Law Analysis*, 14 Ind. Int'l & Comp. L. Rev. 175 (2003), at 3 [reproduced in accompanying notebook at Tab 21]. In general, prisoners were only granted those rights afforded under the laws of the detaining State. States were not generally required to give reciprocal respect to the laws of other States. To clarify, a prisoner of France may have had a right to a lawyer, but a prisoner of England may have had no such right, and such inconsistencies were perfectly acceptable..

[64] *See* GCI, *supra* note 9, [reproduced in accompanying notebook at Tab 2].

[65] *Id*. at art 49.

[66] *See* GCIII, *supra* note 10 [reproduced in accompanying notebook at Tab 3].

[67] *Id*. at art. 105.

represented by counsel before an international tribunal, but do not explicitly define the extent of that right.

If an International Tribunal is unable to uphold the standards necessary to sustain convictions, then the Tribunal is illegitimate. Without strict adherence to Due Process, an International Tribunal is not a Court of Justice, it is merely a Tool of States, used to enforce the will of States. For an International Tribunal, both respect for and adherence to Due Process are of the utmost importance.[68] Without integrity, the Tribunal will merely force the will of large, wealthy and powerful countries upon smaller, growing countries, preventing them from determining their own futures.

To protect the interests of everyone[69] in ensuring Due Process is respected, stand-by counselors have been appointed, even over the objection of detainees. In *Norman*[70], from the Special Court for Sierra Leone, the Trial Chamber concluded that Mr. Norman could not represent himself without stand-by counsel[71] and appointed stand-by counsel over the request by the detainee that he represent himself.[72] The Trial Chamber distinguished *Norman* from *Milosevic* on two grounds.

First, the Trial Chamber notes that Norman is being tried as part of a case with multiple defendants.[73] Second, the Trial Chamber points out that that unlike Mr. Milosevic, who always

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[68] *See* Scharf, *supra* note 8, at 7 [reproduced in accompanying notebook at Tab 25].

[69] *Seselj*, *supra* note 1, at Disposition [reproduced in accompanying notebook at Tab 20].

[70] *Prosecutor v Norman*, Case No. SCSL-04-14, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court (SCSL Trial Chamber, June 8, 2004) [reproduced in accompanying notebook at Tab 17].

[71] *Id*. at para. 32.

[72] *See Id*. at para. 3-5.

[73] *Id*. at para. 19.

maintained his desire to represent himself, Mr. Norman did not make his intention to represent himself known until well into the proceedings against him[74], after more than a year of representation by counsel.[75] Because of the complexity involved in presenting defense in an International Tribunal, and because of the national and international interest in the swift completion of the proceedings the Trial Chamber reasoned that appointing stand-by counsel is appropriate.[76]

In *Seselj*, the ICTY Trial Chamber held that Mr. Seselj should be assisted by stand-by counsel and reserved the right to assign full counsel.[77] The Trial Chamber points out that Article 21 of the ICTY Statue is not a prima facie exclusion of "offering an accused the assistance of assigned counsel where the interests of justice so require. The need may arise for unforeseeable reasons to protect an accused's interest and to ensure a fair and expeditions trial."[78] The assignment of stand-by counsel was not exactly what the Prosecution requested[79] when presenting their rejected motion seeking an order that the Registrar "appoint legal counsel to assist the accused Seselj with the preparation and conduct of his defence."[80]

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[74] *Id*.

[75] *See Id*. at para. 3-5. After being represented by counsel for over a year, Mr. Norman decided to continue for the duration of the proceedings without the assistance of counsel. The fact that Mr. Norman neither elected nor made known his intent known until after he had been represented by counsel for over a year was one of the factors the court discussed when considering whether to honor his request.

[76] *Id*. at para. 32.

[77] *Seselj*, *supra* note 1, at Disposition [reproduced in accompanying notebook at Tab 20].

[78] *Id*. at para. 11.

[79] The motion from the Prosecution requested that Mr. Seselj be assigned counsel to represent him for the duration of the proceedings. Instead the Chamber assigned Mr. Norman stand-by counsel. As discussed above, *ab initio* standy-by counsel is not responsible for the conduct of the case. The purpose of stand-by counsel is to step into the place of lead counsel, in this case the accused himself. The key difference is that with stand-by counsel Mr. Seselj still directs the defense, if full counsel had been assigned, Mr. Seselj would have then been relegated to the position of a typical accused, who must act through counsel.

[80] *Seselj*, *supra* note 1, at Disposition [reproduced in accompanying notebook at Tab 20].

