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The Hypoplasia of the Defence in International Criminal Law: A Critical Analysis of Fair Trial and Equality of Arms



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who have given me everything I need to succeed.
To my brother, for his insights into the criminal mind ("just don't get caught").

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Burcu & Ersoy
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Abbreviations

Equality of Arms (EoA)
Human Rights (HR)
International Criminal Law (ICL)
International Criminal Justice (ICJ)

Nuremberg International Military Tribunal (NIMT)
International Criminal Tribunal for the former Yugoslavia (ICTY)
International Criminal Tribunal for Rwanda (ICTR)
Special Court for Sierra Leone (SCSL)
International Criminal Court (ICC)
European Court of Human Rights (ECtHR)

The term 'modern institutions' will primarily refer to the three institutions which form the focus of this study, namely: the ICTY, the SCSL, and the ICC.

N.B. The English spelling of '*defence*' will be used throughout this thesis, with the exception of direct quotes from authors who have used '*defense*'.

FIAT JUSTITIA, RUAT CAELUM

Let justice be done, though the heavens fall.

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Chapter 1.

Introduction

The 'Hypoplasia' of the Defence in International Criminal Law

*'[O]ne would expect that, some sixty years later, lessons would have been learned from Nuremberg, and matters would have improved dramatically for the defence in later war crimes trials. In some respects, they certainly have. In some others, however, the situation remains noticeably, almost mysteriously comparable.'*¹

1. Introduction

The term 'hypoplasia' refers to a biological inability to mature properly, due to disease or an inadequate supply of nutrients, which results in incomplete or arrested development.² This thesis will seek to demonstrate that the concept of 'hypoplasia' best represents the arrested development of the Defence role in International Criminal Law (ICL). The limited and delayed development of the Defence during the creation of the institutions will be argued as having resulted in profound and lasting consequences, which affect all manner of defence functions, both in theory and in practice. It will be argued that whilst the 'modern institutions'³ provide fair trial protections in their various statutes, rules and codes, such guarantees do not manifest adequately into practical safeguards at trial. Thus, it will be argued ultimately that, when considered collectively, there exists an *Inequality of Arms* at the modern ICL courts and tribunals, which is worthy of greater consideration and recognition.

¹ METTRAUX, G. & CENGIC, A. 'The Role of a Defence Office - Some Lessons from Recent and not so Recent War Crimes Precedents.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May. p394

² See, MARCOVITCH, H. (Ed.) (2005) 'Black's Medical Dictionary.' London, A & C Black Publishers. p349

³ The term 'modern institutions' will be used throughout to signify the ICTY, the SCSL & the ICC.

This Chapter will begin by considering the relevance of the international context for the ICL accused, both in relation to the severity of the crimes of which he is accused, and the global platform on which he appears. Next, Section 3 will provide an overview of the structure of this thesis. Section 4 will then set out the research methods used, together with a rationale justifying the selection of the 'modern institutions' (ICTY, SCSL & ICC), which form the focus of this study. Sections 5 & 6 will attempt to draw together some of the key themes of this thesis, including the anxiety surrounding the international accused which, it will be argued, has ultimately led to the 'hypoplasia' of the Defence.

2. The importance of the international context for the accused in ICL

Every domestic legal system faces the difficult task of dealing with perpetrators of very serious crime. Yet the extent and nature of the crimes of which an international defendant stands accused,⁴ and the global media attention he will attract, might suggest that his notoriety, and the perception of his potential dangerousness,⁵ surpass those of defendants in national jurisdictions. As observed by Arendt, the crimes of which the defendant stands accused have '*disturbed and greatly endangered the community as a whole*'.⁶ Cogan argues that the '*severity of the crimes alleged*', as well as the '*unsavoury background of a large number of the persons accused*', provides some explanation for the relative lack of interest in the rights of the defendant before

⁴ For example, war crimes, crimes against humanity, and genocide - described as the 'crime of crimes' - see, SCHABAS, W. (2003a) 'National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes' 1 *Journal of International Criminal Justice*. 39-63

⁵ See, FOUCAULT, M. (2002) 'Power.' Volume 3. London, Penguin. p57

⁶ ARENDT, H. (1963) '*Eichmann in Jerusalem: A Report on the Banality of Evil*.' Penguin, USA. pp.260-1

international courts and tribunals.⁷ In particular, the '*burning sympathies for the plight of the victims*' can obscure the fair trial requirements for the accused.⁸

'Disinterest' in the accused can extend to a far more vitriolic, active desire to see such individuals convicted, with little or no concern for fair trial protections. One academic even asks '*why should we provide such unique and uniquely horrible offenders (in such strange circumstances) with the trappings of a fair criminal trial, with all its costly procedural safeguards and the ever present possibility of failure?*'.⁹ Furthermore, he argues that '*in many international criminal cases, there is never any serious doubt that the accused is guilty of some of the worst crimes imaginable*'.¹⁰ Such a perspective suggests that a trial is both unnecessary, and a waste of time and resources, particularly regarding the Defence. Yet, as Groulx reminds us, these complex and large-scale crimes do not, in reality, result in '*clear-cut court cases*', due to '*factual ambiguity*'; '*procedural and jurisdictional complexity*'; '*political controversy*', and the '*potential arbitrary use of power*'.¹¹

The institutions in which the international accused is tried can be observed as possessing an inherent, '*natural tendency*' to '*become prosecution-minded*'.¹² Furthermore, Groulx asserts that where '*[e]motions run high*', '*the desire not to listen to the accused is strong*'.¹³ Such a reaction might well have been present at the Nuremberg International Military Tribunal (NIMT), as the Tribunal was formed in reaction to the shock caused by the extent and nature of the crimes committed during

⁷ COGAN, J.K. (2002) 'International Criminal Courts and Fair Trials: Difficulties and Prospects.' **27(1)** *Yale Journal of International Law*. 111-140 at 112

⁸ DAMAŠKA, M. (2011) 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals.' **36(2)** *North Carolina Journal of International Law and Commercial Regulation*. 365-388 at 373

⁹ FICHTELBERG, A. (2005) 'Crimes Beyond Justice? Retributivism and War Crimes.' **24** *Criminal Justice Ethics*. 31-46 at 7

¹⁰ *Ibid.* at 10

¹¹ GROULX, E. (2010a) "'Equality of Arms': Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System.' *Revue Quebecoise de Droit International*. 21-38 at 34

¹² GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) *Champion*. 20-27 at 22

¹³ *Ibid.*

WWII. As Zappalà explains, the '*heinous character*' of the crimes '*meant that an in-depth and thorough reflection on the protection of the rights of persons accused*' was far from easy.¹⁴ However, the modern institutions, including the permanent International Criminal Court (ICC), ought to be capable of acting in a more dispassionate and neutral manner.

This thesis will seek to emphasise the central importance of a fair and rights-respecting procedure in ICL. It will be argued that responding to the accused with a measured and consistent approach is the only way to prevent these individuals from over-stepping and '*shattering*' the legal system.¹⁵ Thus, the coming chapters will focus on the important procedural guarantees, and whether these are given meaningful application, both at an institutional level, as well as during the trial process.

3. Thesis structure

This thesis will begin in **Part I** by examining some theoretical perspectives regarding the international defendant. **Chapter 2** will examine the accused from the perspective that he is an individual deserving of fair trial protections as a rights-bearing citizen, beginning with the influence of both inquisitoriality and adversariality on the modern international institutions. This is important in order to explain fully the conflicts which have arisen as a result of the mixed, *sui generis*, nature of the procedure used in ICL. The cluster of rights which comprise the right to a fair trial will be examined, particularly with regard to the standard to which ICL can, and should, be held. The 'minimum guarantees' to be provided to the accused emerge as having developed as 'bare'

¹⁴ ZAPPALÀ, S. (2003) '*Human Rights in International Criminal Proceedings*.' Oxford, OUP. pp. 21-2

¹⁵ ARENDT, H. *et al* (1992). '*Hannah Arendt - Karl Jaspers - Correspondence 1926-1969*.' New York, Harcourt Brace. p54

minimums, which cannot be assumed to provide adequate protection alone. Finally, the concept of the principle of 'Equality of Arms' (EoA) in ICL, which is linked to many of the crucial guarantees embodied in the right to a fair trial, will also be analysed in respect of its important role in proceedings which utilise a two-party system.

Chapter 3 will examine some of the different ways that the international defendant is perceived, through the use of concepts such as 'moral panics', labelling and stigmatising, in order to consider how society might react to those accused of serious crime. It will be argued that such concepts will impact more upon ICL defendants, in comparison with those accused at domestic levels. The dangers associated with highly notorious individuals, which can be inflamed through media coverage, must be duly acknowledged. The ultimate concern is that the accused is at risk of being both recognised and treated as a non-human, which could lead to a restriction, or dilution, of his fair trial rights and protections. Overall, **Part I** will argue that despite the difficulties associated with trying those accused of international crimes, compromising the fairness of the trials will not only damage the integrity of proceedings, but is also fundamentally '*contrary to the rule of law*'.¹⁶

Part II will analyse the institutional framework of the modern institutions, starting with an in-depth examination of the NIMT in **Chapter 4**, in order to understand its role in providing a 'blueprint' for the subsequent modern institutions. The Chapter will consider the provisions for the Defence, and the extent to which the Tribunal can be said to have adopted a fair and rights-respecting procedure. It will be argued that issues such as the significant restrictions regarding access to evidence, time to prepare the defence case, as well as the experience of defence counsel, together produce a tangible Inequality of Arms. Therefore, the use of the NIMT as a blueprint for

¹⁶ MAY, R. & WIERDA, M. (2002) 'International Criminal Evidence.' New York, Transnational Publishers. p259

the modern institutions is highly problematic, and the extent to which its influence has persisted must be closely analysed.

Accordingly, **Chapter 5** will go on to examine the internal architecture of the different ‘modern institutions’ (ICTY, SCSL & ICC). This will include an in-depth analysis of how each came to be structured, a topic which is often largely overlooked in the literature. As the ICC has its own unique structure of trial ‘phases’, it requires an additional consideration of how the accused’s fair trial rights are protected as he moves through the different trial stages. At the ICC, a ‘new type’ of defence counsel (‘ad-hoc counsel’) was needed *‘to represent the general interests of the defence at a stage in proceedings where no suspect has yet been identified or charged’*.¹⁷ This, it will be argued, is another manifestation of the lack of consideration given to defence issues, due to the significant gaps in the protection of defence rights. Overall, **Part II** will seek to highlight the significant hypoplasia of the Defence at the developmental stages of the NIMT, which subsequently influenced the architecture of the modern institutions.

Part III of this thesis will examine the practical applications of the fair trial guarantees at the modern institutions, with a particular emphasis on the principle of EoA. **Chapter 6** will consider the logistical aspect of the principle of EoA by analysing the extent and nature of defence funding at the modern institutions, including access to facilities and time to prepare. To the extent made possible through the availability of the institutions’ actual and projected budgets, the funding allocated to the Defence will be compared with that of the Prosecution. Whilst the different Courts and Tribunals have had very different experiences with regards to funding (including relying solely on voluntary contributions), defence under-funding can routinely be observed to have affected each of the modern institutions, in stark contrast to the generous budgets allocated to the Prosecution.

¹⁷ DIECKMANN, J. & KERLL, C. (2011) ‘Representing the “General Interests of the Defence”: Boon or Bane? - A Stocktaking of the System of the Ad Hoc Counsel at the ICC.’ **11** *International Criminal Law Review*. 105-136 at 106

Chapter 7 will address the extent to which there is an EoA at the *institutional* level at the modern courts and tribunals. First, the role of the Prosecutor at the ICC will be critically analysed in order to explore the complex nature of the dual requirement to investigate in a neutral manner, whilst also preparing the Prosecution case as a party to the proceedings. It will be argued that this novel role is conceptually flawed, as it places a highly problematic conflict at the heart of the fact-finding procedure. The second potential contributor to the inequality is the role played by victim testimony, and the associated risk posed to due process rights. The situation at the ICC will be the subject of particular focus given its significant efforts to include victim testimony, and the effect this has on trial fairness. It will be argued that victim testimony constitutes a considerable burden for the Court, and arguably imposes another accuser (in addition to the role of the Prosecution) for the Defence to face. The final issue to be considered will be the influence of the judiciary on the trial process. The need for an independent and detached judiciary will be analysed, focusing on the varied legal backgrounds of judges at international institutions. Instances in which judges have demonstrated a form of bias with respect to the accused will be examined, which it is argued could indicate an inappropriate '*prosecutorial zeal*'.¹⁸ In essence, Chapter 7 will question the extent to which the Defence is '*engaged in agonistic confrontation with more than one procedural adversary*'.¹⁹

Chapter 8 will examine the extent to which the principle of EoA can be observed as applying to evidentiary matters throughout the trial process itself. This will include three crucial forms of evidence: pre-trial investigations, the disclosure of evidence, and the use of witness testimony. With respect to pre-trial investigations, it will be argued that various factors give rise to significant inequality due to issues such as the inevitable delay in the start of defence investigations; the lack of provision for a

¹⁸ (EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' **114(7)** *Harvard Law Review*. 1982-2006 at 1995

¹⁹ DAMAŠKA, M. (2011) at 373

standing staff of defence investigators; a limited investigation budget; problems associated with the absence of State and witness co-operation. In particular, the timely and full disclosure of evidence has proven to be a highly controversial issue at the ICC. It will be argued that, regrettably, the Prosecution has failed on numerous occasions to disclose evidence in a timely manner. Finally, instances in which witness testimony has been falsified, or where bribes have been accepted in return for participation, serve as a reminder of the importance of the adequate funding of defence investigations, so that the veracity of witness testimony can be ascertained. **Part III** of this thesis will therefore address a diverse array of issues connected with the fairness of the proceedings for the accused in ICL, with a distinct focus on whether there can be said to be an EoA between the Defence and Prosecution.

Finally, **Chapter 9** will conclude this study by drawing together the various issues which cause the hypoplasia experienced by the Defence in ICL. The collective effect of the manifestations and consequences of this arrested development tend to suggest an Inequality of Arms concerning the Defence at the modern institutions. It will be argued that there is particular cause for concern regarding the practical translation of fair trial rights into meaningful, tangible protections at trial. A failure to recognise the extent of these issues, and properly support the Defence in the representation of the accused, jeopardises the fairness of the proceedings, and thus the legitimacy of the institutions themselves.

4. Methodology

A. The use of Doctrinal and Socio-Legal methods

In order to analyse the unique challenges faced by the defendant in ICL, two methods will be utilised: both doctrinal, and socio-legal. The term 'doctrine' comes from the Latin '*doctrina*', meaning instruction, knowledge or learning, and can concern all manner of rules, principles and norms, allowing it to explain, clarify or justify the law.²⁰ Hutchinson and Duncan explain that the concept is also closely linked with the doctrine of precedent, whereby legal rules are applied in a consistent, as opposed to arbitrary, manner, evolving '*organically and slowly*'.²¹ They also argue that doctrinal research is '*underpinned by positivism and a view of the world where the law is objective, neutral and fixed*'.²² Far from being prescriptive, the doctrinal method requires interpretation and analysis - a process which is highly subjective, and is thereby heavily influenced by the perspective and experience of the researcher.²³ Doctrinal research necessitates '*a specific language, extensive knowledge and a specific set of skills involving precise judgment, detailed description, depth of thought and accuracy*'.²⁴

The use of the doctrinal method therefore begins with identifying and locating the primary documents and sources relevant to the area, in order to establish the '*nature and parameters of the law*'.²⁵ The primary sources for this thesis include, but are not limited to: the discussions and working papers concerning the preparatory conferences for the international courts; statutes and rules of procedure and evidence; staff codes of conduct; rules relating to the appointment and payment of personnel. Another important source is the detailed judicial decisions - both majority and

²⁰ HUTCHINSON, T. & DUNCAN, N. (2012) **17(1)** Deakin Law Review. 83-119 at 84

²¹ *Ibid.* at 84-5

²² *Ibid.* at 116

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.* at 113

dissenting - as well as the subsequent orders made by the court. There are additional sources which are more 'external' to the courts and tribunals which must also be considered given their influence, such as UN reports and resolutions, as well as the decisions of other international institutions, such as the European Court of Human Rights (ECtHR). Academic scholars provide a wide-range of invaluable perspectives, many of whom have had the benefit of first-hand involvement or experience. Overall, it can be observed that there is a wide range of sources which must be considered relevant to this area of ICL. The critical analysis of these crucial sources is necessary in order to appreciate the historical development of the position of the defendant in ICL, as well as to identify the potential pressures and conflicts between defence rights and other competing considerations. Through a measured and thorough critique of this area of law, with a view to the wider implications, the rigorous application of the doctrinal method should ultimately provide a comprehensive foundation for this study.

All research methods receive both praise and criticism regarding their differing attributes, to which the doctrinal method is no exception.²⁶ The primary criticism of doctrinal study arises from the observation that it can often be too 'inward-looking', or internal.²⁷ As a result, the method can be seen to be overly restrictive and narrow. Since law cannot exist in a vacuum, (and ICL, in particular, is influenced by all manner of social, economic and political factors from individual states and international bodies) the need to examine and consider the wider context is compelling. Due to the risk of doctrinal research being too 'inward-looking', it will be complemented though the use of the social-legal method in order further to provide the 'external' perspectives.

The socio-legal method is perhaps even more diverse and difficult to define, since it is comprised of a wide variety of scholarship, which is '*not confined neatly*

²⁶ See, SALTER, M. & MASON, J. (2007). 'Writing Law Dissertations: An Introduction and Guide to Conduct of Legal Research'. Essex, Pearson. pp.112-8

²⁷ McCRUDDEN, C. (2006) 'Legal research and the social sciences'. **122** Law Quarterly Review. 632-650 at 663-4

within well-defined boundaries'.²⁸ Perhaps the most notable benefit of the method is the availability of a wide range of disciplines which can contribute significantly to legal research, such as sociology, psychology, political science, and economics.²⁹ As Morrill *et al* recognise, socio-legal scholars have a '*rich toolbox of methods*' available to them.³⁰ A particular benefit of utilising such diverse methods and perspectives lies in the potential to pay closer attention to the contextual surroundings of the area of law in question. This attention to context can include important social, cultural, political and historical factors,³¹ adding further dimension to the analysis of complex and multilayered issues, thereby attempting to explain the law '*in all its richness*'.³²

Interdisciplinary approaches provide researchers with opportunities to work across boundaries, and McCrudden argues that '*legal research now embraces a pluralism of methodological approaches*'.³³ This has particular implications for research in the area of international law, given the ever-increasing influence of different states and institutions upon each other as the effects of 'globalisation' seemingly become further entrenched in modern society.³⁴ Arguably, the realm of ICL could benefit from the increased use of interdisciplinary research.³⁵ This thesis will utilise both the more classically 'inward-looking' doctrinal method, together with a more social-legal approach, in order to build a multi-dimensional perspective of the position of the accused in ICL. The doctrinal method will provide an analysis of the legal rules and procedures of most relevance to International Criminal Justice (ICJ), particularly focusing on important roles, such as defence counsel, prosecution staff, registry

²⁸ COWNIE, F. & BRADNEY, A. 'Socio-legal Studies. A Challenge to the Doctrinal Approach.' in WATKINS, D. & BURTON, M. (2013) (Eds.) *Research Methods in Law*. Oxford, Routledge. p35

²⁹ McCRUDDEN, C. (2006) at 650; 636

³⁰ MORRILL, C. HAGAN, J. HARCOURT, B.E. & MEARES, T. (2005) 'Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future: A Conversation' *The University of Chicago Legal Forum*. 289-323 at 299

³¹ *Ibid.* at 295

³² McCRUDDEN, C. (2006) at 637

³³ *Ibid.* at 642

³⁴ *Ibid.* at 644

³⁵ NIMAGA, S. (2007) 'An International Conscience Collective? A Durkheimian Analysis of International Criminal Law.' 7 *InternationalCriminalLaw Review*. 561-619 at 619

personnel and judges. This analysis is crucial in order to understand the complexities and difficulties encountered throughout the accused's involvement with the international trial. Of particular relevance is the interplay of different rules and principles concerning the defendant's procedural rights and requirements, especially when considered in relation to the needs of other actors within the system, such as victims and witnesses. In addition to this method, a socio-legal approach will provide invaluable insight into how the international accused is perceived to be a serious threat - an outsider at the social margins - in a wider context.³⁶ This 'openness'³⁷ to a broader, criminological perspective will provide a unique and innovative analysis of the difficulties faced by the international accused. Such interdisciplinarity is rarely utilised in ICL discourse. In particular, the sociological understandings of 'otherisation'³⁸ will present an original means of analysing the treatment of the Defence at the modern institutions.

This thesis will provide a theoretical examination of the structure and functioning of the modern international institutions with respect to the position of the Defence. An alternative approach might have been to undertake an empirical study drawing upon interviews with key defence and prosecutorial staff, however it is doubtful whether an empirical study would have advanced this thesis, particularly given the limitations of such research.³⁹ This is particularly the case given the diversity of the issues which this thesis will attempt to analyse.

³⁶ See, in particular, Chapter 3.

³⁷ McCRUDDEN, C. (2006) at 645 argues that such openness should be welcomed.

³⁸ A form of 'distancing', see Chapter 3.

³⁹ See, WATKINS, D. & BURTON M. (2013) p55

B. The rationale behind the selection of the three ‘modern institutions’

This thesis will focus largely on the *ad hoc* ICTY,⁴⁰ the SCSL and the permanent ICC, which will be referred to collectively as the ‘modern institutions’. The rationale behind the selection is in recognition of their distinct differences, such as their respective mandates, objectives, international character, permanency and jurisdiction. All three institutions are the result of highly complex and very different political negotiations and compromises.⁴¹ It is hoped that the contrast between the ICTY (an *ad hoc*, international and primarily adversarial Tribunal), the SCSL (a ‘hybridised’ Court, which integrates both international and Sierra Leonean law), and the ICC (a permanent Court, formed via a multilateral treaty, which operates an unique, mixed procedure), will provide some insightful comparisons regarding the crucial difficulties faced by the accused in ICL.

i. The blueprint provided by the NIMT

An analysis of the standing of the Defence in ICL would be incomplete without a detailed discussion of the NIMT, due to its significant influence on the internal structural position of the Defence, as well providing a blueprint regarding, for example, the provision of Rules of Procedure and Evidence (RPE) designed specifically for an international criminal tribunal of mixed procedure.⁴² The NIMT’s ‘*precedential value was, and remains, incalculable*’.⁴³ The post-Nuremberg era witnessed the creation of a multiplicity of human rights treaties and laws, yet the development of ICL stagnated for nearly fifty years.⁴⁴ With the benefit of hindsight, it can be observed that the NIMT’s impact was merely postponed. Its achievements are ‘*tangible and important*’, not

⁴⁰ To a lesser extent, the ‘International Criminal Tribunal for Rwanda’ (ICTR).

⁴¹ COCKAYNE, J. (2005) ‘The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.’ **28** *Fordham International Law Journal*. 616-680 at 618

⁴² See, HASSAN-MORLAI, P.M. (2009) ‘Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone.’ **3** *African Journal of Legal Studies*. 96-117 at 98

⁴³ *Ibid.*

⁴⁴ GROULX, E. (2001) at 24

because it provided a perfect conceptual and procedural model, but rather because it explored some of the successes and pitfalls of creating mixed international judicial mechanisms '*in the face of mass atrocities*'.⁴⁵

ii. The ICTY

The '*ad hoc*' ICTY was an experimental endeavour, with only the limited precedent provided by the NIMT.⁴⁶ In many ways, the establishment of the *ad hoc* Tribunals of the ICTY and ICTR⁴⁷ '*marked the revival of international criminal law*'.⁴⁸ The ICTY constitutes the '*first modern international criminal institution*', which provided a model for subsequent courts.⁴⁹ Regrettably, the Defence at the ICTY lacked '*any institutional position or even support in the initial stages*'.⁵⁰ As a result, the Tribunal had to adapt in response to all manner of shortcomings, including the difficulties experienced in relation to the unethical conduct of some early defence counsel.⁵¹ Regardless of its flaws, the experience and development at the ICTY of the Defence has served as the 'modern' blueprint, which has been built upon and adapted by the subsequent institutions.

⁴⁵ TOLBERT, D. (2008-9) 'International Criminal Law: Past and Future.' **30(4)** University of Pennsylvania Journal of International Law. 1281-1294 at 1284

⁴⁶ COHEN, D. (2007) 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future.' **43** Stanford Journal of International Law. 1-38 at 2

⁴⁷ The ICTR, anecdotally described as the 'poor cousin' of the ICTY.

⁴⁸ FEDOROVA, M. (2012) 'The Principle of Equality of Arms in International Criminal Proceedings.' Netherlands, Intersentia. p13

⁴⁹ *Ibid.* p14

⁵⁰ *Ibid.* p4

⁵¹ See Chapter 2.

iii. The SCSL

Hybrid courts, which are partly ‘internationalised’, constitute the ‘*newest members of the community of courts*’.⁵² The ‘*low-cost, quick turn-around alternative*’ has also been described as justice on a ‘*shoestring*’.⁵³ Ultimately, funding has proven to be one of the ‘*major difficulties*’ of these courts.⁵⁴ The question arises as to whether these courts ‘*intermix the worst of both*’ international and local institutions,⁵⁵ making the SCSL of particular interest to this study, particularly with regards to the Defence through the creation of the ‘Office of the Principal Defender’ (OPD). The extent to which the Office is independent from the Registry will be considered carefully.⁵⁶

iv. The ICC

The idea of an international court, designed to try crimes on an international scale, can be observed from as early as the Middle Ages.⁵⁷ Perhaps the most considered effort came from the International Law Association (ILA) in the 1920s, which prepared a draft statute for a permanent criminal court.⁵⁸ As Bassiouni observed, the world was then ‘*too disparate and not ready*’ for the Court.⁵⁹ Tolbert observes that the ICC arose during a ‘*period of post-Cold War optimism and renewed faith in international*

⁵² BURKE-WHITE, W.W. (2002) ‘A Community of Courts: Towards a System of International Criminal Law Enforcement.’ **24** *Michigan Journal of International Law*. 1-101 at 3
Other Hybrid courts include: the ‘Special Panels for Serious Crimes’ (SPSC) in East Timor; the ‘Extraordinary Chambers in the Courts of Cambodia’ (ECCC); and the ‘Special Tribunal for Lebanon’ (STL).

⁵³ COCKAYNE, J. (2005) at 617

⁵⁴ RAUB, L. (2009) ‘Positioning Hybrid Tribunals in International Criminal Justice.’ **41** *New York University Journal of International Law and Politics*. 1013-1053 at 2024

The issue of funding will be analysed in Chapter 6.

⁵⁵ COCKAYNE, J. (2005) at 618-9

⁵⁶ See Chapter 5.

⁵⁷ BLATTMANN, R. & BOWMAN, K. (2008) ‘Achievements and Problems of the International Criminal Court: A view from Within.’ **6** *Journal of International Criminal Justice*. 711-730 at 712

⁵⁸ See, CRETA, V.M. (1998) ‘The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.’ **20** *Houston Journal of International Law*. 381-418 at 387

⁵⁹ BASSIOUNI, M.C. (1994-5) ‘Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal.’ **18** *Fordham International Law Journal*. 1191-1210 at 1195

institutions'.⁶⁰ Fedorova argues that, in many ways, the ICC's legal framework was intended to 'codify' the achievements of the *ad hoc* Tribunals.⁶¹ The extensive discussions and negotiations which took place leading up to 1998, particularly in relation to the Defence, will be examined closely in Chapter 5 of this thesis.

Reference to the Defence unit at the ICC, now known as the 'Office of Public Counsel for the Defence' (OPCD), is completely absent from the Rome Statute, and consequently lacks the foundational status of an organ, or 'pillar' of the Court. This is regrettable given the permanent nature of the ICC, and the degree to which such shortcomings cannot be altered (without an amendment to the Statute - a complicated and arduous process). Therefore, the Defence at the ICC has faced considerable obstacles from the outset regarding its institutional position. The coming Chapters will demonstrate the extent to which the Defence must constantly operate at a disadvantage, particularly in relation to the formidable strength and resources of the Prosecution.

5. The accused in ICL: Anxieties of evil

In order to analyse comprehensively the apparent lack of interest in the position of the defendant in ICL, it is first necessary to reflect on the anxiety which can be associated with such individuals. The accused can be met with apprehension in response to their perceived dangerousness, as well as the more practical difficulties which they present for the trial process. Perhaps the most pronounced anxiety arises by virtue of the recognition that rather than being simply 'evil' or 'monstrous', the alleged actions of the accused represent the common capability of all mankind to act selfishly and

⁶⁰ TOLBERT, D. (2008-9) at 1288

⁶¹ FEDOROVA, M. (2012) p14

destructively.⁶² The experiments carried out by Milgram in the 1960s, which examined the obedience of superior orders, as well as those later conducted by Zimbardo, demonstrate the degradation of the participants' values and norms as a result of the situations in which they were placed.⁶³ It is easier to avoid questioning our innate propensity for evil by dehumanising the accused; simply labelling him as 'evil' allows difficult questions about human nature and the availability of rights protections to be evaded. Cooper raises the interesting concept of '*moral luck*', whereby certain behaviour is condemned in spite of the fact that if '*dealt a different hand in life*', then '*we too would likely have engaged*' in such behaviour.⁶⁴

Further anxiety can arise in the context of the trial setting, such as the fear of providing defendants with a 'soapbox'. Allowing the accused to speak openly at trial could supply them with a platform from which they could disseminate their views, or else provide justifications for the crimes committed, which could be perceived as being reprehensible.⁶⁵ As Groulx explains, a commitment to fair trial procedures '*weakens*' in practice.⁶⁶ However, a '*true commitment to fair trial procedure means giving the accused the opportunity to present a full, fair and vigorous defense*', which necessitates '*carefully listening to the story of the accused, however deeply the majority of people may disagree with it*'.⁶⁷ By allowing the accused to speak openly, those listening are provided with the opportunity to make their own assessment. If the views presented are so abhorrent, they should react accordingly. Thus, the inclination to silence the accused during the trial process should be firmly rejected.⁶⁸ Koskenniemi

⁶² These issues will be examined in depth in Chapter 3 of this thesis.

⁶³ See, MILGRAM, S. (2009) '*Obedience to Authority: An Experimental View*.' New York, Harper Collins. ZIMBARDO, P.G. (2008) '*The Lucifer Effect: Understanding How Good People Turn Evil*.' New York, Random House.

⁶⁴ COOPER, D. 'Collective Responsibility, "Moral Luck" and Reconciliation.' in JOKIĆ, A. (Ed.) (2001) '*War Crimes and Collective Wrongdoing. A Reader*.' Massachusetts, Blackwell. pp. 205-215; p209

⁶⁵ See, SAFFERLING, C. (2012) '*International Criminal Procedure*.' Oxford, OUP. p78

⁶⁶ GROULX, E. (2001) at 21

⁶⁷ *Ibid.*

⁶⁸ For more on freedom of speech, see MILL, J. S. (2005) '*On Liberty*.' New York, Cosimo.

argues that '*for the trial to be legitimate, the accused must be entitled to speak*', so that he is '*able to challenge the version of truth represented by the prosecutor and relativise the guilt that is thrust upon him*'.⁶⁹

Trial verdicts can give rise to additional anxiety that the defendant will be acquitted. Wladimiroff suggests that there is a tendency for the '*world community to expect convictions, not merely fair proceedings*' - a pressure which arises from '*many sources, including the media, politicians and non-governmental organisations*'.⁷⁰ The corollary of this expectation is that acquittals can be perceived as constituting a '*failure*'.⁷¹ In this vein, the provision of a strong and effective defence could be regarded as '*risking*' a higher incidence of acquittals, to the extent that some may regard the resourcing of the Defence as a '*waste*'.⁷² Groulx argues that the '*common misconception*' that a strong Defence weakens a court is to '*misconstrue the dynamics of criminal trials and trial procedure*'.⁷³

Immense time, effort and resources have been invested into the creation and running of the modern institutions. It is an understandable aspect of human nature that, due to the pride taken in such a conscious effort to try those deemed to be the '*worst of the worst*', it is difficult to perceive acquittals as anything other than a '*failure*'. In theory, it is regarded as being better to acquit the guilty, than wrongfully convict the innocent.⁷⁴ Yet the strength of this maxim is tested most robustly in the international criminal context. In light of the serious and disturbing nature of the crimes, the interest in the truth may become diminished in favour of achieving a guilty verdict.⁷⁵ However, as

⁶⁹ KOSKENNIEMI, M. (2002) 'Between Impunity and Show Trials.' **6** *Max Planck Yearbook of United Nations Law*. 1-35 at 35

⁷⁰ WLADIMIROFF, M. (May 2002) 'Challenges for Defence Lawyers Taking Cases for an International Tribunal.' **53** *Deutscher Anwaltstag*. Available online at: http://www.wlaws.com/Challenges_for_defence_lawyers_taking_cases_before_an_international_tribunal.pdf p2

⁷¹ *Ibid.*

⁷² GROULX, E. (2010a) at 52

⁷³ GROULX, E. (2001) at 24

⁷⁴ DAMAŠKA, M. (2011) at 368

⁷⁵ See, BECCARIA, C. (1995) '*On Crimes and Punishments and Other Writings*.' CUP, Cambridge. p79

Wladimiroff argues, with an appropriately high standard of proof imposed upon the Prosecution '*in any properly conducted criminal trial*', the acquittal of '*some guilty men as well as innocent ones*' must be expected.⁷⁶ Importantly, these should not be regarded as a failure of the system. The pressure on international courts and tribunals to obtain convictions arguably '*exceeds that of their national counterparts*'.⁷⁷ Damaška emphasises that if international criminal institutions are to '*preserve their moral muscle*', they '*must maintain a degree of suspense in regard to the final outcome*'.⁷⁸ Furthermore, he argues, if the '*perception were to spread*' that these courts and tribunals '*stack the deck against the defendant, or that their proceedings are programmed to lead to convictions, their legitimacy in the eyes of their audiences would be doomed*'.⁷⁹ This is arguably a very real risk, as a degree of presumption of guilt has been observed by various academics and practitioners.⁸⁰ Wladimiroff goes as far as to suggest that, in reality, '*the presumption of innocence is effectively not worth a legal penny*', as it is '*often taken for granted, and thus only paid lip service by some*'.⁸¹

Ultimately, there is a fundamental concern as to whether the international accused '*explode the limits of the law*', which in turn '*shatters any and all legal systems*'.⁸² The breadth of the ambition in international criminal law is astounding. As Brants explains, they include:

'not only ending impunity with regard to genocide, crimes against humanity and war crimes, but also establishing and/or reinforcing the rule of law and democracy by reconciliation, conflict solution, deterrence and retribution; providing a platform for the recognition of and redress for

⁷⁶ WLADIMIROFF, M. (May 2002) p2

⁷⁷ DAMAŠKA, M. (2011) at 370

⁷⁸ *Ibid.* at 387

⁷⁹ *Ibid.*

⁸⁰ See, for example, Skilbeck's analysis of the ECCC. SKILBECK, R. (2008a) 'Defending the Khmer Rouge.' **8** *International Criminal Law Review*. 423-445 at 424

⁸¹ WLADIMIROFF, M. (2007-9) 'Defending Individuals Accused of Genocide.' **40(1)** *Case Western Reserve Journal of International Law*. 271-280 at 271

⁸² ARENDT, H. et al (1992) p54

*victims; and, through all this, contributing to collective memory and history for the sake of future generations.*⁸³

The (arguably excessive) expectations placed on international courts and tribunals risk undermining their work before a judgement can even be delivered. Damaška argues that trying international crimes is a ‘*very difficult enterprise*’, in part due to the aspiration of achieving such goals, which ‘*exceed or complicate those of national criminal law enforcement*’.⁸⁴ Arguably, the magnitude of these objectives only further heightens the impact of any perceived failures.⁸⁵ Crucially for the accused, Damaška also asserts that the ‘*pressures on fairness toward the defendant would be lessened if international criminal justice were more modest in its ambitions*’.⁸⁶ Chapter 3 will explore in further detail the extent of the effect of such anxieties on the perception and treatment of the international accused.

6. Conclusion: The ‘otherisation’ of the Defence

Across the coming chapters, this thesis will attempt to examine the formidable array of difficulties faced by the accused and his defence team in ICL. The deeply compromised position of the Defence, it will be argued, arises as a result of a profound conflict. As discussed in the previous section, a great deal of anxiety surrounds the international defendant and his trial. If this fear were to influence or determine the international response to those accused of such serious crimes, it would constitute a return to a pre-Enlightenment approach towards the individual, and his relationship with the State.⁸⁷

⁸³ BRANTS, C. (2011) ‘Guilty Landscapes. Collective Guilt and International Criminal Law.’ in BAILLIET, C. & AAS, K.M. (Eds.) ‘*Cosmopolitan Justice and its Discontents*.’ New York, Routledge. pp.53-4

⁸⁴ DAMAŠKA, M. (2011) at 365

⁸⁵ See, KOSKENNIEMI, M. (2002) at 11

⁸⁶ DAMAŠKA, M. (2011) at 377

⁸⁷ See Chapter 2.

The establishment of the ICC, in particular, constitutes a remarkable international effort towards the realisation of important '*cosmopolitan ideals and practices*',⁸⁸ including fair trial protections and guarantees. Despite these impressive developments over recent decades, it will be argued that the anxieties which surround the ICL accused could risk undermining the commitment to important principles of fairness, due process and EoA.

The conflict at the heart of ICL has greatly contributed to the 'otherisation' of the Defence, whereby it has been marginalised, forgotten and even excluded (from the NIMT, and beyond). This otherisation, it will be argued, has contributed towards the systemic hypoplasia of the Defence at the international courts and tribunals. This otherisation, and subsequent hypoplasia, must be recognised as constituting a real threat to the progress and legitimacy of the modern institutions. To fail to put into effect the fair trial protections and guarantees is to put at risk the vast international effort, and hard-won achievements, of ICL to date. The credibility and legitimacy of these institutions must be protected fiercely; the victims of the atrocities, and indeed all those who desire to deny impunity for the 'worst' crimes, deserve no less.

⁸⁸ HAYDEN, P. (2009) 'Political Evil in a Global Age: Hannah Arendt and International Theory.' Oxon, Routledge. p9.

Part I.

Theoretical Foundations: The Accused and the Defence in International Criminal Proceedings

Chapter 2.

The Defendant as an Individual Deserving of Fair Trial Protections: The Role of Fairness and Equality of Arms

*'Fairness must be seen as an uncompromising concept. A trial is either fair or unfair. It cannot be less fair or fairer.'*¹

1. Introduction

Part I of this thesis will provide a theoretical understanding of the international accused, which will attempt to demonstrate a complex tension regarding the position of the Defence. The resolve to provide fair and rights-respecting trials can be weakened by the anxiety which surrounds the international criminal trial, and thus risks undermining the commitment to important fair trial principles and guarantees.²

This Chapter will consider the defendant in ICL as a rights-bearing individual, who faces the formidable opponent of the Prosecution at trial. Due to the distinct pressures and difficulties experienced by the international courts and tribunals, conducting trials which are fair and rights-respecting to the accused is by no means an easy task. International criminal procedure encounters unique '*pitfalls*',³ which arise via the process of blending complex and divergent legal systems.⁴ The incorporation of these systems risks blending the worst features of both, which can also give rise to

¹ SAFFERLING, C. (2012) 'International Criminal Procedure.' Oxford, OUP. p383

² The latter will be examined next in Chapter 3.

³ DEFRANCIA, C. (2001) 'Due Process in International Criminal Courts: Why Procedure Matters' 87 Virginia Law Review. 1381-1439 at 1382

⁴ See, CHANEY, K.R. (1995) 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials.' 14 Dickinson Journal of International Law. 57-94

entirely unprecedented problems relating to fairness.⁵ The extent to which the ‘pitfalls’ hamper the ‘*systematically disadvantaged*’⁶ Defence in *practice* will be examined in Parts II and III of this thesis.

This Chapter will begin by examining briefly the historical background, and influence of, both inquisitorial and adversarial systems of justice. This analysis is of vital importance in assessing the position of the accused, as well as his defence team, at the modern international institutions.⁷ In connection with adversariality, the introduction and impact of defence counsel on trial proceedings will also be examined.

Section 3 will consider some of the difficulties associated with conceptualising ‘fairness’, and in particular what this means to the accused in ICL. This will focus on the importance of the role of *procedural* fairness on the ability of a court to reach verdicts which are perceived as both fair and legitimate. In addition, the relevance of the international context on standards of fairness will also be considered, in particular in relation to the standard of fairness to which ICL can, and should, be held.

Section 4 will examine the right to a fair trial as forming a ‘cluster’ of individual rights, which in turn gives rise to important minimum guarantees for the accused. However, the danger of complacency in achieving these standards will also be considered. This necessitates examining the considerable influence of the European Court of Human Rights (ECtHR), particularly upon the ICC,⁸ in relation to understandings of trial fairness. It is beyond the scope of this study to assess trial fairness at *every* stage of proceedings, yet the omission does not imply that the other stages are immaterial. For example, Safferling has explicitly questioned Schabas’

⁵ See, SKILBECK, R. (2010a) ‘Frankenstein’s Monsters: Creating a New International Procedure’ **8** *Journal of International Criminal Justice*. 451-462

⁶ CAIANIELLO, M. (2011) ‘Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models.’ **36** *North Carolina Journal of International Law and Commercial Regulation*. 287-318 at 288

⁷ See, FAIRLIE, M. (2004) ‘The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit.’ **4** *International Criminal Law Review*. 243-319 at 247

⁸ N.B. Due to the potential scale of the discussion on the topic of fair trial rights, the analysis of this area will be restricted to the permanent ICC. In a similar vein, it is not possible to engage with a detailed discussion of *every* fair trial right required to provide a fair trial.

assertion that the ICC upholds a high standard in relation to defence rights due to the lack of provisions in the Rome Statute concerning the right to physical and mental integrity of the accused, the right to privacy of data protection '*vis-à-vis prosecutorial measures*', as well as issues relating to forensic testing.⁹

Finally, section 5 will examine the principle of Equality of Arms (EoA), which it will be argued constitutes an important means of 'holding the balance' by considering the interests of both the defendant (who is faced with a formidable opponent, and deserving of fair trial protections), and the need to deny impunity for serious crimes. In order to understand the importance of the principle, its early origins will be considered, as well as the modern implications for ICL. It will be questioned whether 'equality' (in the sense of 'sameness') between the Defence and Prosecution is an appropriate or helpful analytical tool in light of their intrinsically different roles. The way in which the various international courts and tribunals have conceptualised EoA will also be examined, ultimately revealing the importance of the principle to the provision of fair trials, despite its inherently intangible nature. In essence, this Chapter is concerned with some of the theoretical foundations of the 'paper', substantive, fair trial rights, which must be properly implemented at trial if they are to translate into meaningful and tangible protections and guarantees.¹⁰

2. The influence of adversariality & inquisitoriality on ICL

Before attempting to conceptualise fairness at the international level, it is worth examining the considerable influence, and differences between, adversarial and inquisitorial systems of justice. Both have evolved extensively over time, and have

⁹ SAFFERLING, C. (2011) 'The Rights and Interests of the Defence in the Pre-Trial Phase.' 9 *Journal of International Criminal Justice*. 651-667 at 656 discussing SCHABAS, W. (2003b) '*The International Criminal Court*.' Cambridge, CUP. p107

¹⁰ The extent to which EoA is given effect in practice will be examined in Part III of this thesis.

influenced the development of the other.¹¹ Arguably, the terms ‘inquisitoriality’ and ‘adversariality’ are most helpful in reference to different legal traditions, rather than as a means of classification for the purpose of analysing the system in operation at the modern institutions, which ought to be acknowledged as being truly unique in nature.¹² The international courts and tribunals have been heavily influenced by both systems of justice - to the exclusion of others.¹³

As Zappalà observes, *‘it is generally recognised that the adversarial system is more suitable when it comes to offering protection to the rights of the accused.’*¹⁴ The rationale behind this perspective will be examined in due course. Whilst adversariality generally can be said to be more focused on the *‘protection of individual liberties’*,¹⁵ the following historical examination of inquisitoriality is not intended to suggest its inferiority with respect to the accused, but rather to warn of the inherent dangers associated with its methodology.¹⁶ As Vogler explains, *‘inquisitoriality, expressing professionalism, rigorous truth finding and deductive reasoning, is highly seductive’*.¹⁷ Although such precepts must be particularly ‘seductive’ to the international institutions, the system’s brutal history should serve as good reason to proceed with caution. As will be explored and argued throughout this thesis, the real and ever-present danger for the international institutions is the haphazard *mixing* of features from different systems, without proper consideration as to their application.¹⁸ It has been observed that the blending of systems in this manner has particular ramifications for the accused,

¹¹ SAFFERLING, C.J.M. (2001) *‘Towards an International Criminal Procedure.’* Oxford, OUP. p17

¹² See, FEDOROVA, M. (2012) *‘The Principle of Equality of Arms in International Criminal Proceedings.’* Netherlands, Intersentia. p93

¹³ Such as Islamic justice. See VOGLER, R. (2005a) *‘A World View of Criminal Justice.’* England, Ashgate. p278

¹⁴ ZAPPALÀ, S. (2003) *‘Human Rights in International Criminal Proceedings.’* Oxford, OUP. p16

¹⁵ *Ibid.* p249

¹⁶ See VOGLER, R. (2005a) p21

¹⁷ *Ibid.*

¹⁸ See, SKILBECK, R. (2010a)

whereby the '*inherent procedural safeguards*'¹⁹ of a particular system no longer provide sufficient protection. The most troublesome aspects of international criminal procedure's unique features (of greatest concern to the accused) will be examined in particular detail in Part III of this thesis.

A. Inquisitoriality

The inquisitorial system of justice has been the dominant model throughout the world over the last eight hundred years, and continues to have a powerful influence.²⁰ Vogler argues that there are four essential features of inquisitoriality.²¹ First, there must be an hierarchical system of authority. Secondly, the presence of a continuous bureaucratic process, based on written communication, is required. Thirdly, there should be forms of '*intolerable pressure against defendants in order to achieve co-operation. All early forms of inquisitorial method employed physical torture extensively*'.²² Finally, the fundamental ideology is one of '*rational deduction and forensic inquiry*'.²³ The broad ramifications of the inquisitorial system for the accused is that the active participation of the defence is '*neither necessary nor expected*', '*especially in the pre-trial process*'.²⁴ However, this is reliant upon the theoretical '*impartiality and objectivity of the investigative authorities*'.²⁵

During the Middle Ages in continental Europe, the accused was typically viewed as an object of investigation, rather than as an individual subject of proceedings, and

¹⁹ FAIRLIE, M. (2003-4) 'Due Process Erosion: The Diminution of Live Testimony at the ICTY.'

34 Californian Western International Law Journal. 47-84 at 82

²⁰ VOGLER, R. (2005a) p19

²¹ *Ibid.* pp.19-20

²² *Ibid.* p19

²³ *Ibid.* p20

²⁴ FEDOROVA, M. (2012) p100

²⁵ *Ibid.*

as such was not thought to be in 'need' of representation.²⁶ Many of the proceedings were highly secretive at this time.²⁷ During the 17th century in France, the inquisitorial methodology underwent significant changes, '*most powerfully expressed*' in the 'Code of Louis' of 1670, based on '*rigorous scientific enquiry and experimentation*'.²⁸ The Code was widely regarded as an '*outstanding example of progressive and effective criminal justice*', which was perceived to be less barbaric than its counterparts in Germany and Italy.²⁹ Despite some evidential restrictions, the threat of torture loomed over the accused, regardless of the decline in its usage.³⁰ The Napoleonic '*Code d'Instruction Criminelle*' (Cd'IC) of 1808 was to have the most profound influence on criminal justice reform, not just in France, but across a substantial portion of the world, its main architecture serving as the predominant model.³¹ Vogler argues that the Cd'IC is a '*deeply conflicted system*', which is based on a '*hybridisation*' with eighteenth century English adversariality.³² This resultant hybrid, he argues, blended the tradition of '*terror and rigorous scientific enquiry*', with '*sufficient elements of due process and human rights, to make the authoritarianism of the Code Louis ideologically acceptable to bourgeois liberals*'.³³ In essence, the procedural changes were largely cosmetic in nature, with the accused nonetheless left subjected to '*torments of fear, doubt, ignorance and the potential of absolute physical power*', and since the procedure ultimately continued to rely on the use of '*unbearable pressure*', it was in effect a '*much more effective weapon of repression than the original*'.³⁴ The lack of real reform for the defence is perhaps best demonstrated by the courtroom architecture, which located the

²⁶ TUINSTRA, J.T. (2009) '*Defence Counsel in International Criminal Law*.' The Hague, TMC Asser Press. p18

²⁷ *Ibid.*

²⁸ VOGLER, R. (2005a) p21

²⁹ *Ibid.* p39

³⁰ *Ibid.* p42

³¹ *Ibid.* p56; 21

³² VOGLER, R. (2005b) '*Reform Trends in Criminal Justice: Spain, France and England & Wales*.' 4 *Washington University Global Studies Law Review*. 631-637 at 632

³³ VOGLER, R. (2005a) p21

³⁴ *Ibid.* p42; 50

prosecutor alongside the judges, '*whereas the lowly defence lawyers*' were separated below in the body of the courtroom.³⁵

Towards the end of the nineteenth century, a '*violent intellectual revolt against the supposed 'arbitrary' nature of adversarial due process,*' arose, which was argued to constitute a direct threat to 'social defence'.³⁶ Furthermore, due process norms were seen as '*irrational and obstructive*' to the pursuit of rigorous truth-finding.³⁷ This 'attack' on adversariality, first articulated by Ferri and Garofalo, had a large impact on attitudes towards the criminal process, and inquisitoriality's revival.³⁸ As Vogler observes, by 1945, adversariality had become confined to current and former territories of the British Empire.³⁹ Yet, throughout the post-WWII era, there was a distinct shift towards adversariality, '*sweeping across Western Europe, Latin America, the former Soviet Union, and into the international tribunals*'.⁴⁰ Therefore, adversariality is also worthy of closer examination regarding its historical background and influence, especially given its impact upon ICJ.