The Trial Chamber then went one step further in an attempt to more fully define the phrase "interests of justice". The Chamber reasoned that the phrase "interests of justice" includes the right of the accused to a fair trial which is "also a fundamental interest of the Tribunal related to its own legitimacy."[81] In addition, the Tribunal has a "legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions."[82]

Furthermore, in addition to describing some of the of the rights and goals protected by the phrase "interests of justice", the Chamber reasoned that in order to adequately determine the extent of the application of the phrase, in the context of the right to a fair trial, a Trial Chamber must consider "the length of the case…"[83] as well as, "its size and complexity…"[84] because "complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence of even a legally qualified accused…"[85] especially when the accused is in jail.[86] There are legitimate reasons to appoint stand-by counsel and full counsel, even over the objection of the detainee.

D. Duty Counsel Should Be Appointed To Protect The Rights Of The Defendant And To Enhance The Fairness Of The Tribunal.

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[81] *Id*. at para. 21.

[82] *Id.*

[83] *Id.*

[84] *Seselj*, *supra* note 1, at Disposition.

[85] *Id.*

[86] There are multiple detainees of the International Tribunals who, in other circumstances, would be candidates to perform as defense counsel. Mr. Seselj is a lawyer by training. Mr. Milosevic also holds a degree in law. The mere fact that detainees are trained to some degree in the law does not impute to them an ability to conduct their own defense. A prisoner does not have access to the same resources as a counselor who is not incarcerated. Without the ability to prepare a proper defense, Tribunal risk infringing the Due Process rights of a defendant by allowing them to proceed unrepresented.

During the last One-Hundred years, the laws of nations, as reflected in customary international law, have come to recognize the importance of observing, and preserving, the rights of individuals involved in international conflicts. These rights are continuously expanding and have grown to explicitly include a right to counsel for prisoners of war.[87]

The right of a detainee, in an international conflict, to be represented by counsel is an outgrowth of individual States recognizing a right to be represented by counsel before domestic courts.[88] Prior to Geneva I, a prisoner of war was afforded the rights usually given to defendants in the domestic courts of the detaining State. Combatant states, individually respecting this right in domestic counts, applied the same doctrine to military Tribunals during their conflicts.

By the end of World War I, enough States recognized a right to counsel in their domestic courts for such a right to be recognized in Geneva I[89] to be applied without prejudice to every defendant before the International Military Tribunal (Nuremburg) and the International Military Tribunal (Tokyo).

The international right to counsel was suggested in Geneva I[90], reiterated in Geneva III[91], and extends to any prisoner of war. Of all the rights retained by prisoners of war, the right to counsel is of paramount importance. It is only with power exercised through his counsel that the due process rights defendant can be preserved, safe-guarded and guaranteed.

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[87] GCIII, *supra* note 10, at art. 105 [reproduced in accompanying notebook at Tab 3].

[88] For example, Due Process is guaranteed under the Fifth Amendment to the U.S. Constitution. In the U.S., Due Process guarantees that no citizen shall be denied life, liberty or property without due process of law. Under *Hall v. University of Minnesota* Due Process has been extended so far as to encompass situations so seemingly inconsequential as a the eligibility of a student to play college basketball.

[89] GCI, *supra* note 9, at art. 49 [reproduced in accompanying notebook at Tab 2].

[90] *Id*.

[91] GCIII, *supra* note 10, at art. 105 [reproduced in accompanying notebook at Tab 3].

Under Rule 45 of the rules of procedure for the ICTR, the Office of the Registrar is charged with the duty to ensure that all persons detained by the authority of the tribunal are represented by counsel.[92] This duty ensures that the due process rights of detainees to counsel are not infringed.

Under Rule 44 *bis* (D), duty counsel must be appointed "as soon as practicable" whenever a person who qualifies for duty counsel is unrepresented.[93] Under Rule 45 *bis,* Rules 44 and 45 apply to any person detained under the authority of the Tribunal.[94] The combination of Rule 44 *bis* and Rule 45 *bis* force the Registrar to summon duty counsel any time a person detained under the authority of the Tribunal is unrepresented.

However, duty counsel is only a temporary solution to a continuing problem. Without effective and permanent representation, a detainee can neither be adequately informed of his rights nor exercise them effectively. Representation by counsel ensures that a detainee has at least one person working for their best interests, defending them zealously until the end of the proceedings against them, and ensuring that every possible legitimate avenue of defense is thoroughly explored.

The process for selection of counsel for detainees of the Tribunal for Rwanda has changed several times during the history of the Tribunal. Amnesty International, for one, has criticized the manner in which counselors are selected. Amnesty contends that even if detainees are not allowed to select their counsel from literally any qualified individual, it is a good policy to allow a detainee the widest possible selections. This broad latitude will help to promote trust

[92] ICTR Rules, *supra* note 3, at rule 45 [reproduced in accompanying notebook at Tab 7].

[93] *Id*. at rule 44 *ter* (B).

[94] *Id*. at rule 45 *bis.*

between the detainee and counsel, fostering an effective representation.[95] Every person detained by the Tribunal has a right to be represented,[96] even if only temporarily, by duty counsel.[97] Duty counsel must be appointed for any detainee who is not represented by counsel.[98]

E. A Public-Defender System Will Benefit The International Tribunals And Serve As An Efficient Solution To Problems Raised By Misconduct Of Counsel, But Only If It Is Carefully Organized And Well Funded.

A public defender system will only solve the preceding problems if several conditions are met. At a minimum, counselors appointed as public defenders must be well trained and experienced, the public defenders, as a group, must be well funded, and perhaps most importantly, the public defenders must be able to coordinate their defenses, instead of each counselor arguing their case independent of all the other cases.

Appointing an attorney as defense counsel who is not adequately trained and versed in the appropriate international law must inevitably lead to erroneous judgments, unnecessary delays, and excessive costs. In *Erdemovic*[99], discussed below, a civil-law attorney unfamiliar with the adversarial system was allowed to represent a defendant before the ICTY, eventually leading the Appeals chamber to overturn the initial sentence of ten years.[100]

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[95] Wilson, *supra* note 48, at 167 [reproduced in accompanying notebook at Tab 27].

[96] *E.g.*, ICTR Rules, *supra* note 4, at rule 44 & 45 [reproduced in accompanying notebook at Tab 7].

[97] *Id*. at rule 44 *bis* (E).

[98] Directives, *supra* note 6, at art. 2(B) [reproduced in accompanying notebook at Tab 1].

[99] *See Prosecutor v. Erdemovic*, Case No. IT-96-22, Sentencing Judgement (ICTY Trial Chamber, Nov. 29, 1996) [hereinafter *Erdemovic* Sentence] [reproduced in accompanying notebook at Tab 15].

[100] *Prosecutor v. Erdemovic*, Case No. IT-96-22, Judgement, at Disposition (ICTY Appeals Chamber, Oct. 7, 1997) [hereinafter *Erdemovic* App Judgement] [reproduced in accompanying notebook at Tab 16] This one adverse decision cost the ICTY in immeasurable ways. First and foremost, it cost the tribunal respect; without valid convictions International Tribunals will never be legitimate. In addition, the appeal and re-trying of Mr. Erdemovic cost the ICTY thousands of hours of work and untold financial expenses.

Without the necessary funding, sufficiently training public defenders will be impossible. If defendants are appointed inadequately trained and improperly equipped defense counsel, this creates at least one direct and recognized avenue for appeal. Defendants can appeal on the basis that they remained uninformed even though represented by counsel, because counsel were themselves uninformed.[101]

The realm of international war crimes prosecution is a relatively new, unexplored and uncharted area of customary international law. The crimes dealt with daily by the ICTR war crimes, genocide and crimes against humanity were poorly defined when first conceived for use by the Nuremburg and Tokyo Tribunals and since then have only been rarely enforced before the creation of the ICTY and the ICTR. The difficulties encountered by defense counsel are compounded by the fact that lawyers must refer to cases and statutes from around the world, some nearly 60 years old, written in diverse languages such as English, French, Norwegian, Danish, Hebrew and Swiss-German.

Even judges are reluctant to attempt to piece together these conflicting and disparate clues, explicitly refusing to rule on procedural or substantive questions until the final judgment is presented,[102] further compounding the difficulties faced by defense counsel. Defense counsel must prepare a case where the elements of the crime are not clearly defined and where there may be a multitude of excusing and mitigating factors, or where there may be none; none of which are readily ascertainable.

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[101] *Id.* at para. 3.

[102] Harvard Law Review, *Developments in the Law International Criminal Law: III. Fair Trials and the Role of International Criminal Defense*, 114 Harv. L. Rev. 1982 (2001), at 6 [hereinafter Harvard] [reproduced in accompanying notebook at Tab 22].

Erdemovic,[103] an early case from the ICTY, demonstrates the necessity of retaining properly trained attorneys as defense counsel, especially as public defenders. The defendant, Mr. Erdemovic, was charged with one count of crimes against humanity and, in the alternative, one count of war crimes.[104]

On the advice of counsel, Mr. Erdemovic pled guilty to the charge of crimes against humanity[105], the Prosecutor dropped the charge of war crimes[106] and the Trial Chamber sentenced Mr. Erdemovic to 10 years.[107] Mr. Erdemovic appealed his sentence.