B. Adversariality

Vogler argues that adversariality⁴¹ is achieved through three essential procedural mechanisms.⁴² First, the State must be restrained from abusing its power to distort the process. The State is undoubtedly in a position of superior power compared with its citizens, and so requires restrictions, for example those which are designed to ensure

³⁵ *Ibid.* p55

³⁶ *Ibid.* p60

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* p64

⁴⁰ VOGLER, R. (2005b) at 631

⁴¹ 'Adversarial' being distinct from 'accusatorial' - the two terms are not interchangeable as adversariality was a distinct procedure which developed throughout 18th Century England. See, VOGLER, R. (2005a) p129

⁴² *Ibid.* p130

that trials are public and impartial.⁴³ Secondly, the State must be prevented from using its greater resources to its unfair advantage. This primarily refers to the principles encapsulated by the Principle of EoA, but also relates to issues such as the presumption of innocence and the use of rules concerning the exclusion of evidence. Finally, the defendant must be treated as an active subject of the trial.

The observation that adversariality is '*generally more focused on the protection of individual liberties than on the interests of society*',⁴⁴ arguably arises to a great extent from the procedure's historical genesis. Having almost no connection to the *accusatorial* tradition, adversariality formed a '*radical new procedure*', which developed in England during the 18th century.⁴⁵ Prior to this era, the principle that the accused should not be aided by representation at trial prevailed.⁴⁶ The '*pre-modern criminal process*' was arguably '*as rights-free, authoritarian and nearly as brutal as its continental counterparts*', whereby the accused was treated as a passive object of the trial.⁴⁷ Greatly influenced by Enlightenment thinking, in particular the work of John Locke, and the 'due process revolution' of the 18th century, the development of adversariality between 1730 and 1770 was to have profound implications, not only for the individual accused, but also for the wider relationship between the individual and the State.⁴⁸ Important protective rules for the accused arose from the adversarial system, including the presumption of innocence, the right to silence, and the right to cross-examination.⁴⁹

Vogler argues that the development of the rights-based trial process coincided with the changing ideologies of the industrial revolution in England.⁵⁰ Despite these

⁴³ *Ibid.*

⁴⁴ ZAPPALÀ, S. (2003) p249

⁴⁵ VOGLER, R. (2005a) p129

⁴⁶ LANGBEIN, J.H. (1999) 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors.' **58(2) Cambridge Law Journal**. 314-365 at 314

⁴⁷ VOGLER, R. (2005a) p132

⁴⁸ *Ibid.* p20; pp.129-31

⁴⁹ *Ibid.* p129; 20

⁵⁰ *Ibid.* p130

dramatic developments, by the end of the 19th century adversariality had failed to 'achieve the global importance which its early development seemed to promise',⁵¹ in light of the growing popularity of inquisitoriality's '*rigorous scientific enquiry*'.⁵² However, with the '*slide into European totalitarianism*' after 1914, the attraction of the 'scientific' approach '*began to diminish sharply in the common law world*'.⁵³ Importantly, the '*new libertarian version*' of adversariality, as developed in both the US and England in the mid-to-late twentieth century, was to achieve '*international prominence*'.⁵⁴

The next section will examine what is arguably adversariality's greatest contribution to the development of criminal justice, particularly with respect to the accused - the assistance of defence counsel.

C. The right to legal assistance

Legal representation at the modern institutions is an indispensable aspect of the protection of defence rights due to the complexity and duration of international trials.⁵⁵ The historical development of the role of defence counsel has impacted profoundly on the adversarial system, and the rights of the accused. As Langbein observes, for centuries it was thought that an individual accused of a '*serious crime should not be represented by counsel*'.⁵⁶ During the Middle Ages in continental Europe, the accused was expected to speak for himself, rather than allowing him the opportunity to '*distort the truth*' via representation.⁵⁷ As Tuinstra explains, since the accused was perceived as an 'object' of investigation, there was '*no need for a separate person to defend the*

⁵¹ *Ibid.* p147

⁵² *Ibid.* p21

⁵³ *Ibid.* p151

⁵⁴ *Ibid.* p151

⁵⁵ ZAPPALÀ, S. (2003) p59

⁵⁶ LANGBEIN, J.H. (1999) at 314

⁵⁷ TUINSTRA, J.T. (2009) pp.17-8

accused's rights'.⁵⁸ The French Enlightenment was influential in promoting the right to legal assistance for the accused in European, civil law systems.⁵⁹ Other European countries were also inspired and influenced by Anglo-American procedure during the late nineteenth century, and so '*granted the accused and his lawyer more rights, especially during the investigation stage*'.⁶⁰

The role of defence counsel in English criminal procedure increased gradually over more than one hundred and forty years.⁶¹ The 18th century saw the '*new and aggressive trial lawyers*', such as William Garrow, greatly influence the system.⁶² Judges slowly allowed defendants to '*invoke the aid of private lawyers for protection at trial*', which became a '*milestone on the road towards the adversary system of lawyer-dominated trial*'.⁶³ Defence counsel began to articulate the, now familiar, '*language of rights*' on behalf of their clients.⁶⁴ Their role produced numerous changes and reforms, such as a '*radical reorganisation of the procedure*', by imposing a '*clear structure on the hitherto formless trial*'.⁶⁵ In addition, defence counsel also contributed to the creation of important fair trial rights and trial features, such as the doctrine of the presumption of innocence, which Vogler argues was '*entirely a creation of defence counsel, clearly articulated by William Garrow in 1791, and well established by 1824*'.⁶⁶

The influence of defence counsel at the Nuremberg International Military Tribunal (NIMT) will be examined in Chapter 4. However, it is worth noting here that despite the '*rather scarce provisions protecting the rights of the accused*' at the NIMT, Zappalà notes its considerable impact on the provision of defence rights, which had '*not yet received international proclamation, and were not yet as detailed as they would*

⁵⁸ *Ibid.* p18

⁵⁹ *Ibid.* p19

⁶⁰ *Ibid.* p19. See also, VOGLER, R. (2005a) p160

⁶¹ LANGBEIN, J.H. (1999) at 317

⁶² VOGLER, R. (2005a) p140

⁶³ LANGBEIN, J.H. (1999) at 364

⁶⁴ VOGLER, R. (2005a) p140

⁶⁵ *Ibid.* p137

⁶⁶ *Ibid.* pp.138-9

be a few decades later'.⁶⁷ The right to legal assistance is clearly articulated in Human Rights (HR) instruments,⁶⁸ as well as the Statutes and 'rules of procedure and evidence' at the modern courts and tribunals.⁶⁹ For example, Article 6(3)a of the ECHR states that the accused can defend himself in person, '*or through legal assistance of his own choosing*'. The right to self-representation is crucial for the international accused, not least because numerous high profile defendants have elected to exercise this right, which is an incredibly difficult task for a layperson.⁷⁰ In the alternative, defendants are entitled to legal assistance '*when the interests of justice so require*'.⁷¹ The ECtHR has ruled that '*everyone charged with a criminal offence has the right to be defended by counsel*', and that this right should be '*practical and effective, and not merely theoretical*'.⁷² Furthermore, '*mere nomination does not ensure effective assistance*'.⁷³

Defence counsel in international criminal proceedings are the ultimate '*watchdogs*'⁷⁴ of fair procedure, who must attempt to ensure that the rights of their client are duly respected.⁷⁵ As Safferling recognises, defence counsel hold a '*somewhat ambiguous position*', as whilst representing the accused, counsel must also

⁶⁷ ZAPPALÀ, S. (2003) pp.21-2

⁶⁸ Such as, Article 14(3)d ICCPR; Article 7(1)c African Charter on Human and Peoples' Rights.

⁶⁹ Article 21(4)b ICTY Statute & Rule 42(a)i ICTY RPE; Article 17(4)d SCSL Statute; Article 55(2)c ICC Rome Statute

⁷⁰ Self-representation will not be included in this study; there is a good deal of high quality literature on the subject, some of which has been authored by the accused's *amicus curiae*, or 'standby', counsel. See, TUINSTRA, J.T. (2006) 'Assisting an Accused to Represent Himself: Appointment of *Amici Curiae* as the Most Appropriate Option.' 4 Journal of International Criminal Justice. 47-63; BOAS, G. (2011) 'Self-representation before the ICTY.' 9 Journal of International Criminal Justice. 53-83; CAMIER, N.L. (2010) 'Controlling the Wrath of Self-Representation: The ICTY's Crucial Trial of Radovan Karadžić.' 44 Valparaíso University Law Review. 957-1013; JORGENSEN, N.H.B.J. (2006) 'The Problem of Self-Representation at International Criminal Tribunals.' 4 Journal of International Criminal Justice. 64-77; NINA, H.B.J. (2006) 'The Problem of Self-Representation at International Criminal Tribunals.' 4 Journal of International Criminal Justice. 64-77

⁷¹ As per Article 6(3)a ECHR. This wording is mirrored in Article 55(2)c of the ICC Rome Statute.

⁷² *Lala v. The Netherlands*, ECHR Judgement of 22 September 1994, Application no.14861/89 para 34

⁷³ *Artico v. Italy*, ECHR Judgement of 13 May 1980, Application no. 6694/74 para 33

⁷⁴ GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' 25 (Oct) Champion. 20-27 at 22

⁷⁵ TUINSTRA, J. T. (2010) 'Defending the Defenders. The Role of Defence in International Criminal Trials.' 8 Journal of International Criminal Justice. 463-486 at 474

act as a 'servant of justice' to the court.⁷⁶ Wladimiroff, having acted as *Milošević's amici curiae*, can attest that defence work can be '*extremely difficult*'.⁷⁷ He also argues that it is an '*honorable profession, focused on the fair administration of justice*'.⁷⁸ Ultimately, the provision of quality representation at the international criminal institutions forms an invaluable part of the accused's right to a fair trial, and in upholding EoA.⁷⁹

3. Conceptualising fairness

Given that the word 'fair' is seemingly so ubiquitous, particularly in modern international law discourse, it is interesting that the word itself appears to have no direct equivalent in other languages, and is thus '*thoroughly untranslatable*'.⁸⁰ The concept of fairness is often associated with developments during the thirteenth century, and the Magna Carta.⁸¹ The Enlightenment period during the seventeenth and eighteenth centuries gave rise to more philosophical connotations being attributed to the word 'fair', which has since become deeply ingrained in modern '*consciousness*'.⁸²

Robinson asserts that to '*be fair is to be just and equitable*'.⁸³ Broadly speaking, the provision of a trial which is 'fair' for the accused could be described as one which

⁷⁶ SAFFERLING, C. (2012) p186

⁷⁷ WLADIMIROFF, M. (1999) 'The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda.' **12** *Leiden Journal of International Law*. 957-968 at 959

⁷⁸ WLADIMIROFF, M. (2007-9) 'Defending Individuals Accused of Genocide.' **40(1)** *Case Western Reserve Journal of International Law*. 271-280

⁷⁹ For a detailed and highly competent analysis of the requirements, ability and experience of defence counsel in ICL, see: TUINSTRA, J.T. (2009) pp.40-52

⁸⁰ WIERZBICKA, A. (2006) '*English: Meaning and Culture*.' Oxford, OUP. p141

⁸¹ DAMAŠKA, M. (2011) 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals.' **36(2)** *North Carolina Journal of International Law and Commercial Regulation*. 365-388 at 366. The Magna Carta (1215) states: '*No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed--nor will we go upon or send upon him--save by the lawful judgment of his peers or by the law of the land.*' Accessible via: <http://www.britannia.com/history/docs/magna2.html> [Last accessed 6.9.2014]

⁸² WIERZBICKA, A. (2006) p152. Perhaps most notably, Article 10 of the 'Universal Declaration on Human Rights' (1948) utilised the language of '*fair and public hearing*'.

⁸³ ROBINSON, P. (2009) 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.' **3** *Berkeley Journal of International Law Publicist*. 1-11 at 5. N.B. the tendency for 'fair' and 'just' to be used interchangeably. See, Wierzbicka (2006) p165

provides them with a reasonable opportunity to present their case, which in turn requires standardised procedural rules. As Judge Shahabuddeen expressed in his dissenting opinion in *Milošević*, '*the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him*'.⁸⁴

A. The importance of procedural fairness

Procedural fairness is important to both the accused and wider society, as Safferling argues that criminal procedure is '*the most repressive form of state intervention into the private sphere of citizens*'.⁸⁵ Bassiouni notes that, as a result, the administration of criminal justice is a battlefield '*in which democracy and human rights are tested*'.⁸⁶ There can be said to be a tangible connection between respect for collective human rights, and the due process protections afforded to defendants.⁸⁷ May and Wierda argue that procedural fairness must be the '*paramount consideration*', as to compromise the fairness of international criminal trials '*does more than damage the integrity of the proceedings; it is contrary to the rule of law*'.⁸⁸

Logically, a fair decision cannot be obtained without utilising a process which is, both structurally and operationally, fair. A fair procedure, in essence, gives life to the substantive structure of a trial, providing a standardised framework with minimum fair trial standards and guarantees. In turn, it also provides a degree of legal certainty and

⁸⁴ *Prosecutor v. Slobodan Milošević*, 'Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the form of Written Statements.' (31 October 2003) Doc. No. IT-02-54-AR73.4

⁸⁵ *Ibid.* p60

⁸⁶ BASSIOUNI, M.C. (1992-3) 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions.' **3** *Duke Journal of Comparative & International Law*. 235-297 at 236

⁸⁷ *Ibid.*

⁸⁸ MAY, R. & WIERDA, M. (2002) '*International Criminal Evidence*.' New York, Transnational Publishers. p259

uniformity as to the expected process and treatment of defendants.⁸⁹ Whilst upholding procedural fairness is widely recognised as being a crucial objective in the process of reaching verdicts which are '*perceived as fair and impartial*',⁹⁰ it must be recognised that it cannot guarantee the overall fairness of a trial.⁹¹ Whilst fair trial procedure contributes to the accuracy of the fact finding process,⁹² there is no guarantee of a fair outcome,⁹³ as an '*arbitrary or evidently unjustified result*' could still be reached.⁹⁴ As the judiciary at the modern institutions acts as the sole trier of fact, there is arguably a distinct obligation to oversee trial fairness in a scrupulous manner.⁹⁵ Judges must be assisted by other actors in this endeavour, including defence counsel, who must serve as '*fair trial watchdogs, acting both for their clients and for the system*'.⁹⁶

B. To what standards can, and should, ICL be held?

Fairness is, in linguistic terms, an 'absolute modifier'. Thus, as noted by Safferling, fairness is '*an uncompromising concept. A trial is either fair or unfair. It cannot be less fair, or fairer*'.⁹⁷ A suitable boundary must then be drawn to demarcate impermissible unfairness from the minimum standards which act as a safeguard. This divide must balance competing pressures, such as the financial and temporal costs of attempting to

⁸⁹ See, CROQUET, N.A.J. (2011) 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' **11(1)** *Human Rights Law Review*. 91-131 at 92

⁹⁰ NEGRI, S. (2005) 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure.' **5** *International Criminal Law Review*. 513-571 at 514

⁹¹ '*I believe that the right to a fair hearing/trial is not confined to procedural safeguards but extends also to the judicial determination itself of the case.*' See, *Göktan v. France*, ECtHR Judgement of 2 July 2002, Application no. 33402/96 'Partly dissenting opinion of Judge Loucaides', pp.14-15

⁹² SOLUM, L.B. (2004) 'Procedural Justice' **78** *Southern California Law Review*. 181-322 at 185

⁹³ As would be the case for 'pure' procedural justice - see, FEDOROVA, M. (2012) p85

⁹⁴ *Göktan v. France*, *supra* pp.14-15

⁹⁵ See Chapter 7 for the role of the judiciary.

⁹⁶ GROULX, E. (2001) at 22

⁹⁷ SAFFERLING, C. (2012) p383

uphold various standards. Rawls identifies the criminal trial as an example of imperfect procedural justice.⁹⁸ Therefore, as Solum argues, '*procedural perfection is unattainable*', and attempting to devise such a system would be '*unjustifiably costly*', and could not be justified as a reasonable use of resources.⁹⁹

International criminal trials are perpetually faced with complex difficulties concerning issues such as inadequate financing; lack of State co-operation; investigational difficulties; trouble locating witnesses - to identify just a few. In light of these numerous obstacles, it must be asked, to what standard of fairness should ICJ be held? Cogan argues that this is not straightforward given the *sui generis* nature of the institutions, which do not replicate a single national legal system.¹⁰⁰ The conceptualisation of fairness with respect to the accused at the international level cannot be understood in a vacuum, removed from the context of ICL.¹⁰¹ As Damaška explains, the complexity of the crimes, the multiplicity of objectives, and the innate weaknesses of the courts mean that the criteria which is used to evaluate fairness '*should thus be crafted with an eye to the [...] peculiar difficulties they face*'.¹⁰² The danger with this approach is that the particular challenges brought about by the international context could be used as justification for diminishing the fair trial rights of the accused. Fedorova and Sluiter argue that the recognition of the unique nature and context of international trials has '*regularly resulted in reduced protection*', rather than a '*discernible increase in protection*'.¹⁰³ Damaška contends that, nevertheless, there should remain an '*elusive core minimum, or kernel*'.¹⁰⁴ To compromise these core

⁹⁸ RAWLS, J. (1999) '*A Theory of Justice*.' USA, Harvard University Press. pp.74-5

⁹⁹ SOLUM, L.B. (2004) at 320; 185; 247

¹⁰⁰ COGAN, J.K. (2002) 'International Criminal Courts and Fair Trials: Difficulties and Prospects.' **27(1)** *Yale Journal of International Law*. 111-140 at 116

¹⁰¹ DAMAŠKA, M. (2011) at 387

¹⁰² DAMAŠKA, M. (2012) 'Reflections on Fairness in International Criminal Justice.' **10** *Journal of International Criminal Justice*. 612-620 at 614

¹⁰³ FEDOROVA, M. & SLUITER, G. (2009) 'Human Rights as Minimum Standards in International Criminal Proceedings.' **3(1)** *Human Rights & International Legal Discourse*. 9-56 at 56

¹⁰⁴ DAMAŠKA, M. (2011) at 387

standards, he argues, would be to jeopardise *'the hard-won achievements of civilization'*, as the *'reputation of international criminal justice depends on respecting this kernel and leaving it intact'*.¹⁰⁵ Others are less 'compromising', instead believing in the importance of standards of fairness being the same in a domestic setting as in an international criminal court.¹⁰⁶ Despite the important role of a rights-respecting procedure in achieving fair trials and the rendering of reliable decisions, practical considerations are necessary in the international context, and must be carefully considered when engaging in the discourse of procedural fairness. The way in which the modern institutions have interpreted fairness will be examined next.

4. The Right to a Fair Trial

*'However dreadful a crime may be, the person accused of committing it has certain rights, including the right to a fair trial.'*¹⁰⁷

Fair trials serve multiple actors' interests in the international arena, as those which are perceived to be fair can help to bolster the legitimacy of the international institutions themselves.¹⁰⁸ Fairness is also of crucial importance to the international criminal defendant, particularly in light of the disparate nature of power and resources in comparison to the institution.¹⁰⁹ Given the serious and complex nature of the crimes with which they stand accused, the provision of a fair trial becomes both increasingly important and, arguably more challenging to achieve. Undertaking a comprehensive

¹⁰⁵ *Ibid.*

¹⁰⁶ ROBINSON, P. (2009) at 9

¹⁰⁷ *T v. The United Kingdom*, ECtHR Judgement (16 December 1999) Application No. 24724/94 per Lord Reed (Concurring Opinion).

¹⁰⁸ TUINSTRA, J.T. (2009) p8

¹⁰⁹ See, ZAPPALÀ, S. (2010) 'The Rights of Victims v. The Rights of the Accused.' **8** *Journal of International Criminal Justice*. 137-164 at 149

analysis of fairness at trial involves an examination of institution-wide issues, in order to reveal whether it can be said to be operating according to the rule of law.¹¹⁰

A. Fair trial as a 'cluster' of individual rights

The difficulties associated with the conceptualisation of fair trial rights arises largely from the '*mixed character*' of fairness.¹¹¹ Croquet contends that defence rights represent a '*subcategory of fair trial rights, which also include institutional guarantees, such as the publicity and the expeditiousness of the trial proceedings, as well as the impartiality and independence of the court*'.¹¹² The concept of a 'fair trial' can arguably be most productively analysed through the recognition that it constitutes a 'cluster' of rights, which, in order to provide a fair trial, must be considered collectively. Safferling perhaps best encapsulates this by referring to the concept as a '*kaleidoscope of rights*' which includes '*a whole range of different rights and obligations*'.¹¹³ A thorough examination of each is a considerable task.¹¹⁴ As Warbrick explains, the right is so general that giving '*detailed, practical life to it requires that a large number of precise matters be resolved*'.¹¹⁵ Safferling attempts to break down the concept of procedural fairness into three concepts: the '*institutional guarantees*' including the independence and impartiality of the court; the '*moral principles*', such as EoA and the presumption of

¹¹⁰ For example, see Chapter 5 for a discussion on the importance of institutional structure.

¹¹¹ CROQUET, N.A.J. (2011) at 128

¹¹² *Ibid.* at 92

¹¹³ SAFFERLING, C.J.M. (2001) p30

¹¹⁴ Fair trial rights include (non-exhaustively), the right: for an accused to be present at trial; to counsel of own choosing or to self-representation; to be informed of the charges (and for trial) without undue delay; to access to adequate time and facilities; to examine witness; to have the assistance of an interpreter; to appeal; to be presumed innocent. In terms of the protections provided for in the Rome Statute of the ICC, these rights are comprehensively reflected. For example, the right: to be present at one's hearing under Articles 63(1) and 67(1)(d); of silence and not to self-incriminate under Article 67(1)(g); to legal assistance and to legal aid at the pre-trial stage under Article 55(2)(c).

¹¹⁵ WARBRICK, C. (1998) 'International Criminal Courts and Fair Trial.' **3(1)** Journal of Armed Conflict Law. 45-64 at 61

innocence; the narrower, more general, rights, such as the right to counsel.¹¹⁶ Together, these can be argued to contribute to procedural fairness, yet Safferling also warns that fairness, as a somewhat vague concept, '*must be seen as a dynamic principle, which goes beyond these separate rights*'.¹¹⁷ The Rome Statute of the ICC, in terms of the rights of the accused articulated therein, can be said to be highly '*protective*'.¹¹⁸ Article 64(2) contains a general commitment to the '*fair and expeditious*' conduct of proceedings, '*with full respect for the rights of the accused*'. Many of the more specific defence rights are set out in Article 67, which includes the right to a fair, impartial and public hearing, which also sets out the '*minimum guarantees*'.¹¹⁹

B. The danger associated with minimum guarantees

In the search for the appropriate standard to which international criminal justice should be held it can be argued that, with respect to ideas of fairness and protection of the accused's rights, there has emerged a trend towards upholding the lowest common denominator.¹²⁰ This can be seen as a natural consequence of a process which attempts to consolidate varying standards in an international context. The overarching

¹¹⁶ SAFFERLING, C. (2012) p61

¹¹⁷ *Ibid.* p383

¹¹⁸ BUCHET, A. 'Effectiveness and Independence in the Implementation of the Rights of the Defence before the ICC' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. p71

¹¹⁹ Article 67(1) Rome Statute of the ICC.

The 'minimum guarantees' include, for example, a) [The right] to be informed promptly and in detail of the nature, cause and content of the charge.. b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence. c) To be tried without undue delay.

N.B. The right to be presumed innocent is articulated separately under Article 66. Article 67(1)i also states that the accused is '*not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal*'.

¹²⁰ ARONOFSKY, D. (2005) 'International War Crimes & Other Criminal Courts: Ten Recommendations for Where We go From Here and How to Get There – Looking to a Permanent International Criminal Tribunal.' **34** Denver Journal of International Law and Policy. 17-32 at 23

concern is that mixing different legal systems and traditions can result in the '*worst of both worlds*'.¹²¹ Mégret argues that when mixing different systems, the most 'protective' rule concerning the protection of rights and trial fairness should prevail.¹²²

Whilst minimum guarantees play an important role in marking the '*permissible limitation of human rights and an impermissible intrusion upon them*',¹²³ care should nevertheless be taken to avoid a 'race to the bottom', whereby only the minimum standards are complied with. The presence of minimum guarantees should ideally not result in a lack of ambition to strive *beyond* their provision to, in turn, strengthen fair trial provisions. Furthermore, additional guarantees may be required in order to ensure fairness at trial. Croquet argues that the ICC has recognised this, and has correspondingly assigned '*an open-ended scope to the right to a fair trial*', which is not limited to the minimum guarantees.¹²⁴ The Court in *Lubanga* noted the ability of the Chamber to exceed the guarantees as stated in Article 67 of the Statute, by referring to the article's 'chapeau'.¹²⁵

C. Understandings of fairness at the ICC: The influence of the ECtHR

The right to a fair trial has been afforded the status of a fundamental right under many of the international instruments on HR.¹²⁶ The international criminal courts and tribunals

¹²¹ MÉGRET, F. (2009) 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure.' **14** *UCLA Journal of International Law and Foreign Affairs*. 37-76 at 50

¹²² *Ibid.*

¹²³ FEDOROVA, M. (2012) pp.29-30

¹²⁴ CROQUET, N.A.J. (2011) at 100

¹²⁵ See: *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute' (19 May 2006) Doc. No. ICC-01/04-01/06-108 at para 37 (esp. fn 25).

The chapeau of Article 67 is phrased: '*and to the following minimum guarantees, in full equality*' (emphasis added), suggesting that the protections can exceed the minimums.

¹²⁶ See, Article 14 International Covenant on Civil and Political Rights (ICCPR); Article 10 Universal Declaration of HR (UDeCHR); Article 6 European Convention on HR (ECHR); Article 8 American Convention on HR (ACHR); Article 7 African Charter on Human and Peoples' Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

have likewise reflected this through their statutes, which are also complemented by the provisions in their rules on procedure and evidence.¹²⁷ The ICC has stated unequivocally that the right to a fair trial is ‘*without doubt, a fundamental right*’.¹²⁸ Despite this resolute approach to the existence and importance of the right to a fair trial, difficulties soon arise when attempting to conceptualise both what it entails, as well as how to ensure its practical translation into tangible and functioning guarantees and protections at the international level. The ICC appears to have frequently drawn on the decisions of the ECtHR, which has often been justified on the grounds of Article 21(3) of the Rome Statute, which states that its application and interpretation ‘*must be consistent with internationally recognized human rights*’. Whilst at times ICC judgements have explicitly referred to the Article’s obligation, there have similarly been instances in which ECtHR decisions have been applied without any justification.¹²⁹ As Croquet explains, the decisions of the ECtHR are a ‘*particularly attractive source of inspiration*’ for the ICC, in light of the institutions’ shared objective of compromise between different and varied legal systems.¹³⁰ In terms of defining the scope of defence rights, he argues that the ICC has significantly deferred to, and hence largely ‘*mirrors*’, the ECtHR.¹³¹ The statutes of the *ad hoc* Tribunals did not specify external sources of international law.¹³² As Fedorova observes, the ICTY in particular began

¹²⁷ Article 21 ICTY Statute; Article 20 ICTR Statute; Article 17 SCSL Statute; Article 33 on the Law on the Establishment of Extraordinary Chambers (ECCC); Article 16 STSL Statute; Article 67(1) Rome Statute of the ICC.

¹²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’ (13 June 2008) Doc. No. ICC-01/04-01/06-1401

¹²⁹ See, CROQUET, N.A.J. (2011) at 108-9

¹³⁰ *Ibid.* at 124

¹³¹ *Ibid.* at 122

¹³² *Ibid.* at 97

with a '*somewhat dismissive approach*' to the ECtHR in *Tadić*,¹³³ before increasingly embracing the Courts jurisprudence.¹³⁴ In a strict legalistic sense, the international courts and tribunals are not bound by HR conventions, or their corresponding fair trial standards, as they lack the status of a State party.¹³⁵

In terms of defining procedural 'fairness', Croquet argues that both the ICC and ECtHR have experienced difficulties in presenting a precise definition, '*instead contenting themselves with a reference to a broad standard, and incrementally deriving new procedural guarantees from the abstract notion of 'fairness''*'.¹³⁶ By refraining from fixing the definition of procedural fairness, its scope is therefore left open to interpretation.¹³⁷ This flexibility is accompanied by the very real danger that without a clear definition, the right to a fair trial could be left exposed to the discretion of decision makers.¹³⁸ This could result in an arbitrary and unequal application, thereby undermining the rule of law.

The ECtHR has nonetheless articulated broad principles concerning trial fairness. It has held that Article 6 of the Convention guarantees '*as a general principle*' that a person be '*entitled to be present and participate effectively in the hearing concerning the determination of criminal charges against him*'.¹³⁹ This includes the opportunity '*to have knowledge of and comment on all evidence adduced or observations filed*', '*with a view to influencing the court's decision*'.¹⁴⁰ The Court has

¹³³ Stating: '*In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.*' *Prosecutor v. Tadić*, 'Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses' (10 August 1995) Case No. IT-94-1-A at 27

¹³⁴ FEDOROVA, M. (2012) p28

¹³⁵ *Ibid.* p25

¹³⁶ CROQUET, N.A.J. (2011) at 99

¹³⁷ *Ibid.* at 129

¹³⁸ Which, as Schomberg argues, is at times arbitrary. See, SCHOMBERG, W. (2009) 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights.' **8(1) Northwestern University Journal of International Human Rights**. 1-29 at 1

¹³⁹ *Zhuk v. Ukraine*, ECtHR Judgement of 21 October 2010, Application no. 45783/05 para 26

¹⁴⁰ *Vermeulen v. Belgium*, ECtHR Judgement of 20 February 1996, Application no. 19075/91 para 33

also observed the importance of the '*opportunity for an adequate defence*' as a vital component.¹⁴¹ Furthermore, it has expressly stated that,

*'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.'*¹⁴²

Thus, the ECtHR has long recognised the importance of fair trial rights corresponding to real and tangible protections at trial. Although the creation of the Convention predates that of the ICC by almost half a century, it was of course only intended to bind the European Member States. Despite including various legal systems and traditions, it attempts to unify their '*common heritage of political traditions, ideals, freedom and the rule of law*' to guarantee specific rights to a recognised standard.¹⁴³ Despite its current influence on the ICC, its effect on an international criminal institution of this kind could not have been foreseen. More recently the ECtHR has interestingly held that in its own assessment of potential violations of Article 6, '*the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures*'.¹⁴⁴ This could potentially resonate with the accused at the international criminal level given the serious nature of the indictments, as well as the potential for very lengthy prison sentences following a guilty verdict.

Due to the ICC's relatively infancy with regards to processing cases, the Chambers have understandably not yet made extensive considerations of fairness. However, in 2006, the Court recognised that the decisions made at the European and international level regarding the fairness of proceedings at the investigation stage must

¹⁴¹ *Goddi v. Italy*, ECtHR Judgement of 9 April 1984, Application no. 8966/80 para 31

¹⁴² *Artico v. Italy*, ECHR Judgement of 13 May 1980, Application no. 6694/74 para 33

¹⁴³ 'Preamble', EConventionHR.

¹⁴⁴ *Zhuk v. Ukraine*, ECtHR Judgement of 21 October 2010, Application no. 45783/05 para 26, referring to *A.B. v. Slovakia*, ECtHR Judgement of 4 March 2003, Application no. 41784/98 para 55

be considered in light of the context.¹⁴⁵ The Pre-Trial Chamber then went on to explain more generally,

*The term “fairness” (équité), from the Latin “equus”, means equilibrium, or balance. As a legal concept, equity, or fairness, “is a direct emanation of the idea of justice”. Equity of the proceedings entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings.*¹⁴⁶

Thus, the relative treatment of the Defence and Prosecution is of significance when conceptualising fairness.¹⁴⁷ The Court has also previously recognised that a ‘*requirement of fairness exists for all participants in the proceedings and therefore also operates to the benefit of the Prosecutor*’.¹⁴⁸ In terms of its importance with respect to the Defence, the Pre-Trial Chamber articulated that the essential element of fairness is that ‘*participants be granted a genuine opportunity to present their case and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*’.¹⁴⁹

Whether defendants are in fact provided with such a ‘genuine opportunity’ will be examined in Part III of this thesis, particularly with regard to the principle of EoA. The Court has certainly expressed its own commitment to protecting and upholding the fairness of its trials, stating that a ‘*fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be*

¹⁴⁵ *Situation in the DRC*, ‘Decision on the Prosecution’s application for leave to appeal the Chamber’s decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6.’ (31 March 2006) Doc. No. ICC-01/04-135-tEN para 37

¹⁴⁶ *Ibid.* & see fn 47-8 which cites ECtHR and ICJ case law.

¹⁴⁷ Section 5 A will examine how the concept of *equity* is of relevance to fairness.

¹⁴⁸ *Situation in Uganda*, ‘Decision on Prosecutor’s application for leave to appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under Article 58’ (19 August 2005) Doc. No. ICC-02/04-01/05-20-US-Exp para 31

¹⁴⁹ *Situation in Uganda*, ‘Decision on the Prosecutor’s applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of March 2006’ (10 July 2006) Doc. No. ICC-02/04-01/05-90-US-Exp at para 24

stopped.¹⁵⁰ Such attitudes, however powerfully articulated, risk becoming meaningless abstractions unless and until defendants are provided with tangible protections and guarantees.

5. Holding the balance through 'Equality of Arms' (EoA)

The principle of EoA initially invokes connotations of chivalry and honour. This is arguably not without merit given the common law roots of the principle from the twelfth century onwards.¹⁵¹ The adversarial system of justice is '*founded on the presumption that the truth is more likely to emerge from the contest between zealous advocates*'.¹⁵² Despite the now influential role of defence representation, the principle remains that for a fair contest to be possible, '*the two contenders must have the same chances of winning*'.¹⁵³

Many practitioners and academics are keen to stress the importance of the role of EoA in the international criminal context regarding its role in providing important safeguards for the accused,¹⁵⁴ particularly in light of the discrepancy in resources and power in contrast with the 'State'.¹⁵⁵ In fact, it is precisely the scale of this inherent

¹⁵⁰ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006' (14 December 2006) Doc. No. ICC-01/04-01/06-772, para 37

¹⁵¹ FEDOROVA, M. (2012) p109

¹⁵² SILVER, S.J. (1990) 'Equality of Arms and the Adversarial Process: A New Constitutional Right.' *Wisconsin Law Review*. 1007-1041 at 1008

¹⁵³ CAIANIELLO, M. (2011) at 293

¹⁵⁴ See, for example: NEGRI, S. (2005); GROULX, E. (2010a) "'Equality of Arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System.' *Revue Quebecoise de Droit International*. 21-38; KNOOPS, G-J.A. (2005) 'The dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective.' *28 Fordham International Law Journal*. 1566-1594

¹⁵⁵ See, KNOOPS, G-J.A. (2005) at 1566

disparity which renders the principle of EoA so indispensable.¹⁵⁶ Caianiello feels that '*it is unthinkable that one side should constantly be in an advantaged institutional position*'.¹⁵⁷

Due to its historical background, EoA is most strongly associated with adversariality.¹⁵⁸ A literal understanding of its meaning focuses only on the comparison between the parties' relative arms. However, when considered from a wider perspective of modern criminal trials, or in connection with a particular institution, the principle arguably has much broader implications concerning various aspects of fairness and equal (or rather, equitable) treatment.¹⁵⁹ Thus, EoA has important procedural ramifications, which are closely associated with the right to sufficient time and resources to prepare.¹⁶⁰

Conceptualising a concrete definition of EoA is somewhat problematic. Despite forming '*a central element of the right to a fair trial*', the principle has not been explicitly defined.¹⁶¹ The use of the specific *phrase* 'EoA' (as opposed to the general concept) is thought to have originated in connection with Article 6 of the ECHR.¹⁶² Safferling is critical of its '*military wording*', and finds it to be '*unseemly for a liberal criminal law*'.¹⁶³ Nevertheless, it continues to be utilised at the modern institutions. As with the concept of 'fair trial', EoA is perhaps best articulated as encompassing a cluster of individual rights, including for example, the right to a fair hearing; to adequate resources and time

¹⁵⁶ This point is recognised by Safferling who states: '*This image might be fitting to a private law action, where plaintiff and defendant stand on equal footing, but a criminal trial is surely shaped by a structural inequality between the state, represented by the prosecutor, and the citizen; that is; the accused.*' SAFFERLING, C. (2012) p411. It appears somewhat counter-intuitive to use such reasoning to suggest the principle is inappropriate in the realm of criminal justice. The principle is thought to arise from the much older principle of *audi alteram partem*, (hear the other side too) and is therefore a principle of 'natural' justice. See, FEDOROVA, M. (2012) pp.106-7

¹⁵⁷ CAIANIELLO, M. (2011) at 293

¹⁵⁸ See, FEDOROVA, M. (2012) p107

¹⁵⁹ These will be considered in Parts II & III of this thesis.

¹⁶⁰ FEDOROVA, M. & SLUITER, G. (2009) at 49

¹⁶¹ *Ibid.*

¹⁶² FEDOROVA, M. (2012) p30

¹⁶³ SAFFERLING, C. (2012) p416. It is argued here that the etymology of the principle should be given little weight given the constant adaptation which words and phrases are subjected to over time.

to prepare; to call and examine witnesses;¹⁶⁴ to have access to information relevant to the case.¹⁶⁵ Safferling expresses concern that the relation of important rights to the '*higher principle*' of EoA could risk their restriction through '*purely formal interpretation[s] of equality*'.¹⁶⁶ Whilst the principle may not tangibly enhance the application of defence rights, one could also argue that it helps to draw much needed attention to an important cluster of fair trial rights, whilst also highlighting the discrepancy in resources between the Defence and Prosecution.

The degree of intangibility of the principle is reflected by the fact that the Statutes of the ICC, ICTY and SCSL do not refer directly to EoA.¹⁶⁷ No doubt this is largely reflective of their hybrid or unique compositions. Similarly, some of the key covenants and charters relating to HR make no direct reference, instead noting that the guarantees to be afforded to the accused must be provided in '*full equality*', whilst others make no such reference.¹⁶⁸ Knoops has argued that the EoA '*as derivative of the overarching right to a fair trial, has attained the status of a fundamental human rights notion*'.¹⁶⁹ More commonly however, EoA is afforded the status of a 'principle' by virtue of its ability to conflict, and therefore be balanced with, other principles (as opposed to rules).¹⁷⁰ Whilst EoA may possess the 'lesser' status of a collective principle, given the nature of its constituent components - many of which are important fair trial rights (rules) - the importance of the principle should be duly recognised in a manner similar to, and interconnected with, the cluster of rights which together form the right to a fair trial.

¹⁶⁴ *Ibid.*

¹⁶⁵ KNOOPS, G-J. A. (2005) at 1567

¹⁶⁶ Safferling argues this has been the case at the ICTY. See, SAFFERLING, C. (2012) p416

¹⁶⁷ Article 67 of the Rome Statute of the ICC states that the accused be provided the 'minimum guarantees, in full equality'.

¹⁶⁸ Article 14(3) International Covenant on Civil and Political Rights (ICCPR); Article 10 Universal Declaration of HR (UDeCHR); Article 8 American Convention on HR (ACHR). In contrast, Article 6 European Convention on HR (ECHR) and Article 7 African Charter on Human and Peoples' Rights do not mention equality with reference to the criminal trial.

¹⁶⁹ KNOOPS, G-J. A. (2005) at 1566

¹⁷⁰ See, FEDOROVA, M. (2012) p7

A. The differing roles of the Defence and Prosecution in ICL: Equality, or equity?

The concept of 'equality' frequently arises in the discourse of HR from an egalitarian perspective. In various contexts, the ideal of 'sameness' is often cited, yet can oversimplify persons and concepts which are in fact too different to be simplistically equated to one another. In this manner, arguing for a formal equality between the Prosecution and Defence might cause the differences in their roles to be under-appreciated. In international criminal justice, the Prosecution is often charged with conducting the bulk of investigations, issuing indictments, bringing the Prosecution's case to trial, and will ultimately carry the burden of proof.¹⁷¹ The Defence, whilst also having a complex and difficult role, is primarily charged with '*discrediting the prosecution's case*'.¹⁷² This is by no means an easy task. Defence counsel will have to, among other duties, process thousands of evidentiary documents; deal with numerous witness (who are often not easily accessible or willing to co-operate);¹⁷³ review the Prosecution's evidence; cross-examine witnesses in order to identify any weaknesses in their testimony; arrange and conduct additional investigations and interviews with potential witnesses.¹⁷⁴ In addition, the Defence must continuously act in the best interests of the client, and seek to defend his rights against '*any and all infringements*'.¹⁷⁵

The modern international criminal institutions have, in the past, failed to duly recognise the complexity of the defence role. During the trial of *Orić* at the ICTY, the Tribunal held that the Defence '*focuses on poking specifically targeted holes in the*

¹⁷¹ *Ibid.* p113

¹⁷² *Ibid.*

¹⁷³ See, TUINSTRA, J.T. (2010)

¹⁷⁴ KARNAVAS, M.G. 'Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May. pp.116-7

¹⁷⁵ WLADIMIROFF, M. (1999) at 958

Prosecution's case, an endeavor which may require less time and fewer witnesses'.¹⁷⁶

The SCSL later cited the ICTY Appeal Chamber, giving further weight to the '*poking specifically targeted holes*' phrase which, it is argued here, undermines and oversimplifies the complexity of their role, which it undertakes amidst often highly challenging circumstances.¹⁷⁷ Without undervaluing the role of either party, it should be acknowledged that they do indeed differ in their objectives, strategies and positions within the institutions' frameworks. Fedorova similarly warns that focusing on equality in terms of 'sameness' can overlook the differences that '*might constitute important considerations for the achievement of pre-set goals*'.¹⁷⁸ As a result, Safferling argues that '*equality should not even be intended*'.¹⁷⁹ Analysing whether two different entities have been provided with roughly similar resources when their roles inherently differ will, therefore, never be straightforward. The ICTY Appeals Chamber later recognised that its '*duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests*'.¹⁸⁰ Tuinstra ultimately argues that given their fundamental differences, '*equalizing the prosecution and the defence is an unattainable and unnecessary goal*'.¹⁸¹

If procedural symmetry is neither possible nor helpful, the question becomes how best to ensure a fair balance between the parties. Fedorova contends that a '*strict observance of certain minimum requirements*' for the accused plays an important role in achieving and maintaining fairness.¹⁸² In essence, procedural equality is of

¹⁷⁶ *Prosecutor v. Orić*, 'Interlocutory Decision on Length of the Defence Case' (20 July 2005) Doc. No. IT-03-68-AR73.2 at para 7. The Appeals Chamber reasoned its opposition to a 'strict' interpretation of equality, yet in the particular instance found that the comparative number and time allotted to witnesses was disproportionate between the parties. See paras 9-10

¹⁷⁷ *Prosecution v. Sesay*, 'Written Decision on Sesay Defence Application for a Week's Adjournment - Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court' (5 March 2008) Document No. SCSL-04-15-T-1031 para 61

¹⁷⁸ FEDOROVA, M. (2012) p42

¹⁷⁹ SAFFERLING, C. (2012) p415

¹⁸⁰ *Prosecutor v. Prlić et al.* 'Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling reducing time for the Prosecution Case.' (6 February 2007) Doc. No. IT-04-74-AR73.4 para 16

¹⁸¹ TUINSTRA, J. T. (2009) p190

¹⁸² FEDOROVA, M. (2012) p140

paramount importance in order to ensure that both parties are operating under the same conditions, without one being at a substantial disadvantage in comparison to the other.¹⁸³

B. The principle of EoA at the modern international criminal institutions

Despite the insistence by some academics that modern ICL procedure is '*predominantly adversarial*'¹⁸⁴ in nature, there is arguably more merit in acknowledging its truly *sui generis* character.¹⁸⁵ Whilst the principle of EoA is more closely linked with adversariality and the common law tradition, in the international HR and criminal law context it has '*not been applied in a tradition-specific manner*'.¹⁸⁶ Safferling argues that the inquisitorial system does not '*incline*' to the principle due to the inquiring role of the judge and his or her '*full knowledge of the prosecutor's files*'.¹⁸⁷ Regardless, as Fedorova explains, the ECtHR in particular has impacted upon modern inquisitorial systems, affecting issues such as the extent of defence participation at trial, as well as the activity of the active, inquiring judge.¹⁸⁸ Considering that modern international procedure has adopted the two-party system of Prosecution and Defence, and given the large disparity between their resources, it is fair to assert that EoA continues to represent an important principle in the international criminal context.

The ICTY, being the first of the major modern international organs, had to interpret EoA within the context of complex and costly international criminal trials, with

¹⁸³ TUINSTRA, J. T. (2009) p154

¹⁸⁴ For example, *ibid.* p167

¹⁸⁵ The extent to which this is the case will be explored and analysed throughout the remainder of this thesis. The ICC, in particular, is a direct result of extensive compromise between States, see Chapter 5.

¹⁸⁶ FEDOROVA, M. (2012) p36

¹⁸⁷ SAFFERLING, C.J.M. (2001) p267

¹⁸⁸ See, FEDOROVA, M. (2012) p130; pp.121-30

little in the way of guidance.¹⁸⁹ Due regard for the principle was arguably made more challenging by virtue of its omission from the Statute, as it was instead thought to be incorporated through the fair trial provisions.¹⁹⁰ In *Tadić*, the Appeals Chamber ultimately held that the principle of EoA '*between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee*'.¹⁹¹ The ICC has echoed this sentiment, finding that fairness and EoA are '*closely linked*', as it '*concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour*'.¹⁹²

It is worth noting that the ECtHR has stressed the importance of providing fair opportunity '*to have knowledge of and comment on the observations filed and the evidence adduced by the other party*'.¹⁹³ In essence, the parties should not be placed at a disadvantage '*vis-a-vis his opponent*'.¹⁹⁴ Additionally, the Court has confirmed that EoA, by its nature, has a comparative element between the parties;¹⁹⁵ if both are similarly denied something, there cannot be said to be a disadvantage in relation to the other.¹⁹⁶ The Human Rights Committee has further emphasised the link with the provision of '*adequate time and facilities for the preparation of his defence*', adding that what is '*adequate*' will depend on the circumstances of each case.¹⁹⁷

Ultimately, due to the abstract and referential nature of EoA, as well as the lack of explicit mention in the various Statutes, the principle is arguably left in a somewhat

¹⁸⁹ De BERTODANO, S. (2004) 'What Price the Defence? Resourcing the Defence at the ICTY.' **2 Journal of International Criminal Justice**. 503-508 at 503

¹⁹⁰ COGAN, J.K. (2002) at 118

¹⁹¹ *Prosecutor v. Tadić*, 'Judgement' (15 July 1999) Case No. IT-94-1-A para 44

¹⁹² Situation in Uganda, 'Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under Article 58' (19 August 2005) Doc. No. ICC-02/04-01/05-20-US-Exp para 30

¹⁹³ *Case of V. v. Finland*, 'Judgement' (24 April 2007) Application no. 40412/98 para 74

¹⁹⁴ *Case of Bulut v. Austria*, 'Judgement' (22 February 1996) Application no. 17358/90 para 47

¹⁹⁵ *Case of Jasper v. UK*, 'Judgement' (16 February 2000) Application no. 27052/95 para 57

¹⁹⁶ *Case of Monell & Morris v. UK* 'Judgement' (2 March 1987) Application nos. 9562/81 & 9818/82 para 62

¹⁹⁷ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), U.N. Doc. HRI/GEN/1/Rev.1 (1994) at para 9. Available at: <http://www1.umn.edu/humanrts/gencomm/hrcom13.htm> [Last accessed 11.08.2014]

tenuous position. Much will depend on the importance attached to EoA, particularly at the ICC, which inevitably will continue to be faced with issues relating to the equality of the parties. The principle of EoA, however it may manifest itself in terms of labelling, is undoubtedly an important principle, particularly for any system which utilises opposing parties. The Prosecution, being funded and supported by the 'State', is routinely in a fundamentally stronger position than the Defence, whether at the domestic or international level.¹⁹⁸ The existence of the principle in many ways is an acknowledgement of the inherent inequality, which requires a degree of proportionate compensation, relative to the different roles of the parties.¹⁹⁹

One of the principle aims of this thesis is to question whether there is more than a mere formal, 'paper' EoA at the modern international courts and tribunals. It will be argued that there is a real risk that the guarantees embodied by the principle, in practice, become '*vitiated by considerable differences in resources*'.²⁰⁰ A formalistic commitment to EoA alone provides no guarantee of translation into tangible equality at trial.²⁰¹ The extent to which the principle is given life in practice will be examined in greater detail in Part III of this thesis.