Upon review of the trial transcript, the Appeals Chamber deduced that neither Mr. Erdemovic nor his counsel understood the elements of either the charge of war crimes or crimes against humanity.[108] The Appeals Chamber overturned the plea, finding it to be uninformed and not equivocal.[109]

In a 4-1 opinion, the Chamber ruled that the charge of crimes against humanity was so clearly more serious than the charge of war crimes that counsel for Erdemovic did not understand the law when advising his client to enter a guilty plea to the more serious charge.[110]

In addition to problems faced by counsel who are uneducated in the realm of international criminal law, some are wholly unfamiliar with the procedure used in hybrid courts like the ICTR.

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[103] *See Erdemovic* Sentence, *supra* note 99 [reproduced in accompanying notebook at Tab 15].

[104] *Prosecutor v. Erdemovic*, Case No. IT-96-22, Indictment, at para. 16 (ICTY Trial Chamber, May 22, 1996) [reproduced in accompanying notebook at Tab 14].

[105] *Erdemovic* App Judgement, *supra* note 100, at para. 4 [reproduced in accompanying notebook at Tab 16].

[106] *Id*.

[107] *Erdemovic* Sentence, *supra* note 99, at Disposition [reproduced in accompanying notebook at Tab 15].

[108] *Id*. at para. 3.

[109] *Id*.

[110] *See Erdemovic* App Judgement, *supra* note 100 [reproduced in accompanying notebook at Tab 16].

In civil law courts, cross-examination is directed by the judges; but in common law courts, cross-examination is directed by the defense. The ICTR utilizes a fundamentally adversarial approach during witness cross-examination; a tactic with which civil law professionals may find themselves unfamiliar, whether professors or counselors.

In the first case before the ICTY, *Tadic*, it was unfamiliarity with appropriate procedure that caused the Tribunal unnecessary delays and expenses. Lead counsel for Mr. Tadic, Mr. Michaïl Wladimiroff, a Dutch criminal defense attorney and professor, recognized he and his co-counsels own deficiency with adversarial trial experience.

To compensate for their unfamiliarity, with cooperation from the ICTY and the American Bar Association's Central and East European Law Initiative, a week-long training session was held by one British and two American attorneys. After this intensive session, Mr. Wladimiroff remained apprehensive about his abilities and the British attorney was retained as additional co-counsel.[111] This one instance of an unprepared attorney cost the ICTY a week of unnecessary delays and thousands of dollars.

If an Office of Defense were established prior to the commencement of proceedings against detainees of the ICTY, Messrs. Tadic and Erdemovic would have been represented by appropriately trained and educated counsel. Consequently, these episodes, and countless more like them, would never have been a possibility. As a counterpart to the Office of the Prosecutor, an Office of Defense must be established.

At present, defense counselors are assigned to detainees by the Registrar.[112] The Registrar necessarily has a conflict of interest when assigning defense counsel. The statues

[111] Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges of the Defense Counsel*, 7 Duke J. Comp. & Int'l L. 519 (1997), at 3 [reproduced in accompanying notebook at Tab 24].

[112] ICTR Rules, *supra* note 3, at rule 44 *bis* (C) [reproduced in accompanying notebook at Tab 7].

governing the Registrar of the ICTR state that the Registrar is to assign counsel in the interests of Justice.[113] Under the same statutes, the Registrar is supposed to minimize the costs of providing defense to indigent detainees.[114] An Office of Defense, fully funded and independent from the Registrar, must be created to overcome this systematic violation of Due Process.

An independent Office of Defense will better protect the due process rights of detainees.[115] At present, the Office of the Registrar is charged with the duty to assign counsel to indigent detainees before the Tribunal for Rwanda.[116] This is in direct conflict with the duty of the Registrar to control costs.[117] The Directives on Assignment of Counsel for the Tribunal for Rwanda establish that the tribunal shall "meet costs and expenses in legal representation of the suspect or accused so long as they are necessarily and reasonably incurred."[118] The potential for a breach of Due Process is evidenced by the fact that defense counsel have been restricted not only in the number of hours they are allowed to bill, but also in the number of support staff they are allowed to hire.[119]

In order to fulfill its duty to the Tribunal, the Registrar must fail its duty detainees. In order to fulfill its duty to detainees, the Registrar must fail its duty to the Tribunal. Considering

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[113] ICTR Statute, *supra* note 57, at art. 20(4)(d) [reproduced in accompanying notebook at Tab 8].

[114] *See* Wilson, *supra* note 48, at 176 [reproduced in accompanying notebook at Tab 27].

[115] The duties of the Office of Defense would include, but not be limited to: screening of attorneys; training of attorneys; discipline of attorneys for ethics violations; coordination of defenses; and assistance with research and translations. If such an Office were created, Tribunals would operate more efficiently and with lower long-run costs, while safeguarding Justice and protecting the Due Process rights of detainees.