In order for international criminal trials to function as legitimate and fair expressions of justice, rather than mere sentencing mechanisms, it is crucial that the individual defendant is given a real and reasonable opportunity to defend his case. It is suggested here that the principle of EoA is the primary means at a court's disposal to reconcile the competing interests of the defendant, who stands in opposition to the

¹⁹⁸ "Equality of arms doesn't exist at all in ICC. Why? It's natural and it's not only ICC, it is in all systems." *Verbatim*, per Xavier-Jean Keïta, Principle Counsel at the ICC's 'Office of Public Counsel for the Defense'. IBA video 'In the Dock - Defence Rights at the International Criminal Court.' Available at: <http://vimeo.com/23958341> [Last accessed 11.8.2014]

¹⁹⁹ FEDOROVA, M. (2012) pp.114-5

²⁰⁰ 'The domestic critique of the myth of "equality of arms" is that this equality is simply formal and is in practice vitiated by considerable differences in resources.' MEGRET, F. (2009) p63. Whether the resources provided to the parties represent an EoA at the modern institutions will be examined in Part III of this thesis.

²⁰¹ SWOBODA, S. (2008) 'The ICC Disclosure Regime - A Defence Perspective.' *19 Criminal Law Forum*. 449-472 at 450

institutions' considerable resources, and the important objective of denying impunity to those responsible for serious crime. Due regard for the principle at the procedural level - at all stages of the criminal trial - will help to promote fair trials, as well as perceptions of fairness, which are of such crucial importance to the institutions' functioning.

6. Conclusion

Fairness is undoubtedly a complex and practically arduous concept to achieve, particularly in the realm of international criminal justice. Cogan argues that the '*absence of interest in defendants' rights*' arises from a general assumption that as international tribunals have been created and run by informed and respectable individuals, they must *necessarily* adhere to fair and proper standards relating to the accused.²⁰² There is cause for concern that this assumption could result in a complacent attitude regarding the protection of defence rights. It can be observed that the architects (of the Rome Statute of the ICC, in particular) included fairly robust formalistic fair trial protections and minimum guarantees.²⁰³ Yet, as Fedorova and Sluiter argue, the minimum requirements for a fair trial do '*not automatically imply that the trial is 'fair'*'.²⁰⁴

Achieving fairness at the international criminal institutions is a highly challenging endeavour by virtue of its *sui generis* nature, as it must operate without the benefit of '*a long and learned history of its own from which to draw*'.²⁰⁵ It could be argued that there is a pressing need for greater recognition of the fragile nature of fairness in ICJ. As Zappalà explains:

²⁰² COGAN, J.K. (2002) at 113

²⁰³ *Ibid.* at 115

²⁰⁴ FEDOROVA, M. & SLUITER, G. (2009) p18

²⁰⁵ FAIRLIE, M. (2004) at 318

*'If only one of these rights is violated, in only one aspect, in only one instance, the whole process loses credibility and is likely to fail in its objective of properly establishing the truth and of imposing just punishment. There is no truth outside the process; there is no truth that can be reached without full respect of the rights of the accused.'*²⁰⁶

Thus, a diligent respect for the core fair trial rights is of utmost importance, as the *'reputation of international criminal justice depends on respecting this kernel and leaving it intact'*.²⁰⁷ The overarching right to fairness ties together the vital procedural guarantees and minimums which must be afforded to the accused.²⁰⁸ Although unjustifiable violations of the minimum guarantees will constitute a breach of the right to a fair trial, it does not correspond that mere compliance will guarantee fair criminal proceedings.²⁰⁹

If the modern institutions are to be regarded as legitimate, the guiding principle of fairness needs to radiate throughout each stage of the trial. If these institutions are to produce verdicts befitting of their vast human and financial investment, the ethos that, if *worth* conducting, these trial are worth conducting *fairly*, must prevail.²¹⁰ As Groulx explains, the rigorous application of this principle ensures that courts *'become stronger, not weaker'*.²¹¹ The unfair treatment of the accused can leave institutions open to an array of criticism, potentially undermining their credibility and legitimacy. As May & Wierda argue, further than damaging the integrity of proceedings, compromising fairness is fundamentally *'contrary to the rule of law'*, which the very proceedings are attempting to promote.²¹²

This Chapter has attempted to analyse some of the historical and theoretical understandings of fairness, particularly with regard to trial procedure, and the

²⁰⁶ ZAPPALÀ, S. (2010) p145

²⁰⁷ DAMAŠKA, M. (2011) at 387

²⁰⁸ Croquet argues the minimum guarantees must furthermore be *'illustrative rather than exhaustive'*. CROQUET, N.A.J. (2011) at 100

²⁰⁹ CROQUET, N.A.J. (2011) at 129

²¹⁰ GROULX, E. (2001) at 24

²¹¹ *Ibid.*

²¹² MAY, R. & WIERDA, M. (2002) p259

substantive rights of the accused. This thesis is ultimately concerned with the critique best articulated by Buchet, who asserts that '*defence rights have been conceptualized in the Statute only in a static manner: they are legally recognized but not legally organized. They exist, but do not live*'.²¹³ Thus, a determination of trial fairness must go beyond the formalistic, substantive rights provided to the accused.²¹⁴ As Groulx asserts, '*the right to a fair trial needs to be grounded not just in legal texts, but in institutional reality*'.²¹⁵ Whether the modern institutions succeed in providing tangible fairness at trial will be assessed over the forthcoming chapters. Chapter 3 will now examine some of the anxiety surrounding the international accused, which could risk undermining the modern institutions' theoretical commitment to fair trials.

²¹³ BUCHET, A. in BEVERS, H. & JOUBERT, C. (2000) p71

²¹⁴ See, COGAN, J.K. (2002) at 114-5

²¹⁵ GROULX, E. (2010a) at 24

Chapter 3.

Perceptions of the International Criminal Defendant

*'It is the criminal, in fact, that is needed by the press and public opinion. It is he who will be hated, against whom all the passions will be directed, and for whom the penalty and oblivion will be demanded.'*¹

1. Introduction

The previous Chapter has established the importance of treating the accused as an individual who is deserving of fair international criminal trials. In order to appreciate the inherent tension in ICL, this Chapter will now consider some of the anxieties surrounding the international accused from a criminological perspective. It will be argued that the intensity of the fear surrounding his trial has led to the 'otherisation' of the Defence, and the resultant hypoplasia.

It is first worth noting that the principle of individual accountability inevitably means that only a few, selected individuals will face trial, due to constraints of time, resources and efficacy. One of the major criticisms of, not only the ICC but of international courts more generally, is that it is possible for indictees to escape arrest, sometimes being able to live openly in countries which have no inclination to co-operate.² The selectivity inherent in ICL will be argued as intensifying the perceptions of the international defendant.

As a result of this context, the accused will be recognised as constituting the 'worst of the worst' of offenders, having committed the '*most serious crimes*'.³ Due to

¹ FOUCAULT, M. (2002) '*Power*.' Volume 3. London, Penguin. p432

² For example, until recently, *Bosco Ntaganda* (DRC) had lived openly, outside the reach of the ICC's jurisdiction, until he handed himself in. See, <http://www.guardian.co.uk/world/2013/mar/19/africa-congo> [Last accessed 6.8.2014] *Radovan Karadžić* evaded capture for over a decade.

³ The ICC preamble states: '*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished..*'

the gravity of the crimes in question, the multitude of victims, and the scale of the abhorrence felt in reaction, it can be challenging to consider the provision of defence rights and protections. Throughout this thesis, it will emerge that the position of the Defence has been considered in a piecemeal, *ex post facto* manner.⁴

Building on the discussion in the Introduction, this Chapter will focus on how the accused can come to be labelled as a contemporary 'folk devil', which has serious implications for his procedural position. This will include examining the criminological concept of the 'moral panic' as a means of understanding the extent of the adverse reaction and aversion regarding the accused. The impact of labelling the defendant, and the resultant stigmatisation which occurs, will be analysed. Particular attention will be given to 'otherisation' - the process of distancing the accused. Ultimately, it will be argued that there is a need for greater awareness concerning the potential danger that individuals may, as a result, no longer come to be considered as constituting a part of humanity, thus leading to a corrosion of their fair trial protections.

2. 'Moral panics'; the defendant as the 'folk devil'

A moral panic arises where an individual or group becomes '*defined as a threat to societal values and interests*'.⁵ The concept was developed by Stanley Cohen in the 1960s, who also noted its connection with collective behaviour.⁶ Moral panics can typically occur during difficult and troubled times, and can be focused within particular groups who experience a trauma or disturbance.⁷ According to Goode and Ben-

⁴ See, for example, NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** *Stanford Journal of International Law*. 379-440 at 409

⁵ COHEN, S. (1972) '*Folk Devils and Moral Panics: The Creation of the Mods and Rockers*.' Oxford, Robertson. p9

⁶ GOODE, E. & BEN-YEHUDA, N. (1994) '*Moral Panics: The Social Construction of Deviance*.' Oxford, Blackwell. p104

⁷ *Ibid.* p32

Yahuda, there are five crucial elements needed in order to define a moral panic: concern, hostility, consensus, disproportionality, and volatility.⁸ Concern usually materialises in the form of media attention, or other forms of public commentary. Although there is a distinction made between concern and fear, both are seen as a *'reasonable response to what is regarded as a very real and palpable threat.'*⁹ Secondly, there must be an increased level of hostility towards the individual or group, who are collectively recognised as the enemy, deemed to pose a threat to society.¹⁰ Thirdly, there must be *'substantial or widespread agreement or consensus'* concerning the threat, recognising both that it is serious, and that it is caused by the behaviour of the individual(s) in question.¹¹ The fourth requirement, disproportionality, is harder to ascertain, as such an evaluation requires one to know the 'true' level of the threat in order to compare it to the perceived level. Nevertheless, disproportionality regarding the extent of the threat is a key requirement of the moral panic.¹² Finally, the requirement of volatility concerns the speed at which the panic will be brought to the forefront of the public's consciousness, and will disappear at a similar rate.¹³

There is an additional element relating to the final requirement of volatility that is perhaps particularly relevant to its application in ICL. Although the focus on certain indictees will increase, particularly during an accused's capture or trial, it will also often subside again just as quickly as the media moves on to the next 'newsworthy' story. The moral panic in ICL can thus be understood in one of two ways. It could be observed that a series of smaller moral panics arise, as and when a specific individual is considered to constitute a threat, and is met with hostility. In the alternative, a wider

⁸ *Ibid.* p33

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* p34

¹² *Ibid.* p38

¹³ 'Kony 2012' is a clear example of this type of sweeping global interest, which burns with great ferocity, before largely burning out. This involved a 'viral' video, concerning involvement of *Joseph Kony* (Case No. ICC-02/04-01/05) in crimes committed in Uganda, which consisted of misinformation, as well as factual inconsistencies and errors.

moral panic could exist concerning the 'worst of the worst' offenders. Both are possible, and arguably need not be mutually exclusive. Goode and Ben-Yehuda point out that some moral panics can become '*routinised or institutionalised*', in that the concern shown by society can ultimately become fixed '*in the form of social movement organisations, legislation, [...] or practices for punishing transgressors*.'¹⁴

ICL has developed rapidly over recent decades, with the creation of courts and tribunals which have served as blueprints, and set important precedents, for successive institutions. If there can be said to be a *larger* moral panic concerning the dangerousness of the 'worst of the worst' of offenders, (which must have some merit, based on the measures which have been taken by the international community to attempt to deny impunity), then the reaction has indeed become institutionalised. The threat of these individuals is regarded as *so* damaging that serious steps are thought to be needed in order to '*control the behaviour, punish the perpetrators, and repair the damage*'.¹⁵ This feeling has certainly materialised into the creation of all manner of institutions in order to address the perceived threat. Despite the fact that many moral panics disappear from sight almost as quickly as they appear, this does not preclude them from having '*structural or historical antecedents*' and moral panics may consist of a '*conceptual grouping or a series of more or less discrete, more or less localised, more or less short-term panics*'.¹⁶ Ultimately, the distinction as to whether moral panics in ICL are short-term, or whether they are in fact part of a wider moral panic which reignites itself through different indictees, may be relevant only in principle, making little difference to the resultant moral panic that ensues.

¹⁴ GOODE, E. & BEN-YEHUDA, N. (1994) pp.38-9

¹⁵ *Ibid.* p31

¹⁶ *Ibid.* p39

A. The creation of the 'folk devil'?

In ICL, the concept of the moral panic is strongly connected with that of the 'folk devil' - the physical embodiment of evil, who is instantly recognisable.¹⁷ Importantly, suspects are '*stripped of all favourable characteristics and imparted with exclusively negative ones.*'¹⁸ Thus, any positive qualities can become engulfed by the overwhelming fixation on the wickedness of the person.¹⁹ Folk devils are seen to be '*legitimate and deserving targets of self-righteous anger, hostility, and punishment.*'²⁰ Regarded as the 'enemy of society', it is acceptable, and indeed *expected*, for society to react with hostility towards those who are deemed to be hostile themselves.²¹

The continuing appeal of the concept of the 'folk devil', particularly at the ICL level, can be argued to stem from the idea that viewing defendants as 'folk devils' serves several purposes. They act as an example, or cautionary tale, which highlights those in society with whom we should avoid contact, and refrain from emulating. As Rock argues, folk devils therefore can serve an '*exemplary and educative purpose. They are caricatures of abhorrent behaviour which frequently stress the most unpleasant features of rule breaking.*'²² Thus, the '*demonology*'²³ of the 'folk devil', as he is portrayed, can act both as a deterrent, and as means for society to reaffirm its boundaries through identifying what is unacceptable, harmful behaviour.

¹⁷ *Ibid.* p28

¹⁸ *Ibid.*

¹⁹ Whether *Issa Sesay's* role in the disarmament process, and subsequent Lomé agreement, were duly taken consideration concerning during mitigation is interesting. Whilst Sesay was described as '*very very co-operative*' with the process, the consideration of the accused's positive attributes might have proved too troublesome to reconcile with negative labels. See, <http://news.bbc.co.uk/1/hi/world/africa/7405481.stm> [Last accessed 3.6.2014]

²⁰ GOODE, E. & BEN-YEHUDA, N. (1994) p21

²¹ To fail to react with extreme disapproval could, in turn, permit others to disapprove of those who don't strongly condemn such individuals.

²² ROCK, P. (1973) '*Deviant Behaviour.*' London, Hutchinson & Co. p34

²³ GOODE, E. & BEN-YEHUDA, N. (1994) p28 quoting COHEN, S. (1972) p44

3. The role of labelling and ‘otherisation’

All too often, the complexities of human behaviour and diversity cannot be pigeonholed into distinct categories, at times leading to the application of overly simplistic labels in order to come to terms with difficult attributes or events. The process of ‘labelling’ helps to simplify the position of the accused in ICL, and allows the object to be ‘*detached from its background and made discrete*’.²⁴ Labels, such as ‘dangerous’, ‘monstrous’ or ‘evil’, can have the effect of singling out individuals ‘*for purposes of education, action and often, the justification of action*’.²⁵ If an accused is seen to be ‘*capricious, random and unpredictable in his behaviour*’,²⁶ he can be at risk of being perceived, and treated, as an outsider, or ‘other’.

The process of ‘otherisation’ is a means of distancing, which is argued here as being particularly problematic, as the more remote issues or objects become, the more difficult it is to test information concerning them. As Rock explains, ‘*we have little opportunity to dispute contentions about those who are socially distant. Not only is opportunity lacking, incentive may also be weak*’.²⁷ The latter point is important. The ‘gap’ which is created through the process of negatively labelling an individual has the potential to increase fear and loathing towards them. By virtue of the nature of the crimes with which ICL accused are indicted, they are not individuals with whom it is easy to identify. Instead, they tend to be the individuals at the social margins, in networks which are removed from most people’s daily existence.²⁸ This distance between ‘us’ and ‘them’ means that it is highly unlikely that most people will gain ‘*any experience of the non-normal*’, further isolating ‘them’ from the rest of society.²⁹ It is also unlikely that many would wish to minimise this gap, due at least in part to the risk

²⁴ ROCK, P. (1973) p27

²⁵ *Ibid.* p19

²⁶ *Ibid.* pp.58-9

²⁷ *Ibid.* p29

²⁸ *Ibid.* p29

²⁹ WILKINS, L.T. (1964) ‘Social Deviance.’ London, Tavistock. p63

of becoming stigmatised through association: '*Closeness to deviancy can impugn our own moral standing.*'³⁰

The process of 'otherisation' should be recognised as being potentially highly destructive. It is suitably ironic that various criminal campaigns and regimes have stemmed, at least in part, from demonising certain groups or individuals. This is not to suggest that society's demonisation of ICL defendants is on a par with those groups who have been targeted in criminal atrocities. However, it is interesting that a similar reaction can arise towards those deemed to be harmful. Importantly, if guilt has not yet been established, the treatment which arises as a consequence of the 'otherisation' is far from well-founded.

A. The attraction, and danger, of 'otherisation'

Distancing oneself from the defendant not only helps to distinguish 'you' and 'us' from the *hostis generis humani*³¹ in a personal sense, but there is also a sense of community and safety created by unifying against these individuals in solidarity. Those accused of crimes of such magnitude are often labelled, either consciously or through our reaction to them, as 'the enemy of us all'.³² By firmly rejecting the 'monsters' we can attempt to help solidify acceptable and desirable traits, and in turn reject those who we have deemed to be 'evil' or damaging to the fabric of society.³³ The creation of a 'gap' provides comfort through distancing those who have been identified as potentially or actually harmful. As Rock notes, '*[t]he sense which is made can be inaccurate or misleading, but triviality has been restored and life can be resumed.*'³⁴ Although this act

³⁰ ROCK, P. (1973) p29

³¹ 'Enemy of mankind'.

³² FOUCAULT, M. (1995) 'Discipline and Punish. The Birth of the Prison.' New York, Vintage. p101

³³ ROCK, P. (1973) p34

³⁴ *Ibid.* p28

of distancing may only create an *illusion* of safety, it is also a means of preserving the integrity of a given society or group.³⁵ Arendt spoke of the concept of 'inter-est' as being our collective interests and "*web' of human relationships'* which allow us to relate to each other, and in turn bind us together.³⁶ The creation of international courts and tribunals signifies this on a larger scale; the unification against a common enemy, even if the 'enemy' is broader than any particular individual.

Extreme feelings of fear and hatred can be directed at a defendant in ICL, to the extent to which they are no longer perceived as human; instead, they appear to be '*a villain, a monster, a madman, perhaps, a sick and, before long, 'abnormal' individual.*'³⁷ The labelling of the accused as a non-human, outsider or 'outlaw' is potentially dangerous, as it can give rise to a legitimisation that their subsequent treatment can be likewise less-than-human. The label of 'monster' enables a distancing from the painful notion that a fellow member of your species, similar to you in *many* ways, is capable of such actions. According to Nietzsche, as mankind has attempted in many ways to create laws and structures for itself, a hatred is felt for those who are seen to '*remain closer to the animal state*' which can lead to individuals being '*disdained as a non-human, a thing*'.³⁸

The alternative is to recognise that the accused is not a monster, but an individual not entirely unlike oneself. This would mean accepting that we have, at the very least, the *capacity* to act selfishly, dangerously and, perhaps most strikingly, with full awareness and comprehension of our actions. This is not an easy concept with which we are able, or willing, to reconcile. Perhaps the most recounted observation made by Hannah Arendt, regarding the trial of Adolf Eichmann, involves her perception of the accused. '*The trouble with Eichmann was precisely that so many were like him,*

³⁵ *Ibid.* p128

³⁶ ARENDT, H. (1958) '*The Human Condition.*' University of Chicago Press, USA. p183

³⁷ FOUCAULT, M. (1995) p101

³⁸ NIETZSCHE, F. (2008) '*Human, All Too Human. & Beyond Good and Evil.*' England, Wordsworth Classics. p40. Nietzsche uses the example of the slave as being disdained as 'non-human'.

and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal.'³⁹ This so called 'banality of evil' is a difficult concept to come to terms with. Not only does labelling the defendants as 'monsters' provide a means of 'coping', but accepting the alternative is incredibly troubling, as such a recognition could be *'painful, inconvenient, or disruptive.'*⁴⁰

A trial itself will largely focus on the individual defendant and his accountability; there is little scope to consider the collective nature of many crimes. Brants argues that this can afford bystanders a form of amnesty.⁴¹ In turn, this can provide an opportunity to 'gloss over' difficult, wider issues including concepts such as the 'banality of evil'. It is suggested that if 'evil' in its broad sense is in fact banal and ever-present within our nature, this 'threat' is the most difficult to conceive of, as it suggests that these crimes will continue to be committed, as the ongoing global occurrence of war and violence tends to suggest may well be the case.

B. Labelling and stigma

The international criminal accused can attract negative labels readily due to the strain they place on the boundaries of social and legal order. *'The anomalies are not so much abhorrent in themselves, but abhorrent because of their implications for the way in which reality is constructed.'*⁴² Criminal behaviour will always push the limits of legal systems, and of wider social systems; no more so is this true, or more visible, than at the ICL level. Due to the emphasis placed on individual guilt, and the selective nature

³⁹ ARENDT, H. (1963) 'Eichmann in Jerusalem: A Report on the Banality of Evil.' Penguin, USA. p276

⁴⁰ GOODE, E. & BEN-YEHUDA, N. (1994) p32

⁴¹ BRANTS, C. (2011) 'Guilty Landscapes. Collective Guilt and International Criminal Law.' in BAILLIET, C. & AAS, K.M. (Eds.) 'Cosmopolitan Justice and its Discontents.' New York, Routledge. p59

⁴² ROCK, P. (1973) p51

of prosecutions, there is undoubtedly a great deal of focus placed on the need for an individual target, which is best articulated by Foucault:

*'One doesn't punish an act, one has to punish a man. And so, once again, a crime one can no longer do anything about will be dropped in order to deal with the criminal. It is the criminal, in fact, that is needed by the press and public opinion. It is he who will be hated, against whom all the passions will be directed, and for whom the penalty and oblivion will be demanded.'*⁴³

As a result of this intense concentration on just a few, selected accused, there is ample opportunity for stigmatisation to occur.⁴⁴ For example, *Lubanga* was found guilty at the ICC on the sole charge of enlisting and conscripting children.⁴⁵ Mégret argues that, as a result, his prosecution '*considerably elevated the stigma of child recruitment*'.⁴⁶ Furthermore, *Lubanga's* name will '*go down in history as the first person convicted internationally for recruiting children*', despite the fact that there are undoubtedly others who share culpability.⁴⁷ The very fact that others could have been indicted for prosecution furthers *Lubanga's* stigmatisation.⁴⁸

Stigma is a form of '*social opprobrium*', which does not have to be deliberately or consciously '*performed*'.⁴⁹ Reflecting on the impact of sociologist Emile Durkheim's idea of '*collective conscience*',⁵⁰ Mégret explains that it is not the crimes themselves which are necessarily shocking, '*but that their commission contradicts our deeply held beliefs*', which must be met with '*strong disapproval*'.⁵¹ In this way, stigmatising individuals is both an expression of society, as well as a means of manifesting that

⁴³ FOUCAULT, M. (2002) p432

⁴⁴ MÉGRET, F. (2014) 'Practices of Stigmatization.' **76 Law and Contemporary Problems**. 287-318 at 310 observed the '*double stigma*' of being both charged *and* tried at the ICC.

⁴⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

⁴⁶ MÉGRET, F. (2014) at 298

⁴⁷ *Ibid.* at 305

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 287; 294

⁵⁰ See, DURKHEIM, E. (1997) '*The Division of Labor in Society*.' New York, The Free Press.