[116] ICTR Rules, *supra* note 3, at rule 44 *bis* (C) [reproduced in accompanying notebook at Tab 7].

[117] Wilson, *supra* note 48, at 176 [reproduced in accompanying notebook at Tab 27].

[118] *Id*. at 182.

[119] *Id*.

that the Registrar is an integral part of the administration of the Tribunal[120] who, with the Judges, establishes the criteria for payment[121], and defense counselors are independent professionals paid by the Registrar, it is more likely that the Registrar will fail in its duty to provide a complete defense.

The primary function of the Registrar is as an administrative agency "to support the judges, not the lawyers for defense."[122] While having defense counsel assigned by the Registrar is not a *prima facie* violation of Due Process it does create a conflict of interests likely to be resolved against the defense. In 1997 and 1998 the Tribunal for Rwanda placed caps on defense hiring and hours.[123] An Office of Defense must not be subject to arbitrary budgetary restraints; the prerequisite of presenting full and complete defenses should determine funding, funding should not determine the completeness of defenses presented.

In *Kayishema*[124], the defendant argued that defense and prosecution should have equal, or at least less disparate, resources. That particular Trial Chamber reasoned that "the rights of the accused should not be interpreted to mean that the Defence is entitled to same [sic] means and resources as the Prosecution."[125] The Chamber further reasoned that "Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would

[120] ICTR Rules, *supra* note 3, at rule 33(a) [reproduced in accompanying notebook at Tab 7].

[121] *Id*. at rule 45(e).

[122] Wilson, *supra* note 48, at 177 [reproduced in accompanying notebook at Tab 27].

[123] Guidelines for the Remuneration of Counsel Appearing Before the ICTR, at art. 1.4 & 3.2, available at http://69.94.11.53/ENGLISH/ldfms/guidee.pdf (last visited Apr. 28, 2006) [reproduced in accompanying notebook at Tab 4].

[124] *See Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment (ICTR Trial Chamber, May 21, 1999) [reproduced in accompanying notebook at Tab 17].

[125] *Id*. at para. 60.

clearly not reflect the intentions of the drafters of this Tribunal's Statute."[126] The Trial Chamber also denied the argument of the defendant that there was a deficiency of resources with regard to access to evidence and time for the defense to prepare both their case-in-chief and closing arguments.[127] "The Trial Chamber cited no drafting history to support its assertions, nor did it provide any authority for assertions as to the *status quo* said to exist in the world's jurisdictions."[128] In fact, "its only textual reference was to provisions of the Directive on Assignment of Defence Counsel requiring that the Tribunal assume only those costs for the defense that the defendant is himself unable to assume."[129]

In a decision from the ICTY, dealing with a prosecution motion to obtain copies of defense witness statements[130], Judge Vohrah reasoned that the concept of equal resources must favor the accused. Judge Vohrah explained that ordinarily the principle of equal resources exists to ensure that the defense is able to present a case utilizing means "equal to those available to the Prosecution which has all the advantages of the State on its side."[131] While the logic of Judge Vohrah has been criticized by later ICTY rulings, the mention of the importance of equal resources shows that such an idea cannot be idly dismissed and must instead be given all appropriate consideration, especially in the realm of International Tribunals.

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[126] *Id*.

[127] *Id*. at para. 61-64.

[128] Wilson, *supra* note 48, at 187 [reproduced in accompanying notebook at Tab 27].

[129] *Id*.

[130] *See Prosecutor v. Tadic*, Case No. IT-94-1, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements (ICTY Trial Chamber, Nov. 27, 1996) [reproduced in accompanying notebook at Tab 21].

[131] *Id*. at 4.

Due Process includes a right to present a complete defense.[132] In an article written as the vice-president of the International Criminal Defence Attorney Association, Professor Michaïl Wladimiroff said: "A full and fair defence is an essential element of any claim to conduct a fair trial and enforce the rule of law."[133] Presentation of a complete defense is impossible if counsel for the defense is overwhelmed by the sheer size of the prosecution. Without equality of resources between the Prosecution and the Defense, presentation of a complete defense is impossible and the due process rights of every detainee are systematically violated.

Regional and multi-lateral treaty enforcement bodies, international lawyers groups, Amnesty International, the ICTY and the ICTR all agree that a right to equal resources is a part of the right to a fair trial.[134] The idea of equal resources is rarely applied in practice without prejudice. Case law from both the ICTY and ICTR reveals a propensity for favoring the prosecution, especially "with regard to training, access to documents, support staff, compensation and other resource questions."[135]

Under article 15(C) of the ICTR Directive the Registrar may assign multiple counselors to a detainee, if appropriate and if requested by lead counsel.[136] It is always appropriate to assign multiple counselors to represent individual detainees. The complexity of international war crimes trials makes multiple counselors necessary.[137] Initially the Registrar of the ICTR was

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[132] *E.g.*, ICCPR, *supra* note 59, at art. 14(3)(B) [reproduced in accompanying notebook at Tab 5].

[133] Michaïl Wladimiroff, *The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda*, 12 LEIDEN J. INT'L L. 957 (1999) [reproduced in accompanying notebook at Tab 26].

[134] Wilson, *supra* note 48, at 185 [reproduced in accompanying notebook at Tab 27].

[135] *Id.*

[136] Directive, *supra* note 6, at art. 15(C) [reproduced in accompanying notebook at Tab 1].

[137] Wilson, *supra* note 48, at 168 [reproduced in accompanying notebook at Tab 27].

only to assign individual counsel. After the decision in *Akeyasu*[138], where denial of a request for multiple counselors was considered a denial of Due Process, the rules of the ICTR were amended to allow additional counsel to be assigned. In addition to a request from initial counsel, assignment of additional counselors still requires approval by the Registrar.[139] To appropriately protect Due Process, multiple counselors must be assigned to every detainee who does not refuse appointed counsel. In some instances, it is equally appropriate to assign stand-by or full counsel over the objections of the detainee.

F. International Tribunals Must Recommend Sanctions To Neither Bar Associations Nor Universities; However, Bars and Universities Have Discretion To Investigate Matters Referred To Them.

On 8 November 1994, the ICTR was created by the UNSC.[140] Exercising authority derived from Chapter VII of the Charter, the UNSC passed Resolution 955 providing for the Statute of the Tribunal.[141] Member States of the U.N., which is to say signatory States to the Charter, are bound thereby to abide by the decisions of the UNSC.[142] Only States may be members of the U.N., consequently, non-state entities are excluded.

Obligations under Chapter VII of the Charter only apply to States.[143] As a general rule, Bar Associations and Universities are not organs of a State. Instead, Bar Associations are independent agencies outside the direct authority and control of a State. Because independent non-State administrative agencies are not organs of a State they are therefore not required to

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[138] *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Trial Chamber, Sept. 2, 1998) [reproduced in accompanying notebook at Tab 11].

[139] Directive, *supra* note 6, at art. 15(C) [reproduced in accompanying notebook at Tab 1].

[140] ICTR Statute, *supra* note 57, at art. 1 [reproduced in accompanying notebook at Tab 8].

[141] Charter, *supra* note 14, at art. 7 [reproduced in accompanying notebook at Tab 9].

[142] *Id*.

[143] *Id.*

carry-out punishments recommended by international Tribunals. Bar Associations and Universities are allowed, and may be politically expected, to inquire on their own initiative but they are certainly not obligated.

According to the Statute of the ICTR, States are explicitly required to comply with certain requests of the Tribunal.[144] States are required to comply with "any request for assistance or an order issued by a Trial Chamber."[145] Article 28 specifically enumerates that States "must assist"[146] with: the identification or location of persons; the arrest or detention of persons; the surrender or transfer of persons to the Tribunal; the service of documents; the taking of testimony; and with the production of evidence.[147] Article 28 also says that this list is not exhaustive.[148]

The ICTY considered the extent of Tribunal authority and jurisdiction *vis-à-vis* States and State organs in the case of *Blaskic*.[149] The Appeals Chamber began to define the limits and scope of the authority and jurisdiction vested in International Tribunals by the UNSC. The Appeals Chamber reasoned that Article 29 of the Statute of the ICTY imposes upon all Member States an obligation to "lend cooperation and judicial assistance to the…Tribunal."[150]

The Chamber further noted that the UNSC, "the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all

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[144] ICTR Statue, *supra* note 53, at art. 28 [reproduced in accompanying notebook at Tab 7].

[145] *Id.*

[146] *Id.*

[147] *Id*.

[148] *Id*.

[149] *Blaskic*, *supra* note 20 [reproduced in accompanying notebook at Tab 13].

[150] *Blaskic*, *supra* note 20, at para. 26 [reproduced in accompanying notebook at Tab 13].

member States to comply with orders and requests of the International Tribunal."[151] This particular wording demonstrates that any power a Tribunal may have stems from the UNSC; the ICTY itself does not have the power to force compliance. Sanctions are under the exclusive control of the UNSC. The Chamber concludes their reasoning by remarking that "[e]very Member State of the United Nations has a legal interest in the fulfillments of the obligation"[152] of cooperation with the Tribunal.