⁵¹ MÉGRET, F. (2014) at 289

society itself.⁵² By placing individuals '*on the outer borders of humanity*',⁵³ the attachment of stigma by international criminal institutions can be seen to constitute a form of 'otherisation'. This can occur long before the finding of guilt, as the status of 'suspect' alone can attract stigma, '*despite the presumption of innocence*'.⁵⁴ Such is the strength of the stigmatisation at the ICL level, it can be seen to extend to defence counsel and their teams.⁵⁵

Although there may be a '*very real distaste for the idea that international criminal justice is about stigmatisation*', it could provide important understandings of power roles in ICL.⁵⁶ Mégret observes the Prosecutor's '*considerable power in the global economy of shame*', by virtue of the authority to make decisions relating to the initiation of investigations, and the formation of indictments.⁵⁷ Arguably, this is further reinforced by the public perception that the '*Prosecutor "must be pretty sure" of her case to have selected a particular defendant*'.⁵⁸ Thus, the role and influence of stigma as a means of otherisation can be argued to provide useful insights into the context in which the international accused finds himself.

⁵² *Ibid.* at 292

⁵³ *Ibid.* at 302

⁵⁴ *Ibid.* at 299

⁵⁵ For example, media interviews with Courtenay Griffiths QC have frequently prompted him to have to 'justify' acting as defence counsel for Charles Taylor's (SCSL). See, <http://www.bbc.co.uk/news/world-africa-11059821> [Last accessed 1.4.2015]

⁵⁶ MÉGRET, F. (2014) at 294; 317-8

⁵⁷ *Ibid.* at 296

⁵⁸ *Ibid.* at 310

4. Conclusion

In order for the courts to address the question of individual guilt, it is necessary to separate the defendant's individual responsibility for their own actions, from the circumstances and events which surround the trial. The defendant's guilt ought to be separated from: the general knowledge, and abhorrent nature, of the crime; the association of the defendants with any other individuals who are suspected/indicted; perhaps most importantly, the victims who have been affected. Due to the heightened reactions as a result of the occurrence of the crime, this can be far from easy. Ben-Gurion, the former Israeli prime minister, commented in reference to the trial of Eichmann, "[i]t is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history."⁵⁹ The sentiment expressed is an honest one. How can such crimes, and their victims, be separated from the 'face of evil' standing before us in the dock?

This leads us to question what exactly is being 'judged' in the trial process itself. Practically speaking, the focus of the trial is inevitably on the individual, '*a man of flesh and blood with an individual history, with an always unique set of qualities, peculiarities, behaviour patterns, and circumstances.*'⁶⁰ However, as already suggested, the focus may not be strictly limited to the defendant himself, but in fact may go far beyond him, extending to much wider circumstances, events and other individuals - factors which may well have been beyond his influence, control or involvement. These factors may be included within the trial - perhaps not in explicit terms or in ways which are directly tangible - but included nonetheless. As Foucault describes:

'[I]t is these shadows lurking behind the case itself that are judged and punished. They are judged indirectly as 'attenuating circumstances' that introduce into the verdict not only 'circumstantial' evidence, but something

⁵⁹ ARENDT, H. (1963) p19

⁶⁰ *Ibid.* p285

*quite different, which is not juridically codifiable: the knowledge of the criminal, one's estimation of him, what is known about the relations between him, his past and his crime, and what might be expected of him in the future.'*⁶¹

Foucault's last point, concerning future expectations of the defendant, ties in with the perception of his 'dangerousness'. This is a question of potentiality; society will also consider, in addition to what the defendant has actually done, his potential dangerousness in the future.⁶² This will join the myriad of other factors which will be considered in addition to the defendant's guilt for the crimes indicted.

Overall, the wider moral panic associated with the accused in ICL, can be said to cement further feelings of division between 'us' (the law-abiding onlookers who are united in their abhorrence of the crimes) and 'them' (the '*bad guys, undesirables, outsiders, criminals, the underworld, disreputable folk..*').⁶³ There is a distinct danger associated with the process of 'otherisation', which is arguably best summed up by Rock: '*He has lost many of his rights to be taken seriously as a fully human member of society.*'⁶⁴ Through the use of negative labelling, the accused is at least at risk of being thought of, and treated as, a non-human which could, in turn, lead to a restriction or dilution of his rights and protections. It is argued here that it is crucial to remain aware of such tendencies, particularly regarding the rights and treatment of the accused within international criminal justice.

It is worth noting that individuals who have been acquitted from the ICTR nevertheless continue to struggle to find countries which are willing to permit them leave to reside, thus leaving them stranded.⁶⁵ This demonstrates the longevity of the stigma which attaches to an ICL accused. A continual awareness as to the impact of

⁶¹ FOUCAULT, M. (1995) pp.17-8

⁶² FOUCAULT, M. (2002) p57

⁶³ GOODE, E. & BEN-YEHUDA, N. (1994) p34

⁶⁴ *Ibid.* pp.58-9

⁶⁵ 'Rwanda genocide: ICTR seeks refuge for acquitted.' Available at <http://www.bbc.co.uk/news/world-africa-16816668> [Last accessed 6.8.2014]

such issues is required regarding how defendants are processed, throughout the trial system, and beyond.

Part I of this thesis has attempted to conceptualise the inherent tension surrounding international criminal trials, which arises as a result of the conflict between the idealistic aspirations of ICL (Chapter 2), and the anxieties which surround international defendants (Chapter 3). The recognition of key concepts, such as the 'otherisation' and resultant arrested development (or 'hypoplasia') of the Defence, will provide an invaluable foundation for the doctrinal analysis of the 'institutional otherisation' at the modern institutions in Part II.

Part II.

The Modern International Courts and Tribunals: 'Institutional Otherisation'

Chapter 4.

The Influence of Nuremberg IMT on the Rights of the Accused: The Beginnings of an International Criminal Procedure

*'If the foundation is wrong, nothing that comes from it can be right.'*¹

1. Introduction

The '*unimaginable atrocities*' which were committed during WWII served as a rigorous test of the commitment to the right to a defence, as many of the Allied leaders 'toyed' with the option of summary execution for the Nazi leaders.² The 'Nuremberg International Military Tribunal' (NIMT) was an important development in ICJ and its cosmopolitan aspirations,³ and has had a profound impact on the seismic development of ICL over the past half century. It is worth emphasising that extent of the shock caused by the crimes of WWII cannot be underestimated. Despite the continuation of wars and atrocities, it is still very difficult to comprehend the sheer scale and extent of the human suffering and loss, which went far beyond casualties of war that one could have reasonably anticipated in the circumstances. Arendt commented, *'[t]he Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness... That is, this guilt, in contrast to all criminal guilt,*

¹ BIRKETT, N. (1947) 'International Legal Theories Evolved at Nuremberg.' **23** *International Affairs*. 317-325 at 322

² SCHABAS, W. (2012) '*Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*'. Oxford, OUP. p9

³ See, ROBINSON, D. (2013) 'A Cosmopolitan Liberal Account of International Criminal Law. **26** *Leiden Journal of International Law*. 127-153

oversteps and shatters any and all legal systems.'⁴ Arendt's view is understandable; if 'justice' is represented through punishment, then there is very little one can award a *genocidier*, which will in any way be proportionate to the crimes committed.

The NIMT was created by way of the 'London Charter', signed by the Allies on the 8th of August 1945, which Safferling describes as the '*birth of international criminal procedure*'.⁵ Although senior figures in the Third Reich such as Hitler and Goebbels, committed suicide, other key figures were captured, leaving the Allies with the extremely difficult question of how to deal with them.⁶ Whilst it was clear that an innovative means of dealing with these individuals was needed, the means by which this should be achieved was less apparent.⁷ After the failure of attempts made to impose sanctions after WWI, such as the Treaty of Versailles and the Leipzig trials,⁸ there was a renewed effort in striving to enforce individual accountability. Since the NIMT, there has been a significant and lasting change in the status of the individual under international law.⁹

How, then, to best analyse and assess the Tribunal? Naturally, a qualitative analysis is necessary, and will be provided hereafter, regarding its establishment, structure and functioning in relation to the accused and defence counsel. It would be all too easy to pass judgement on the proceedings with the benefit of hindsight and subsequent development of international criminal procedure. However, perhaps a fairer

⁴ ARENDT, H. *et al* (1992). 'Hannah Arendt - Karl Jaspers - Correspondence 1926-1969.' New York, Harcourt Brace. p54

⁵ SAFFERLING, C. (2012) 'International Criminal Procedure.' Oxford, OUP. p11

⁶ N.B. The criticism that NIMT is an example of victor's justice, and so violated the principle of *nullum crimen sine lege*, are discussed extensively elsewhere and so will not be addressed in great depth here. See, for example (including arguments against such assertions) MERON, T. (2006) 'Reflections on the Prosecution of War Crimes by International Tribunals.' **100(3)** *American Journal of International Law*. 551-579 at 567

⁷ OVERY, R. 'The Nuremberg Trials: International Law in the Making.' in SANDS, P. (2003) 'From Nuremberg to The Hague: The Future of International Criminal Justice.' Cambridge, CUP. p28

⁸ The Leipzig War Crimes Trials were held after the WWI in Germany, as agreed upon in the Treaty of Versailles. See, CASSESE, A. (1998) 'Reflections on International Criminal Justice.' **61(1)** *Modern Law Review*. 1-10 at 7

⁹ GALLANT, K.S. (2010) 'Criminal Defence and the International Legal Personality of the Individual.' *Revue québécoise de droit international (Hors-série)*. 75-90 at 75

analysis should involve a more measured and contextual approach, in light of the lack of preceding institutions, as well as the political and social pressures which existed at that time. As Bassiouni explains:

*'Most commentators on the Nuremberg legacy tend to approach the analysis and appraisal.. in much the same terms as the proverbial optimist and pessimist describing a glass as half full or half empty.'*¹⁰

Some commentators tend to hold the tribunal up as a shining beacon of justice,¹¹ whilst other see a 'political' application of victor's justice and *ex post facto* law, and hence see it as 'half-empty'. Caution should be taken when faced with the temptation of judging the Tribunal by *current* standards of due process and human rights.

The NIMT provides valuable insight across many aspect of ICL, and has particularly important ramifications for the role of the Defence and the rights of the accused. Procedurally, the NIMT is of crucial importance since it gave rise to an, albeit limited, 'Rules of Procedure',¹² designed specially for an international tribunal of mixed character.¹³ It will be argued that since the NIMT, the Defence has struggled to acquire varying degrees and means of independence.¹⁴ The hypoplasia of the Defence in ICL can be seen as originating at the NIMT, particularly since some of its shortcomings continue to be '*endemic to courts*' at the modern institutions.¹⁵

As the NIMT is undoubtedly the cornerstone in the foundation of ICL, the extent to which it is structurally sound with respect to defence issues must be assessed. This Chapter will examine the substantive provisions in the Charter and 'Rules of Procedure'

¹⁰ BASSIOUNI, M.C. (1986) 'Nuremberg: Forty Years After.' **80** American Society of International Law Proceedings. 59-64 at 59

¹¹ For a very 'positive' view of the Defence's position, see TAYLOR, T. (1955) 'The Nuremberg Trials.' **55** Columbia Law Review. 488-525 at 512

¹² Adopted 29 October 1945.

¹³ HASSAN-MORLAI, P.M. (2009) 'Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone.' **3** African Journal of Legal Studies. 96-117 at 98

¹⁴ WILSON, R.J. (2008) "Emaciated' Defence or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?" **15(2)** Human Rights Brief. 6-9 at 9

¹⁵ MERON, T. (2006) at 552

regarding issues relating to the fair trial of the accused. This will include the appointment and background of defence counsel, and the overwhelming nature of the their role in light of the vast restrictions regarding time and resources. The numerous difficulties presented by the acquisition, translation and submission of evidence will also be examined so as to ultimately assess whether there can be said to have been an 'Equality of Arms' (EoA). The International Military Tribunal for the Far East (IMTFE, or 'Tokyo IMT') will also be examined briefly for any significant differences regarding the Defence.

2. The Composition of the Tribunal

The London Charter laid out the key provisions for the establishment and functioning of the NIMT. The Allies had a significant level of control over every aspect of the trial: the Prosecution, the Bench, custody of accused and possession of extensive evidence.¹⁶ It is worth recognising the contribution of Robert Jackson, who has rightly been described as the '*architect*' of the Tribunal.¹⁷ When addressing the American Society of International Law in 1945, Jackson explained:

*'The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proved guilty. If you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict.'*¹⁸

¹⁶ SYMPOSIUM (1995) 'Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial.' 12 (3) New York Law School Journal of Human Rights. 453-544 at 479-80

¹⁷ BASSIOUNI, M.C. (1986) at 64

¹⁸ CONOT, R.E. (1983) 'Justice at Nuremberg.' Washington D.C., Weidenfeld & Nicolson. p14

'Courts' which are established with the only purpose of convicting and sentencing, are nothing more than political mechanisms designed to '*rubber-stamp convictions - and executions*'.¹⁹

A. The Selection of the accused to stand trial

The criteria for the selection of the accused who were ultimately indicted by the Tribunal and stood trial, changed considerably throughout the course of negotiations. It appears that the Allies had assumed that the selection of accused would be somewhat self-evident, which was not to be the case.²⁰ No criteria for selection existed *per se*, which meant that the list took shape as a result of months of political negotiations and requests from each of the Allies.²¹ Whilst the inclusion of some of the accused was relatively non-controversial, the rationale behind the addition of specific individuals was a clear cause for concern. Perhaps one of the most self-evident examples of this was the so called 'Krupp fiasco', which initially involved Gustav Krupp, whose health was extremely poor. Realising this it was unfeasible to pursue the prosecution, Jackson attempted to instead include his son Alfried, mentioning that he might, '*as a sporting gesture*', volunteer to fill the void.²² This notion, whilst thankfully rejected, demonstrates a questionable approach to the selection process.

In August 1945, after the signing of the London Charter, the number of possible defendants on Jackson's list stood at approximately seventy-three. However, upon presenting the list to France and the USSR, both were perturbed that none of the

¹⁹ GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) *Champion*. 20-27 at 24

²⁰ OVERY, R. (2003) pp.7-8

²¹ LIPPMAN, M. (1991) 'Nuremberg: Forty Five Years Later.' **7(1)** *Connecticut Journal of International Law*. 1-64 at 39

²² SARVARIAN, A. (2012) 'Ethical Standards for Prosecution and Defence Counsel before International Courts. The Legacy of Nuremberg.' **10** *Journal of International Criminal Justice*. 423-446 at 435

individuals whom *they* had detained were included.²³ By the 25th of August, this number had been narrowed down to twenty or so defendants, with Bormann being the only individual not yet captured. At the last moment, prior to the list being released to the public, the Soviets requested the addition of two individuals: Raeder, a commander of the German Navy, and Fritzsche, a radio newscaster. The addition of Fritzsche is particularly troubling in the sense that he was not considered to be a major war criminal, but as the Soviets at this point would not be trying *any* of the individuals in their custody, it was felt to be appropriate to 'allow' him be included in the indictment.²⁴ The Soviets could not be seen to not to have any of their detainees included in the indictment; it was a matter of political pride.²⁵

Meanwhile, the US was concerned with attempting to deem certain organisations as criminal (under the conspiracy charge), with a view to enabling further prosecutions post-Nuremberg, simply by virtue of an individual's membership of the relevant organisation.²⁶ An example of the ramifications of such an approach, can be seen in the inclusion of Schacht, president of the *Reichsbank*, as a result of the American plan to prosecute organisations.²⁷ The questionable decision to include Schacht is perhaps best understood in terms of the need for a continued discovery of evidence. In contrast to many of the other accused, the evidence relating to Schacht, '*tended to exculpate him*',²⁸ perhaps demonstrating the questionability of his indictment.

The selection process at the NIMT has been described as '*arbitrary in the extreme*'.²⁹ Ultimately, the defendants were selected hastily, without due concern as to their suitability for indictment.³⁰ Hess, for example, may well have been insane, and yet

²³ CONOT, R.E. (1983) p27; Taylor notes, '*Fritzsche was added only to caress the Soviet ego.*' TAYLOR, T. (1993) '*The Anatomy of the Nuremberg Trials.*' USA, Bloomsbury. p90

²⁴ *Ibid.* p28

²⁵ OVERY, R. (2003) p13

²⁶ TAYLOR, T. (1993) p36

²⁷ SYMPOSIUM (1995) at 510

²⁸ CONOT, R.E. (1983) p396

²⁹ OVERY, R. (2003) p29

³⁰ TAYLOR, T. (1993) p90

was tried, found guilty and given a life sentence.³¹ Kaltenbrunner, having suffered a potentially fatal haemorrhage preceding the trial, spent time in hospital and as a result was absent for several weeks.³²

B. The provision and omission of defence rights in the Charter & Rules of Procedure

Whilst there is no deception in the title, 'Nuremberg International *Military* Tribunal', this aspect of the trial has a tendency to be overlooked both in terms of its assessment, as well as its place in history as an influential precedent for subsequent Courts. The concept of a 'military tribunal' suggests that it does not operate within the 'usual' framework of national Courts, but instead has its own (reduced) standards of process and procedure.³³ In particular, these differences are concerned with due process, whereby expediency is arguably the most prominent objective, which results in a degree of relaxation when compared with 'civilian' standards.³⁴ It was for precisely these reasons that a military tribunal was sought.³⁵ It was crucial that the trial did not escalate beyond the Allies' control.

As the NIMT has played such an influential and formative role in shaping the subsequent Courts, caution must be taken in acknowledging the disparities between using a *military* tribunal as a template for more traditional, 'formal' Courts. The fact that the NIMT was constructed as a military tribunal must undoubtedly shed light on why the rights of the accused, or the importance of fair trial, were at times subsumed under

³¹ WALLACH, E.J. (1998-9) 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?' 37 Columbia Journal of Transnational Law. 851-883 at 876

³² CONOT, R.E. (1983) p96. Kaltenbrunner was sentenced to death.

³³ Regarding the military tribunal more generally, see KASTENBERG, J.E. (2003-4) 'The Right to Assistance of Counsel in Military and War Crimes Tribunals: An international and Domestic Law Analysis.' 14 Indiana International & Comparative Law Review. 175-225 at 180-1

³⁴ SCHWARZENBERGER, G. 'The Judgement of Nuremberg.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP. p169

³⁵ *Ibid.* p170

other considerations or aims. To then extrapolate the approach taken at the NIMT across to strictly 'legal' trials, is to risk perpetuating and institutionalising such principles. Whilst human rights law developed exponentially after WWII, the NIMT as an institution was in many ways the only available blueprint for the subsequent Courts. Thus, its shortcomings must be recognised with a view to whether any 'defects' have managed to filter through to the modern international institutions.

i. The Charter

Gallant argues that the drafters of the Charter '*paid very little attention to the rights of the accused*', other than providing the right to counsel.³⁶ Although due process protections were recognised, such considerations were closely followed by concerns regarding the potential for obstructive behaviour on the part of the accused, and so were 'justifiably' restricted.³⁷ Meron argues that due process protections were simply not amongst the Allies' chief concerns.³⁸ Despite the brief nature of the Charter, in particular the Defence provisions, some basic fair trial features were nonetheless included. It is worth noting that the due process protections of the Universal Declaration of Human Rights (UDHR) were in contemplation at this time.³⁹

The rights of the Defence can be found primarily within Article 16 of the London Charter. Article 16a) stated that the accused must be provided with a copy of the indictment, translated into a language which they understood at a '*reasonable time before the Trial*.'⁴⁰ Article 16d) provided for the accused to have the right to '*assistance of counsel*' or to conduct their own defence, with no mention as to the adequacy or

³⁶ GALLANT K.S. (2003) 'Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.' 14 Criminal Law Forum. 317-334 at 318

³⁷ JACKSON, R. 'Report to the President' (6 June 6 1945) in MARRUS, M.R. (1997) 'The Nuremberg War Crimes Trial 1945-46. A Documentary History.' USA, Bedford. p41

³⁸ MERON, T. (2006) at 569

³⁹ See, FARRELL, B. (2009) 'Habeas Corpus and the Drafting of the Universal Declaration of Human Rights.' 11 Journal of the History of International Law. 81-101 at 83

⁴⁰ Adequacy of time to prepare will also be discussed in Chapter 6.

guaranteed standards of such representation. Article 16e) allowed defendants to present evidence in their defence, as well as to cross-examine witnesses called against them.

The London Charter was deficient in several respects in relation to the rights of the accused. For example, Bormann was tried, convicted and sentenced to death completely *in absentia*.⁴¹ The London Charter also omitted any protection regarding *ne bis in idem*. In fact, Article 11 expressly stated that a defendant ‘*may be charged before a national, military or occupation court*’ despite being convicted at the NIMT.⁴² A deliberate inclusion of such a provision provides a ‘catch-all’ mechanism should any of the defendants have been acquitted, or should defence counsel have attempted to pervert the course of justice. Three of the accused (Fritzsche, von Papen and Schacht), were later prosecuted in German Courts, despite being acquitted at the NIMT.

There was no right to appeal the sentences handed down by the IMT. Clemency could be sought only from the Allied Control Council.⁴³ On the 1st of October 1946, when the judgement and sentences were handed down, the President advised that the defendants would have four days in which to apply for clemency.⁴⁴ All submitted applications were denied, as were the requests to be shot instead of hanged.⁴⁵ On the 16th of October, a little over two weeks after the judgement, the sentences were promptly carried out. Access to any form of appeals process was consequently denied by the use of the death penalty.

⁴¹ MERON, T. (2006) at 569

⁴² *Ibid.*

⁴³ *Ibid.* at 570

⁴⁴ Judgement of NIMT (1 October 1946). Available at <http://avalon.law.yale.edu/imt/judsent.asp> [Last accessed 10.9.2014]

⁴⁵ ‘Clemency is Denied All Nazis’ (10 October 1946) The Deseret News. Available at <http://news.google.com/newspapers?nid=336&dat=19461010&id=jmRSAAAAIBAJ&sjid=vXwDAAAAIBAJ&pg=4633,3998360> [Last accessed 10.9.2014]

ii. The Rules of Procedure & Evidence (RPE)

The 'Rules of Procedure' at the NIMT were highly flexible.⁴⁶ By virtue of creating a *military* tribunal, and the objectives of expediency therein, the Rules of Procedure were thus of a versatile and fluid nature. Article 19 of the London Charter of the NIMT was explicit:

'The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.'

Naturally, the Rules of Procedure had a large impact upon the proceedings, and the lack of technical rules relating to evidence was troubling to those from the Anglo-American systems.⁴⁷ Whilst the intention of such flexibility was likely to have been to expedite the proceedings and maintain control, the reality of the situation was that the Court was forced to rule '*almost daily*' on issues relating to the admissibility of evidence.⁴⁸ The trial, being primarily adversarial in nature, had no jury from which evidence of a prejudicial nature needed to be excluded. This meant that the usual rules preventing such evidence from being admitted were 'discarded'.⁴⁹ The flexibility of the Rules of Procedure have been sharply criticised. For example, according to Wallach, '*the overriding reality [was] that the rules of evidence and procedure which governed the trials were flexible beyond not just the norms of criminal trials in democratic systems, but beyond the bounds of fairness as well.*'⁵⁰

⁴⁶ Accessible at <http://avalon.law.yale.edu/imt/imtrules.asp> [Last accessed 10.9.2014]

⁴⁷ SYMPOSIUM (1995) at 479

⁴⁸ BIDDLE, F. 'The Nürnberg Trial.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP. p202

⁴⁹ MAY, R. & WIERDA, M. (1999) 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha.' 37 Columbia Journal of Transnational Law. 725-765 at 729-30

⁵⁰ WALLACH, E.J. (1998-9) at 868-9

C. The fairness of the Tribunal's composition

Zappalà argues that some of the procedural rules were applied inequitably between the Defence and Prosecution,⁵¹ thus creating a procedural imbalance. Kranzbühler, perhaps the most prominent defence counsel at the NIMT, made a strong argument that the procedures adopted significantly disadvantaged the accused.⁵² Much of the academic commentary tends to analyse the fairness of the NIMT by concluding that the Charter itself was essentially just, but the Rules of Procedure were responsible for providing much of the unfairness. This can certainly be argued to be '*a trifle too generous*', as the 'blame' cannot fall solely on the Rules of Procedure.⁵³ Perhaps the greatest cause for concern centres around the omission of fair trial provisions. Zappalà refers to three examples in order to demonstrate such deficiencies: '*the absence of a detailed procedure for discovery, the absence of any provisions on exculpatory materials, and the absence of the presumption of innocence.*'⁵⁴ That there was no explicit mention in the London Charter of the presumption of innocence, the burden of proof,⁵⁵ or the principle of EoA is perhaps most indicative of the serious absence of some of the more crucial aspects of a fair trial.