After elaborating about the source and scope of the authority and jurisdiction of the ICTY, the Appeals Chamber discussed the appropriate remedies in the case of non-compliance. The Chamber reiterated and clarified their earlier language, reasoning that "the International Tribunal is not vested with any enforcement or sanctionary power vis-à-vis States. It is primarily for its parent body, the Security Council, to impose sanctions…"[153] under the authority of Chapter VII of the Charter. This language makes the lack of sanctioning power vested in International Tribunals when dealing with States directly abundantly clear.

The appropriate course of action for a Tribunal to undertake when dealing with a disobedient State is to make a judicial finding of non-compliance and to report their finding to the UNSC.[154] This judicial finding is made by the Tribunal, exercising their inherent power to "make all those judicial determinations that are necessary for the exercise of its primary jurisdiction."[155] The court explained that this inherent power must exist for a Tribunal so that

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[151] *Id*.

[152] *Id*.

[153] *Id*. at para. 33.

[154] *Id.*

[155] *Id*.

"its basic judicial function may be fully discharged and its judicial role safeguarded."[156] The power to report is an extension of the relationship between the Tribunal and the UNSC.

The UNSC creates International Tribunals to prosecute those responsible for violations of international law; it logically follows that if a State fails in its duty to cooperate with the Tribunal, preventing the Tribunal from achieving its mission, the Tribunal is then "entitled to report this non-observance to the Security Council."[157] The UNSC does not take such findings lightly. On at least 5 separate occasions after a reports were made, the President of the UNSC made a statement on behalf of the whole body addressed to the insubordinate State.[158]

To clarify the extent and content of such reports the Chamber held that a Tribunal "must not include any recommendations or suggestions…"[159] as to what sanctions, if any, should be applied. The Chamber went on to say that Tribunals "may not encroach upon the sanctionary powers accruing to the Security Council…"[160] under Chapter VII of the U.N. Charter. The Chamber further held that the President of the Tribunal, when exercising their duty to transmit the report to the UNSC only has the role of *nuncius*; they must simply transmit the judicial finding to the UNSC with neither recommendations nor suggestions for sanctions.[161]

States who do not comply with legal requests of International Tribunals are subject to several sanctions. Aside from any remedial actions taken by the UNSC, collective or unilateral action may be taken by Member States. Unilateral action is restricted to a request that the

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[156] *Id*.

[157] *Id*.

[158] *Id*. at para 34.

[159] *Id*. at para. 36.

[160] *Id*.

[161] *Id*. at para. 37.

delinquent State terminate its breach;[162] examples of acceptable collective action include: political or moral condemnation, a collective request to comply; and economic or diplomatic sanctions.[163] Tribunal actions brought against States for non-compliance with legal Tribunal requests are limited in that Tribunals must neither recommend nor suggest sanctions, *a fortiori*, when dealing with non-State administrative entities Tribunals must exercise equivalent restraint.

Under Rule 8.5 of the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA), counselors admitted to practice in any U.S. jurisdiction are always subject to the authority of that jurisdiction, no matter where they conduct their practice.[164] Rule 8.5 explicitly states that counsel may be subject to the authority of more than one jurisdiction for the same conduct.[165] Under the Model Rules, counsel who practice before international tribunals are still under the authority of their home jurisdiction.[166] This system of dual authority created by the ABA allows an international tribunal to punish American counsel with whatever inherent authority and remedies the Tribunal has available. However, the ABA is not obligated to punish counsel for any actions, whether domestic or international.[167]

This discussion illustrates how one country has decided to deal with an hypothetical situation like that before the Tribunal.[168] It is probable that other countries in the world retain

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[162] *Id.* at para. 36.

[163] *Id*.

[164] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2005) [reproduced in accompanying notebook at Tab 5].

[165] *Id*.

[166] *Id*.

[167] *See Id*.

[168] A thorough analysis of this situation requires investigation into every legal system from which a lawyer may come to represent detainees of the ICTR. Undoubtedly, there are varying levels of control retained by States over their Bars and Universities. Without a methodical analysis and comparison of how each of these States would treat counsel practicing internationally, it is impossible to accurately and completely resolve this query. Such an analysis

more direct control over discipline in their Bar Associations and Universities than does the United States. The only time these two institutions are obligated to enforce punishments handed down by a Tribunal is if they are organs of the State.[169] If a State directly controls and administers discipline for counselors or professors, and that State is a Member of the U.N., then the State is directly obligated to honor the punishments doled out by the UNSC.

G. With Recourse To Neither Bar Associations Nor Universities, International Tribunals Must Punish Misconduct By Counsel According To Their Own Rules and Procedures.