Considering the important defects and omissions in the Charter and RPE, the potential for fairness at trial is questionable. Laternser, defence counsel, argued that when questioning the fairness of the trial, only a negative answer is possible due to the

⁵¹ ZAPPALÀ, S. 'The Rights of the Accused.' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP. p1323

⁵² MARRUS, M.R. (1997) p248

⁵³ ZAPPALÀ, S. in CASSESE, A. *et al.* (2002) p1321

⁵⁴ *Ibid.* p1324

⁵⁵ MERON, T. (1995) 'From Nuremberg to the Hague.' **149 Military Law Review**. 107-112 at 108. The Tribunal nevertheless arguably placed the burden firmly on the Prosecution, in line with the adversarial system. See, MERON, T. (2006) at 569

fact that the unfairness began '*outside of the court chamber and therefore had to continue in it.*'⁵⁶

3. The Trial Stage at Nuremberg IMT

A. Overwhelming Evidence and the '*sui generis*' Mixed Procedure

The amount of evidence collected by the Prosecution at the NIMT was astonishing. The Nazis were thorough record keepers, which provided the Prosecution with a wealth of evidence. Due to the availability of extensive *affidavit* evidence, this necessarily shaped the approach of the Prosecution, who adduced extraordinary amounts of, primarily written, evidence at trial.⁵⁷

Also fundamental to the nature of the Tribunal, was the merging and compromise between the legal systems of the Allies. Due to their shared English common-law foundations, the US and Britain had sufficiently similar legal systems and procedures so as not to cause too much difficulty. Despite differences between the French, Soviet (and German) systems, they were clearly distinct from the Anglo-American system.⁵⁸ It can be observed that little attention was actually given as to how the '*two systems could be married.*'⁵⁹ Necessarily, due to the lack of time available to prepare such an unprecedented institution of this kind, this intrinsic feature of the proceedings unavoidably caused much confusion and difficulty. For example, counsel from the continental systems were clearly shocked that evidence could be submitted

⁵⁶ LATERNSEER, H. 'Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP. p489

⁵⁷ MERON, T. (2006) at 560

⁵⁸ TAYLOR, T. (1993) p59

⁵⁹ *Ibid.*

for the first time at the trial stage, rather than being disclosed.⁶⁰ Such disbelief was not, however, limited to counsel. The Soviet Judge, Nikitchenko, appeared to fail to understand Jackson when he stated that the Judges must be independent and impartial, in accordance with the adversarial system, in which the judge acts as arbiter between the Prosecution and Defence.⁶¹ It can be argued that the mixed procedure affected defence counsel profoundly, who were all of a German legal background, unfamiliar with features of adversarial procedure.⁶² As will be argued next, they were nevertheless expected to cope with very little support from the Tribunal.

B. Defence counsel at the NIMT: appointment, attributes and ability

Any potential counsel for the Defence at the NIMT could be under no illusion as to the difficulty of their complex role. The extent to which the trial would test their abilities as defence lawyers was, however, less clear. To be asked to defend those accused of crimes of such magnitude, at a time when such trials were far from the norm, would have been a difficult proposition to consider for a number of reasons. Most of the individual defendants were notorious, and public perception was almost inexorably negative towards them; such '*revulsion*' would naturally extend to those lawyers accepting to act in their defence.⁶³ Described as '*the auxiliaries of the damned*',⁶⁴ the defence counsel who agreed to represent the accused undertook a difficult burden.

⁶⁰ *Ibid.* p501

⁶¹ CONOT, R.E. (1983) p18

⁶² SYMPOSIUM (1995) at 479-80

⁶³ WILSON, R.J. in BOHLANDER, M. *et al.* (2006) p42

⁶⁴ CARTER, K. (1993) 'Proof Beyond a Reasonable Doubt? Collecting Evidence for the International Criminal Tribunal for the Former Yugoslavia.' **31** Canadian Year Book of International Law. 235-263 at 240

Remuneration of counsel stood in stark contrast, as whilst the Prosecution were paid in accordance with their own national standards,⁶⁵ the Judges agreed to offer German defence counsel payment in Marks, by way of an advanced payment of four thousand Marks, followed by two-thousand-five-hundred Marks per month. Conot notes that this level of payment, whilst being in-line with German standards at the time, was of 'academic' importance only, '*since the only viable currency in the Reich was now American cigarettes.*'⁶⁶ With basic necessities such as food and shelter being in such short supply in Germany, the decision to accept the role of defence counsel is likely to have been swayed by factors other than appropriate standards of remuneration. Whilst agreements were reached with respect to the remuneration of defence counsel, these were made '*only after great effort and time had passed.*'⁶⁷

It was feared that the selection of entirely German defence counsel would provide a platform for Nazism, and for the actions of the Nazi regime to be 'defended'.⁶⁸ Jackson, even with his determined drive to establish the Tribunal, stated that he would prefer there to be no trial at all, rather than risk allowing the German defence counsel to '*exploit*' the process.⁶⁹

With regards to the appointment of defence counsel, no selection criteria or mechanism was agreed upon in the Statute.⁷⁰ As such, a huge reliance would be placed on the personnel capable of aiding the defendants in seeking representation. The Tribunal's Rules of Procedure made some accommodation for the selection of personnel. According to Rule 2(d):

⁶⁵ SKILBECK, R. (2004) 'Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone.' **1(1)** *Essex Human Rights Review*. 66-86 at 71

⁶⁶ CONOT, R.E. (1983) p83

⁶⁷ NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** *Stanford Journal of International Law*. 379-440 at 413

⁶⁸ TUINSTRA, J.T. (2010) 'Defending the Defenders. The Role of Defence in International Criminal Trials.' **8** *Journal of International Criminal Justice*. 463-486 at 464-5

⁶⁹ SYMPOSIUM (1995) at 478

⁷⁰ WILSON, R.J. in BOHLANDER, M. *et al.* (2006) p39

*'The Tribunal will designate counsel for any defendant who fails to apply for particular counsel or, where particular counsel requested is not within ten days to be found or available, unless the defendant elects in writing to conduct his own defense.'*⁷¹

As such, the Tribunal was prepared to assign defence counsel in situations where none could be found in accordance with the requests of the accused. Whilst many counsel were selected by the accused, twelve had not been assigned defence counsel with only three weeks remaining prior to the start of the trial.⁷² It was not until the 12th of November, that it could be reported that all of the defendants had, to some basic degree, secured defence representation.⁷³ With the trial starting on the 20th of November, this left some of the defence counsel with little more than a week to prepare their cases. Such limitations on time are incredibly burdensome for any trial, let alone one of such complexity, which carried threat of the enforcement of the death penalty.

The reported abilities of defence counsel vary between commentators. With regards to experience, Conot notes that only eight of the counsel for the Defence *'had had substantial experience in criminal cases.'*⁷⁴ Dodd, assistant to the US Prosecution, felt that whilst some defence counsel were *'outstanding lawyers at the German Bar'*, overall they could be deemed only as *'competent'*.⁷⁵ Taylor particularly notes Dix and Kranzbühler as being of superior ability, whilst he also observes that *'a few were painfully incompetent'*.⁷⁶ The task before defence counsel was onerous, and due to the circumstances and considerations already discussed, it follows logically that such a role might attract counsel of varying quality. Their abilities must be viewed in light of the demands made on their professional capabilities, particularly in view of their legal backgrounds, and lack of training with regards to the key differences between legal

⁷¹ Rule 2(d) of the Rules of Procedure, NIMT.

⁷² CONOT, R.E. (1983) p81

⁷³ TAYLOR, T. (1993) pp.143-4

⁷⁴ *Ibid.* p86

⁷⁵ DODD, T.J. 'The Nuremberg Trials.' in METTRAUX, G. (Ed.) (2008) *'Perspectives on the Nuremberg Trial.'* Oxford, OUP. p197

⁷⁶ TAYLOR, T. (1993) p228

systems. Cross-examination is perhaps the clearest example of a crucial skill required at the NIMT. Having no experience by virtue of their German legal backgrounds, they were clearly placed at a disadvantage; some managed to respond more effectively to this task than others.⁷⁷ Despite this lack of experience, the Judges were clear that the role of cross-examining prosecution witnesses lay firmly with defence counsel.⁷⁸

C. The principle of 'Equality of Arms': constraints on time and resources

In what was largely an adversarial procedure at the NIMT, considerable importance was placed on the respective roles of the Prosecution and Defence. Thus, the principle of EoA has significant importance when considering the fairness of the trial. As discussed in Part I of this thesis, the parties should be in a position to have a real chance of succeeding with their case. The principle of EoA is foremost observable via the time afforded to both parties in the preparation of their cases, as well as the resources with which they are provided.

The defence counsel at the NIMT argued strongly that there was a lack of EoA between themselves and the Prosecution.⁷⁹ One factor which indicated the perceived imbalance, was the number of staff assisting each side. As previously mentioned, the defendants were entitled to one lawyer to represent them, some of whom represented multiple defendants. On the other hand, the US Prosecution team alone had the largest number of personnel, with around seven hundred people assisting their effort.⁸⁰

⁷⁷ MARRUS, M.R. (1997) pp.117-9

⁷⁸ ORIE, A. 'Accusatorial vs. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings of the ICC.' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP. p1457

⁷⁹ WILSON, R.J. in BOHLANDER, M. *et al.* (2006) p9

⁸⁰ SKILBECK, R. (2004) at 71

A strong case can be made that the Defence were not provided with adequate time to prepare their cases *ab initio*, as well as throughout the trial. As Skilbeck notes, the Defence had little in the way of resources, which meant that, together with the speed at which the trial process started, there could be '*no real investigations*.'⁸¹ The denial of time to prepare can be seen from as early as the entering of the defendants' pleas. Dr. Rudolf Dix, speaking at the time on behalf of defence counsel, was forced to protest due to the fact that they had not yet had an opportunity, prior to the session starting, to ascertain how their clients wished to plead.⁸² A short recess was granted to allow consultation with their clients. However, it is somewhat astonishing that such an essential factor as the plea, which is central to how counsel will proceed with the accused's defence, was not foreseen to necessitate client consultation.

The provision of resources for the Defence was a crucial aspect concerning their ability to properly fulfil their role. Initially, it is argued that the defence counsel '*stood there with literally empty hands*' and were allocated only a small library room, which did not even provide enough space for each counsel to have their own work place.⁸³ Over time, the facilities afforded to the Defence improved somewhat, with the provision of a larger room and limited access to a single shared telephone.⁸⁴

Overall, it seems appropriate to conclude that at the NIMT there were worrying indications that the principle of EoA was not duly respected. The Prosecution was slow to provide any support, and did so only '*grudgingly*'.⁸⁵ Despite some limited recognition of their difficulties, the Defence was nonetheless faced with an arguably insurmountable challenge, due in main to the lack of resources and time afforded to them. This issue becomes most troubling when considered in relation to the strength

⁸¹ *Ibid.*

⁸² TAYLOR, T. (1993) p166

⁸³ LATERNSEER, H. (2008) p476

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 408

and resources afforded to the Prosecution; it can be argued that the comparative disparity between the parties '*stood in no expressible proportion*'.⁸⁶

D. The Allied Judges

The Bench at the NIMT comprised of judges selected from each of the Allies. The absence of a neutral Judge, much less a German Judge, is perhaps one of the most significant criticisms relating to the fairness of the proceedings. Had a Judge from a 'neutral' State been included, it would have afforded the Bench a great deal more legitimacy, both at the time as well as in retrospect.⁸⁷

Even if a neutral or German Judge was not required in the interest of fairness, it can nevertheless be argued that the defendants were entitled to an impartial and fair judiciary. It has been argued that there existed an '*overriding intention*' on behalf of the judges to presume the guilt of the accused.⁸⁸ Certainly, there were incidents which indicate such a presumption on the part of some of the Judges. The Tribunal presented an extraordinary situation, stretching over many months in which the Judges and Prosecutors from the Allies socialised together. Taylor recounts a toast made by Soviet Judge Vishinsky, who raised his glass to the other Judges and Prosecutors present and announced: "*I propose a toast to the defendants. May their paths lead straight from the courthouse to the grave!*"⁸⁹ Due to the language barrier, several of the Judges drank to this toast before the translation was explained, causing considerable anxiety.⁹⁰

⁸⁶ LATERNSEER, H. (2008) p476

⁸⁷ CHANEY, K.R. (1995) 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials.' 14 Dickinson Journal of International Law. 57-94 at 87

⁸⁸ WALLACH, E.J. (1998-9) at 882

⁸⁹ TAYLOR, T. (1993) p211

⁹⁰ *Ibid.*

E. Evidence admitted at trial: nature, restriction and effect

The way in which evidence was adduced at the Tribunal had a large bearing on the fairness of the trial and the effectiveness of the Defence. Already at a disadvantage due to the unfamiliar procedure, the German defence counsel were required to adapt quickly to the procedure, within the evidentiary restrictions placed upon them. This was by no means an easy task, and it has been observed that many counsel, at least initially, struggled to cope.⁹¹

i. The dominance of *affidavit* evidence

Due to the mass of evidence collected in advance by the Allies,⁹² aided by the avid record keeping of the Nazi Regime, the issue arose as to whether the Tribunal would allow, and rely on to a great extent, the use of *affidavit* evidence. As a general rule in Anglo-American systems, the principle of 'best evidence' suggests that preference should be given to a witness, who can be called before the Court and so cross-examined and 'tested' for accuracy, over a sworn document, which by its nature cannot carry the same safeguards. Therefore, it would not have been unsurprising if the Tribunal would look less favourably on written evidence, especially where witnesses may be available. However, as one of the overarching aims of the trial was to compile an historical record, the Tribunal was in practice far more '*ambivalent*' regarding the admission of *affidavit* evidence.⁹³ Consequently, the vast majority of evidence accepted by the Tribunal was comprised of written documents.⁹⁴

The sheer volume of written evidence available to the Prosecution was overwhelming. After a while, Jackson had to call to a halt the searching for further

⁹¹ CONOT, R.E. (1983) p86

⁹² LATERNSEER, H. (2008) p476

⁹³ MAY, R. & WIERDA, M. (1999) at 749

⁹⁴ ZAPPALÀ, S. in CASSESE, A. *et al.* (2002) p1323

evidence, as the number of documents recovered was in the region of five thousand.⁹⁵ Despite the overwhelming array of material from which the Prosecution could select, all evidence was not necessarily reliable; in some instances it came to light that documents had been falsified.⁹⁶

With such a heavy reliance on written evidence, the issue of translation was of great importance. With English, French, Russian and of course German all being spoken (and needing to be understood) simultaneously within the court room, the language barrier had the potential to undermine and greatly protract the proceedings. Due to the innovation of the system provided by IBM, translation was provided almost simultaneously in Court. This meant that all those participating could speak in their language of choice, and could also 'tune in' to the channel broadcasting in the language they wished to hear.⁹⁷ Without such a novel system, it is hard to conceive how the Tribunal could have properly functioned; certainly the trial would have lasted considerably longer, and would have likely caused greater difficulties for the defence counsel and accused in presenting their cases.

However, it was not just the Court room itself which required comprehensive translation. Crucial to the preparation for both parties to the trial, documents needed to be translated in a timely and accurate manner. This is perhaps where the Defence suffered most greatly. Whilst only half of the approximate five thousand documents in the Prosecution's hands were translated, only around five hundred were made available to the Defence.⁹⁸ Kranzbühler, defence counsel, recalls being initially '*flooded*' by documents which were only in English, which meant that often the Defence did not have any meaningful knowledge of such evidence prior the Prosecution presenting them in Court.⁹⁹ Ultimately, defence counsel were given the Prosecution's material only

⁹⁵ CONOT, R.E. (1983) p88

⁹⁶ ZAPPALÀ, S. in CASSESE, A. *et al.* (2002) p1323

⁹⁷ CONOT, R.E. (1983) p84

⁹⁸ *Ibid.* p88

⁹⁹ KRANZBUHLER, O. (1964-5) 'Nuremberg Eighteen Years Afterwards.' 14 DePaul Law Review. 333-347 at 345

five days prior to the start of the trial.¹⁰⁰ Defence counsel routinely argued that documents were not delivered to them until the evening prior to the proceedings.¹⁰¹ Such extreme delays would render it almost impossible to prepare adequately the defence case.

The Tribunal decided to create what was known as the 'Defendants' Information Centre'. This was the mechanism through which the Prosecution, to a certain extent, made the documents which they intended to submit to the Court available to the Defence. Although the Prosecution placed many documents within the Centre, Marrus notes that the Defence had to comply with an '*elaborate procedure*'.¹⁰² The Defence were not permitted to access the Prosecution's evidentiary archives, nor was it permissible for them to submit non-German documents to be used in favour of the accused.¹⁰³ The Defence, as Kranzbühler explains, '*had to live on what was left over*'.¹⁰⁴ Thus, one could argue, that with such extensive restrictions, to not provide the 'Defence Information Centre' would have been for the Prosecution to *completely* incapacitate the Defence. However, providing the 'Centre' was, in reality, merely another way of controlling the nature of evidence available, and the extent to which it could be conceivably accessed by the Defence.

ii. The Restrictions on Disclosure of Evidence and Exculpatory Material

Access to evidence by the Defence was purposefully highly controlled and 'effective'. This had serious implications for the objective of compiling the evidence admitted at trial in order to create an *accurate* historical record.¹⁰⁵ The restrictions also impaired the Defence in their efforts, resulting in valuable material not being used in defence of

¹⁰⁰ NEWTON, M.A. (2011) at 408

¹⁰¹ CONOT, R.E. (1983) p323

¹⁰² MARRUS, M.R. (1997) p119

¹⁰³ TAYLOR, T. (1993) p627

¹⁰⁴ KRANZBUHLER, O. (1964-5) at 336

¹⁰⁵ *Ibid.*

the accused.¹⁰⁶ Specific to the needs of the Defence was the issue of exculpatory evidence uncovered by the Prosecution, and the extent to which this was disclosed. To disclose such evidence is a key safeguard concerning fair procedure, particularly in circumstances where the Prosecution holds an advantageous position due to its dominant possession and control of the evidence.¹⁰⁷

It is contended that the Defence at the NIMT had '*no possibility of obtaining exculpatory evidence from the Prosecutor*'.¹⁰⁸ By withholding such evidence from the Court, the Prosecution was not acting contrary to the Rules of Procedure.¹⁰⁹ This suggests, in line with the Allies' general approach to the Tribunal, that there was a reluctance to provide any scope for the Defence to 'abuse' the Tribunal. Perhaps realistically, preventing the Defence from being more likely to achieve acquittals was also integral to this position.

Defence counsel left the Tribunal in no doubt that they suspected that exculpatory evidence was not being disclosed to them.¹¹⁰ The most frequently withheld form of evidence appeared to relate to material concerned with cross-examinations.¹¹¹ With no requirement for the Prosecution concerning early disclosure,¹¹² there can strictly speaking be no accusation levelled at the Prosecution regarding this matter. Whilst the provision of further assistance for the Defence would have positively impacted upon the fairness of the proceedings, such an omission ultimately lies with the drafting of the London Charter, as well as the Rules of Procedure.

¹⁰⁶ LATERNSEER, H. (2008) p476

¹⁰⁷ SARVARIAN, A. (2012) at 436

¹⁰⁸ ZAPPALÀ, S. in CASSESE, A. *et al.* (2002) p1323

¹⁰⁹ LATERNSEER, H. (2008) p475

¹¹⁰ CONOT, R.E. (1983) p323

¹¹¹ ORIE, A. in CASSESE, A. *et al* (2002) p1460

¹¹² MAY, R. & WIERDA, M. (1999) at 756

iii. The use of prejudicial evidence?

The horrors of WWII, particularly the concentration camps, are so shocking that they are understandably hard to conceptualise or accept as true. As the technology to record moving images with sound had become more readily available, the American forces, in particular, utilised film to record the scenes they discovered. Much of the film which was taken was then compiled to make an hour-long 'documentary film' known as '*Nazi Concentration Camps*'. Even by today's standards, despite any possible desensitisation to violence, the film is highly disturbing and portrays the level of human suffering and the appalling number of dead.

The film '*Nazi Concentration Camps*' was admitted as evidence, and attested to by *affidavits* shown prior to the film being projected, in an attempt to authenticate it. Video evidence, without the filmmaker present, could amount to hearsay if there is no possibility to cross-examine the evidence. (The admission of hearsay, as well as other '*unsubstantiated evidence*' was permissible at the NIMT.¹¹³ For example, evidence was admitted from the defendants' pre-trial interrogations.¹¹⁴) The documentary attempts to appear objective, yet goes beyond providing mere descriptions of the scenes.¹¹⁵ The film, it could be argued, was admitted to the Court for reasons other than its evidential value. Again, due to the desire to create an historical record of the atrocities, it was felt necessary to include it.¹¹⁶ Whilst it is not disputed that these images were in any way 'forged', the relevance of showing this 'documentary' at the NIMT must be rigorously questioned.

The gruesome film undoubtedly had a massive effect on all those present in the courtroom: Judges, counsel and defendants alike.¹¹⁷ Taylor observed that the film

¹¹³ CONOT, R.E. (1983) p86

¹¹⁴ MAY, R. & WIERDA, M. (1999) at 761

¹¹⁵ DOUGLAS, L. (1995-6) 'Film as Witness: Screening *Nazi Concentration Camps* Before the Nuremberg Tribunal.' **105(2)** *Yale Law Journal*. 449-482 at 468

¹¹⁶ TAYLOR, T. (1993) p186

¹¹⁷ TURNER, J.I. (2008) 'Defence Perspectives on Law and Politics in International Criminal Trials.' **48** *Virginia Journal of International Law*. 529-594 at 541

'certainly hardened sentiment against the defendants generally, but it contributed little to the determination of their individual guilt'.¹¹⁸ The admission that the film contributed little to the guilt of the accused is supported by the fact that no discussion or explanation of the film was offered. Instead, the Court adjourned at only 10.00, and reconvened the following day with no mention whatsoever of the 'documentary'.¹¹⁹ This suggests that the film was given little consideration as evidence, perhaps due to the fact that Courts had not yet developed an awareness of how to treat video evidence at trial. Nevertheless, the film clearly had a shocking effect on the Court. Taylor also recounts that some of the defence counsel could be heard to say that it had *"become intolerable to sit in the same room with men like Kaltenbrunner and Frank."*¹²⁰ Thus, it can be deduced that permitting the film to be admitted as evidence at the NIMT produced significant, tangible negative effects for the defendants.

It is submitted here that evidence, such as the film shown at the NIMT, together with the way in which the evidence is utilised, has the potential to be highly prejudicial. This is on the basis that the need to admit such evidence, with questionable relevance to the *individual* guilt of the accused, is outweighed by its potential to negatively impact on the defendants. In light of the availability of the developing technology, as well as the need for an historical record for current and future generations, it is understandable that the film was accepted with little questioning or relevant explanation.

iv. Witnesses

At the NIMT, sixty-one witnesses appeared on behalf of the Defence, as opposed to just thirty-three for the Prosecution.¹²¹ In addition to these witnesses, many of the defendants elected to testify on their own behalf, which took up much of the Defence's

¹¹⁸ TAYLOR, T. (1993) p187

¹¹⁹ DOUGLAS, L. (1995-6) at 455

¹²⁰ TAYLOR, T. (1993) p187

¹²¹ MAY, R. & WIERDA, M. (1999) at 744

time.¹²² Considering the length of the trial, the number of defendants before the Court and the extensive nature of the relevant crimes, it is surprising that so few witnesses appeared before the Tribunal, and this demonstrates further the reliance on written evidence. This approach was confirmed by the Prosecution when it was realised that many of the witnesses were providing contradictory or ambiguous statements to the interrogators, often in attempts to avoid attracting blame themselves.¹²³

Balancing the needs of the witnesses with those of the defendants is by no means an easy task, but as Zappalà argues: *'Under no circumstances may the rights of victims prevail over the rights of the defendant, nor may the interest in discovering the truth.'*¹²⁴ As previously discussed, the German defence counsel, with their non-adversarial backgrounds, were struggling to overcome such a disadvantage from the outset. Difficulties were compounded by the deliberate time restrictions placed on the Defence, as they were given notice of witnesses' appearance only the day before.¹²⁵ With the Prosecution preparing weeks in advance for cross-examinations,¹²⁶ a skill which would not have been alien to most Prosecution counsel, they held a distinct advantage over the Defence.