A Tribunal must punish counsel of its own accord with the jurisdiction and authority inherent to every court.[170] Tribunal Chambers have the authority and jurisdiction to hold contempt proceedings[171] for counsel (both prosecution and defense) and for detainees appearing before them. Without the power to internally enforce rules of procedure and evidence, a court is not a legitimate fact-finding body; instead it is a mere theater for exhibitions, produced and paid for by States.

Under Rule 46(B), after a warning, and only with the approval of the president, a Trial Chamber may report misconduct of counsel to their regulating body, be it Bar or University.[172] Under Rule 46(A), after a warning, a Chamber may impose sanctions against counsel if their conduct "remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the

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is outside the scope of this memo. However the topic should not be dismissed based on the research presented in this memo. Further inquiry must be performed if the problem is to be resolved in a manner which respects and abides by international law, Due Process, and the rights and obligations of States, Counsel and International Tribunals.

[169] *See Blaskic*, *supra* note 20, at para. 26 [reproduced in accompanying notebook at Tab 13].

[170] *Id*. at para. 33.

[171] ICTR Rules, *supra* note 3, at rule 77 [reproduced in accompanying notebook at Tab 7].

[172] *Id*. at rule 46(B).

interests of justice."[173] Rule 45 *ter* (B) allows a Chamber to impose any sanctions deemed appropriate,[174] but is limited by Rule 77.[175]

Due Process requires all parties involved to respect and abide by the rules. Prosecutors and defense must present evidence according to the rules of procedure and evidence to ensure inadmissible evidence is not presented to the Tribunal. Counsel for all parties must follow regulations regarding the questioning and cross-examination of witnesses to ensure that the witness is testifying to what they know and not what they were told to say. Perhaps most importantly, everyone before a Chamber must abide by the rules of the Chamber regarding appropriate procedure to address the court, such as: timely filing of motions; appropriate discourse among Counsel and between Counsel and Judges; as well as making prompt appearances before a Chamber. Without enforcement of internal regulations a court cannot possibly hope to be recognized as a legitimate International Tribunal.[176]

IV. CONCLUSION

International Tribunals represent one of several possible methods of dealing with perpetrators of war crimes, crimes against humanity and genocide. In addition to directly punishing those most responsible, International Tribunals accomplish many other important objectives. International Tribunals create an historic record of the events, the aftermath and the resolution; they foster reconciliation; they provide a model as an example for future proceedings; and perhaps most importantly, International Tribunals show the world that the prime movers of

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[173] *Id*. at rule 46(A).

[174] *Id*. at rule 45 *ter* (B).

[175] *Id*. at rule 77.

[176] Scharf, *supra* note 8, at 7 [reproduced in accompanying notebook at Tab 25].

such heinous atrocities will not escape the rule of Law and go unpunished.[177] The use of International Tribunals has increased dramatically during the last fifteen years, changing the status quo from one where perpetrators are allowed to go unpunished to one where they are held accountable for their actions. Unfortunately, as prosecutions become more solidified and uniform, defenses remain impromptu and individualized.

Without provisions for systematic defenses on an equal footing with systematic prosecutions, International Tribunals will never be perceived as legitimate fact-finding bodies. In addition to providing equal resources to prosecution and defense, Tribunals must ensure that those who appear before them, both counselors and detainees, abide by the regulations of the Tribunal.

Use of duty counsel ensures that detainees will be represented from the earliest possible time during the proceedings against them. However, duty counsel is only a measure for temporary provision of counsel to a detainee. Public defenders, organized under an Office of Defense, are a legitimate and effective long-term solution. The creation of an Office of Defense will provide an effective and efficient method to protect the Due Process rights of detainees while hastening the progress of the court; but only if the Office is carefully constructed and well funded.

As a punitive measure, Trial Chambers are able to report misconduct of counsel to their domestic regulating body. While politically this may be an appropriate method of sanction, it is entirely ineffective. Domestic disciplinary agencies (at least in the United States) rarely, if ever,

[177] *Id.*

inquire into referrals from International Tribunals.[178] Furthermore International Tribunals may only report on misconduct and are required to not recommend sanctions.

Instead, Tribunals are allowed to refuse audience to counsel, or the Registrar may replace counsel entirely. Neither of these penalties ensures that future counsel will not simply repeat the same disruptive tactics. Replacing insolent counsel with equally disrespectful counsel does not solve the problem. Instead, Tribunals must punish counsel locally with internal methods already available. Courts have inherent jurisdiction to hold contempt proceedings for those appearing before them. Actions speak louder than words; International Tribunals must exercise their inherent power and authority to enforce the rules of procedure and evidence, protect Due Process and ensure smooth, efficient and legitimate proceedings.

[178] *See* e-mail from Professor Robert Lawry to Kyle Miller April 24, 2006 [reproduced in accompanying notebook at Tab 26].