Where a decision has been taken to admit questionable evidence, there is then the risk that the judges could attribute it with a disproportionate weighting during the decision-making process. Lippman argues that as the determination of guilt was largely the product of negotiation and bias, the deliberate consideration of the appropriate weight to assign to evidence was in fact a more minor concern.¹²⁷

¹²² *Ibid.* at 742

¹²³ CONOT, R.E. (1983) p89

¹²⁴ ZAPPALÀ, S. (2010) 'The Rights of Victims v. The Rights of the Accused.' 8 Journal of International Criminal Justice. 137-164 at 164

¹²⁵ CONOT, R.E. (1983) p324

¹²⁶ *Ibid.*

¹²⁷ LIPPMAN, M. (1991) at 40

v. The Judgement and acquittals of the IMT

The judgement of the NIMT has been criticised for its lack of detail concerning the *individual* guilt of the accused.¹²⁸ Instead, the focus of the judgement appears to be more concerned with ‘concluding’ the historical record, which the Tribunal was intended to provide. Another criticism concerning the judgement, as well as sentencing, is the inconsistent and somewhat haphazard nature of decision making. Lippman argues that judicial decisions, concerning guilt and punishment, were reached through ‘*judicial bargaining, negotiation, lobbying and biases*.’¹²⁹ It has been argued, for example, that Schacht most likely had his acquittal strengthened by virtue of his time spent imprisoned at the Dachau concentration camp.¹³⁰

The three acquittals at the NIMT shocked many who had anticipated that a finding of ‘not guilty’ was inconceivable in the circumstances. Rather, it was felt that the Tribunal was merely a formality to be complied with, prior to punishing the accused.¹³¹ The acquittals are often presented as the real ‘*acid test*’ of fairness at the NIMT.¹³² However, in light of the process by which the defendants were selected (as previously discussed), such an argument is significantly weakened. If the Tribunal was in fact fair, then it was very right that those individuals were acquitted; to fail to acquit them would have demonstrated that the Tribunal was wholly unfair. The Soviet Judge Nikitchenko strongly dissented to the judgement, arguing that all defendants should be found guilty and that Hess should receive the death penalty.¹³³ Due to the political and highly arbitrary nature of the selection process of the accused, it is problematic to use acquittals rates at the NIMT in order to demonstrate due process. The acquittals do not, *in and of themselves*, necessarily demonstrate a significant level of fairness given

¹²⁸ *Ibid.* at 39-40

¹²⁹ *Ibid.*

¹³⁰ SYMPOSIUM (1995) at 510

¹³¹ MERON, T. (2006) at 552

¹³² SYMPOSIUM (1995) at 461

¹³³ *Ibid.* at 510

the accused which were selected. Nonetheless, the acquittals have seemingly provided legitimacy to the Tribunal.

Those sentenced to death by hanging were not told when their executions would take place, reminiscent of the treatment depicted by Nabokov.¹³⁴ The harshest of all sentences was needed in order to secure co-operation with the nations who would have executed the captured, without trial. The hangings brought about a brief finality to the proceedings, after the lengthy trial at the NIMT.

4. The International Military Tribunal for the Far East

The International Military Tribunal for the Far East (IMTFE), otherwise known more colloquially as the Tokyo IMT, has had far less impact on the development of international law. Whilst it shared many features with the NIMT, the principle differences, and reasons for its lack of impact, will be briefly analysed. As Bassiouni argues, *'the Tokyo trial was shamefully unfair and riddled procedurally with every type of error, bias, prejudice and unfairness that one can imagine.'*¹³⁵ Thus, although the Charters of the two IMTs were not dissimilar, the main difficulties, and source of unfairness, appears to have emanated from the procedure adopted at Tokyo. The perceived bias and lack of due process are the crucial factors which attract most criticism.¹³⁶

The Defence at Tokyo was likewise not of the same standard as at the NIMT. Defence counsel were faced with similar hostility; when a radio appeal was made asking the Japanese people for practical help with funding, food and accommodation

¹³⁴ Nabokov, V. 'Invitation to a Beheading'.

¹³⁵ BASSIOUNI, M.C. (1986) at 62

¹³⁶ MERON, T. (2006) at 570

for the Defence, it seemingly produced almost no response.¹³⁷ The IMTFE employed a mixture of American defence counsel, as well as Japanese. However, the former did not arrive until two weeks after the commencement of proceedings.¹³⁸

Regarding the functioning and resources of the Defence at Tokyo, there is relatively little information recorded.¹³⁹ As Wilson argues, this was at least in part due to the reported levels of disorganisation within the Defence.¹⁴⁰ As was the case at the NIMT, the Defence faced restrictions of time and resource, and were also denied access to relevant material.¹⁴¹ For example, the Prosecution had the use of two hundred translators, of which seventy-two were also used by the Defence. However, only four or five were perceived to be competent by the Defence.¹⁴²

Overall, the efforts of the Defence have been described as '*extremely weak, frequently causing laughter in the courtroom.*'¹⁴³ Due to the lack of support and procedural fairness, as well as an inefficient and disorganised approach, the objectives of defence counsel appear to have been unattainable.¹⁴⁴ Deale, an advising American lawyer at Tokyo, most chillingly described the perceived role of the Defence as, '*figuratively speaking, to put flowers gracefully on his client's grave.*'¹⁴⁵

¹³⁷ HARRIES, M. & HARRIES, S. (1987) 'Sheathing the Sword. The Demilitarisation of Japan.' London, Heinemann. p145

¹³⁸ SKILBECK, R. (2008a) 'Defending the Khmer Rouge.' **8** International Criminal Law Review. 423-445 at 435

¹³⁹ WILSON, R.J. in BOHLANDER, M. *et al.* (2006) p40

¹⁴⁰ *Ibid.*

¹⁴¹ MERON, T. (2006) at 570

¹⁴² WILSON, R.J. in BOHLANDER, M. *et al.* (2006) p44

¹⁴³ SKILBECK, R. (2004) at 72

¹⁴⁴ HARRIES, M. & HARRIES, S. (1987) p145

¹⁴⁵ DEALE, V.B. (19 Dec 1948) 'The Tokyo Tribunal; Principles and Practices of Procedure Criticized.' New York Times. Available at: <http://select.nytimes.com/gst/abstract.html?res=F30D11FC3959157A93CBA81789D95F4C8485F9#> [Last accessed 11.08.2014]

5. Conclusion

*'There is no need to recall that one of the main teachings of the Nuremberg legacy is that the fairness of the proceedings to the defendants is the main yardstick against which the legitimacy of the whole exercise will be measured.'*¹⁴⁶

The architects and personnel of the NIMT failed to recognise the importance of the Defence, and thereby also failed to provide it with the necessary support. The Defence was essentially seen as *'ignoble and inconvenient'*.¹⁴⁷ Such an attitude, it has been argued, was the result of a fear that defence counsel would attempt to derail, or unduly delay, the judicial process. In terms of legitimacy however, the Tribunal would have been better served by recognising the crucial role of the Defence.

The NIMT presented itself as a tribunal in which international law, as the Allies defined it, would be applied according to due process. This is the standard against which the Tribunal must be judged. As a result, as Zappalà has argued, the rights of the accused are central to the credibility and legitimacy of the Court.¹⁴⁸ However, the circumstances surrounding WWII and the creation of the Tribunal cannot be forgotten; other aims, in particular that of creating an historical record, were perhaps equally the objectives of the Tribunal. When understanding the importance of the NIMT, and its use as a precedent for subsequent Courts, it must be remembered that as a *military* tribunal, any extrapolations should be made with care. Military courts and tribunals utilise relaxed rules of procedure and evidence, in an effort to be as expeditious as possible - *'sometimes excessively so'*.¹⁴⁹ We must be conscious of the values and objectives in ICL as to the standards and procedure we wish to promote where the rights of the accused are concerned.

¹⁴⁶ ZAPPALÀ, S. (2010) at 164

¹⁴⁷ NEWTON, M.A. (2011) at 408

¹⁴⁸ ZAPPALÀ, S. (2010) at 145

¹⁴⁹ CASSESE, A. (2009) *'The Oxford Companion to International Criminal Justice'*. Oxford, OUP. p416

In light of the heightened political and social pressures, it could reasonably be suggested that the defendants at the NIMT benefited only from a very superficial level of presumption of innocence. The Tribunal was undoubtedly politically motivated, which affected its legitimacy as a legal justice mechanism. The Soviets in particular were painfully honest regarding their assumption of the defendants' guilt.¹⁵⁰ When a multiplicity of factors points to the Allies seeking the conviction and punishment of the individuals indicted at the Tribunal,¹⁵¹ it becomes difficult to argue that a tangible, meaningful presumption of innocence existed.¹⁵² Furthermore, given the disparities in available resources, personnel and access to evidence, it is reasonable to argue that the NIMT was lacking in a meaningful EoA between the Prosecution and Defence.

The Tribunal was an amazing accomplishment for its time, overcoming numerous obstacles simply to come into creation. As noted by Jackson, the decision to establish the NIMT was '*one of the most significant tributes that Power has ever paid to reason*'.¹⁵³ Due to the abhorrent nature of the crimes, the resultant anxiety which surrounded those indicted at the NIMT could have easily precluded the idealistic aim of creating such a Tribunal.

Undeniably, there was a considerable period of time in which it was legitimate to argue that the NIMT, whilst a valiant effort, had in actuality contributed little to the tangible development of ICL. Whilst the post-Nuremberg era saw the birth of a multiplicity of human rights treaties and laws, in terms of the creation of an international criminal justice system, no progress was made for nearly fifty years.¹⁵⁴ With the benefit of hindsight, it can reasonably be suggested that this 'delay' is no reflection on the NIMT and its influence. As Overy argues, '*[i]t is a consequence of a persistent reality in*

¹⁵⁰ OVERY, R. (2003) p24

¹⁵¹ LIPPMAN, M. (1991) at 522

¹⁵² This may be a systemic drawback when imposing 'victor's justice' on a vanquished nation. This risk potentially belies all courts which are created on an *ad hoc* basis, to which NIMT is no exception.

¹⁵³ Robert Jackson, US Chief Prosecutor, Opening Speech (21 November 1945). Available at: <http://avalon.law.yale.edu/imt/11-21-45.asp> [Last accessed 14.7.2014]

¹⁵⁴ GROULX, E. (2001) at 24

which power will always tend to triumph over justice.'¹⁵⁵ The fact that the subsequent *ad hoc* and permanent Courts have drawn from the experience of the NIMT, means only that its impact was postponed. The NIMT is not of such significance because it functioned flawlessly, but rather because it demonstrates both the successes and pitfalls of creating an international court.

The primary concern of this thesis is that the position of the Defence was unsatisfactory at the NIMT, and that this disadvantaged position has continued in various significant ways. As Birkett observes, '*[i]f the foundation is wrong, nothing that comes from it can be right.*'¹⁵⁶ It is argued that the NIMT represents a significant hypoplasia in the rights and treatment of the defence in ICL at a crucial, developmental stage.

The extent to which the influence of the NIMT has been disseminated through to the modern international institutions will be analysed across the coming chapters, particularly in Part III, in order to ascertain the degree to which defendants in ICL have been passed a '*poisoned chalice*'.¹⁵⁷

¹⁵⁵ OVERY, R. (2003) p29

¹⁵⁶ BIRKETT, N. (1947) at 322

¹⁵⁷ Robert Jackson (21 November 1945) *supra*.

Chapter 5.

The Architecture of the Modern ICL Institutions: The Defence as an Afterthought

*‘..[A] perfect equality of arms is a structural impossibility
in the current system of international justice..’¹*

1. Introduction

A detailed analysis of the extent of the ‘otherisation’ of the Defence in ICL necessitates a rigorous examination of the different architectural designs utilised at the modern institutions. This Chapter will seek to demonstrate that since the NIMT, the Defence has routinely failed to attract due consideration during the establishment of the modern international courts and tribunals. It will be argued that, regrettably, defence issues have invariably received attention at a very late stage. The focus will be on the architecture adopted at the ICTY, SCSL and ICC. Where the Defence is subjected to a fundamental structural imbalance (together with delays to its organisation), serious issues concerning the respect for the principle of Equality of Arms (EoA) could arise. If the Defence is placed at a tangible disadvantage *ab initio*, procedural measures taken at trial may prove to be insufficient to correct any imbalance. Particular attention will be paid to the structural formulation of the ICC, given that the Rome Statute excludes any provision for the Defence as a unit in its own right. This will include a close examination of the negotiations and proposals, shedding considerable light on the prevailing attitudes of those most influential to the Court’s creation.² The timescale of the creation of the Court’s ‘Office of Public Counsel for the Defence’ (OPCD) further reveals the

¹ NEWTON, M.A. (2011) ‘Evolving Equality: The Development of the International Defence Bar.’ **47(2) Stanford Journal of International Law**. 379-440 at 385

² Specifically, the Rome Diplomatic Conference, and the subsequent ‘Preparatory Commission for the ICC’ (Prep Comm).

prevailing trend in ICJ to defer the creation of the Defence unit until the other institutions have been established.

Additionally, this Chapter will examine the unique role of '*ad-hoc*' counsel at the ICC, who are employed at the 'Situation' phase, prior to the identification of named accused. The use of *ad-hoc* counsel will be included in the discussion in order to demonstrate the extent of the Court's chaotic and ill-conceived provisions for the defence in a trial process which requires multiple forms of representation. It will be argued that the transition between these different stages did not receive proper consideration, which will become evident during the analysis of the multiple difficulties which have arisen as a result of the lack of clarity surrounding the role.

2. The internal architecture adopted at the modern institutions

Whilst the modern courts and tribunals were created and operate under varying mandates, one observation common to almost all can be made regarding the position of the Defence 'unit' within the institutional structures. Namely, when devising many of these institutions, the Defence has routinely been considered only as an 'afterthought',³ a defect which will be shown to have serious and far-reaching consequences.

Court structures are often centred around foundational 'pillars', which are usually found enshrined in the statutes. These pillars, in international criminal justice, are often tripartite in nature, so as to include the Registry (the administrative and organisational organ), the Chambers (the judiciary), and the Office of the Prosecutor.⁴ Notably, the Defence does not rank amongst the branches of the court which have

³ METTRAUX, G. & CENGIC, A. 'The Role of a Defence Office - Some Lessons from Recent and not so Recent War Crimes Precedents.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May. p395

⁴ In the case of the ICC, the Presidency is also an 'organ'. See Article 34 of the Rome Statute.

been afforded foundational status. The only major exception is the Special Tribunal for Lebanon (STL), which has commendably broken away from the usual approach by including the Defence Office as an official organ.⁵ In fact, Groulx argues that the ICC and ICTY/R are in reality only *two-pillared* institutions, as the Prosecution and Chambers are '*well defined and independent*'.⁶ The composition of the core organs of any court will have a number of consequences, such as how the different organs and sections interact with one another, their level of independence, and the levels of support and funding which they might expect to receive.

Within these unique frameworks the Defence has an interest in structural uniformity.⁷ In order to secure a fair trial, it can be argued that '*[o]nly a sound and unbiased structure permits the effective adjustment of procedural rights*'.⁸ Even where the 'paper rights' of the accused are coherently integrated into the working documents of a court, structural weaknesses can nevertheless pose a serious danger to defence independence, the parity of resources and, in turn, this can create an Inequality of Arms between the Defence and Prosecution.⁹ Hence, the absence of the Defence from the core structures must be explored in order to better understand their development, as well as any ongoing consequences. Groulx notes that the structural absence of the Defence is observable at several institutions, whereby the Defence fails to be recognised as '*an essential organ, or pillar, of the justice system*'.¹⁰ It will be argued

⁵ Article 7 of the Statute of the Special Tribunal for Lebanon, adopted by Security Council Resolution S/RES/1757 (2007). See also <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl> [Last accessed 11.9.2014]

⁶ GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) *Champion*. 20-27 at 23

⁷ (EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' **114(7)** *Harvard Law Review*. 1982-2006 at 1983

⁸ *Ibid.* at 1994

⁹ GROULX, E. (2010a) "'Equality of Arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System.' *Revue Quebecoise de Droit International*. 21-38 at 22

¹⁰ *Ibid.* at 23

that the void into which the Defence falls is a '*structural defect in the architecture of these institutions*'.¹¹

This 'structural defect' can be seen to have several unfortunate consequences. Primarily, one could infer that the Defence is regarded as unimportant to the trial process and, secondly, that the Defence does not function on an '*equal footing*'.¹² This regrettable premise is not a new phenomenon, as the Defence has failed to have statutory recognition since the NIMT.¹³ As explored in the previous Chapter, the creators of the NIMT were faced with the monumental task of devising a tribunal with little in the way of relevant precedent to guide them.

One critical consequence of the omission of the Defence as a separate organ in the various Statutes is that from a very early stage the Defence has all too often suffered serious difficulty and delay with initial funding, organisation and support. As a result, the Defence has been deprived of the '*sense of urgency necessary for its prompt and efficient establishment*'.¹⁴ As Mettraux explains, there was almost complete uniformity across the institutions in the delay in setting up the Defence, which generally occurred '*well into the life of the international tribunal to which it relates, and well after other organs or sections of the tribunal had started work*'.¹⁵ The latter point is of particular importance, as the other organs were given the opportunity to begin their organisational development from the outset.

The justification for the late establishment of the various Defence offices has often been based on financial reasons.¹⁶ Understandably, at the initial stages of any new, large-scale institution, questions of how best to utilise funding will be crucial. Additionally, it will be important to establish the Prosecution in order to initiate investigations with a view to forming indictments. However, it should be regarded as a

¹¹ GROULX, E. (2001) at 23

¹² METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p396

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

mistake to ignore the Defence in this process, as it too requires time to organise itself, build a pool of appropriate and qualified defence counsel, and prepare itself in the same manner as the Prosecution, in readiness for the first investigations and cases.¹⁷ It is doubtful that the other organs would be willing to accept a similar delay in their initial funding and organisation. Mettraux argues that this deferral could be prejudicial to the accused and their defence teams, arguing that it *'not only prevents the defence from organizing itself, but might also create a structural imbalance between those - prosecutors and defence counsel - who will eventually face each other as parties in proceedings'*.¹⁸ This suggests that there is at least the potential for an Inequality of Arms to exist from the outset.

The other requirement which must be borne in mind before analysing the respective defence structures at each of the major courts, is that of defence independence. There is the risk that if the Defence were in fact included as a fundamental pillar of an international court, it could appear to be an extension of court itself, *'unless its independence was fully understood and guaranteed'*.¹⁹ The independence of defence counsel is indispensable to the role, both as an *'officer of the court and as a safe keeper of his client's interests'*.²⁰ Groulx, president of the International Criminal Defence Attorneys Association (ICDAA), notes that there is *'no universally accepted definition'* of defence independence.²¹ However, Groulx argues that defence counsel must be free to *'conduct unencumbered investigations, choose litigation tactics and determine trial strategy'*,²² and should not be influenced improperly by *'judges, prosecutors and court officials'*.²³ Communications, particularly the

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ TUINSTRA, J.T. (2009) *'Defence Counsel in International Criminal Law.'* The Hague, TMC Asser Press. p86

²⁰ *Ibid.* p201

²¹ GROULX, L. 'A Strong Defence Before the ICC' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) *'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.'* Amsterdam, Thela Thesis. p15

²² *Ibid.*

²³ GROULX, E. (2010a) at 26

discussion of defence strategies with an accused, must be confidential.²⁴ Any leaks or inappropriate sharing of information can have a profound impact, as Wladimiroff experienced when acting as defence counsel at the ICTR. Upon starting to investigate in Rwanda, his team learned that the Prosecution had just left the very sites that they had intended to visit, deciding to '*poach the same things*' as a direct result of their awareness of the defence itinerary.²⁵ As will be explored, due to the Prosecution's superior funding and resources, such behaviour is unacceptable, considering the difficulties faced by the Defence with their investigations, using meagre resources.²⁶ Rather than making the Defence an organ of the courts, the usual approach has been to integrate the Defence unit within the the Registry. The architectural structure adopted at the ICTY, SCSL and ICC will now be explored in more detail.

A. The ICTY

The ICTY had the difficult challenge of setting up an institution without the benefit of a modern equivalent from which lessons could be learned. As de Sampayo Garrido-Nijgh explains, '*unlike the Greek goddess Athena, the ICTY did not spring from its parent the Security Council, fully clad to do battle for justice and fully mature to dispense wisdom*'.²⁷ Yet expectations for the Tribunal were high, even in its '*vulnerable infant*

²⁴ GALLANT K.S. (2003) 'Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.' 14 Criminal Law Forum, 317-334 at 330

²⁵ WLADIMIROFF, M. 'Position of the Defence: The Role of Defence Counsel before they ICTY and ICTR.' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. p40

²⁶ See Chapter 6.

²⁷ DE SAMPAYO GARRIDO-NIJGH, D. 'The Defence Unit of the Registry of the ICTY' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. pp.52-3

stages'.²⁸ Had a permanent, fully-funded defence office at the ICTY been created, a stronger message concerning the importance of defence rights would have been sent.²⁹ Whilst the Statute and 'Rules of Procedure and Evidence' (RPE) of the ICTY articulate the rights of the accused,³⁰ there is no mention of the Defence as a unit at all. Instead, the ICTY was to provide for the Defence solely via the Registry.

The Tribunal established the 'Defence Counsel Unit' (DCU), which was reorganised in 2000 to form the 'Office for Legal Aid and Detention Matters' (OLAD).³¹ OLAD has a dual responsibility to both aid the Defence in some respects, whilst also dealing with issues such as indigence, the assignment of counsel, and their payment.³² However, OLAD is not responsible for providing legal aid or assistance to counsel concerning substantive or procedural issues.³³ It is also not involved with the preparing or running of the defence case, with the exception of some financial and administrative matters.³⁴ Therefore, it does not have an extensive role to play in the support of defence counsel. It has been noted that OLAD's dual mandate has '*greatly complicated*' its ability to assist the Defence.³⁵ As a result, tensions have arisen between OLAD and many defence teams, making it difficult for the Office to be '*regarded as an unbiased partner which could in fact 'aid' the defence in preparing its cases*'.³⁶ Sadly, this has led to the perception by the Defence that there is a lack of transparency, although the situation is said to have improved over more recent years.³⁷ The key problem could be seen to centre around the involvement with, and lack of independence from, the Registry. Mettraux argues that OLAD's positioning within the

²⁸ *Ibid.*

²⁹ JOHNSON, S.T. (1998) 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia.' **10** *International Legal Perspective*. 111-192 at 117

³⁰ Article 21 ICTY Statute.

³¹ NEWTON, M.A. (2011) at 413

³² *Ibid.*

³³ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p401

³⁴ *Ibid.*

³⁵ *Ibid.* pp.401-2

³⁶ *Ibid.* p402

³⁷ *Ibid.*

Registry has resulted in its '*inability to actually become a partner to the defence*',³⁸ and reasons that it would have been preferable to assign the financial and logistical responsibilities elsewhere in the Registry so as to allow OLAD to focus on assisting the Defence.³⁹

The relationship between the Defence and Registry is also worth considering more generally in terms of their interaction, and potential influence. The Registry's responsibilities, which are perhaps the root cause of much of the 'conflict', include matters such as: determining whether counsel are appropriately qualified; their appointment and removal; the management of funding.⁴⁰ At times, such issues have left defence counsel feeling as if the Registry is their '*worst enemy*'.⁴¹ An exacerbating factor is the extreme diversity of the Registry's roles.⁴² As Wilson argues, this '*disparate list of functions may result in less focus exclusively on the defense aspects of the tribunals, perhaps the key component to a fair trial*'.⁴³ This disparity can arguably result in the Registry, by virtue of its mandate, encountering conflicts of interest, particularly as its main administrative function is to ensure efficiency.⁴⁴ Most problematically for the Defence, there may be instances where the Registry, when allocating resources, will have to choose between Defence needs, and the needs of other areas of the Tribunal.⁴⁵ Such budgetary conflicts are not desirable and place the Registry in a difficult position. It is worth noting that the ICTR's 'Defence Counsel and Detention Management Scheme' (DCDMS), which was set up in July 1997, provides

³⁸ *Ibid.*

³⁹ *Ibid.* pp.402-3

⁴⁰ TUINSTRA, J. T. (2009) pp.78-9

⁴¹ *Ibid.* p78

⁴² Such roles include: '*[T]asks relating to public information, community outreach, security and safety in the tribunals, court management and support, detention issues, victim and witness support, budget and financing issues, and all conference and language services in the ICTY.*' WILSON, R. (2002) 'Assigned Defence Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach.' 2 *International Criminal Law Review*. 145-194 at 177

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 176

⁴⁵ *Ibid.*

even less support. Once appointments are made, little other assistance is offered relating to the preparation or running of a trial, making its usefulness *'almost non-existent'*.⁴⁶

Given the omission of provision for a defence office in the Statute of the Tribunal, as well as the minimal support supplied by OLAD and DCDMS, there was a distinct lack of defence co-ordination and peer-based support. Wladimiroff explains that in 1995, when the Tribunal began issuing charges against individual accused, *'there was no experience whatsoever available, no jurisprudence, no practices, nothing but the Rules of Procedure and Evidence'*.⁴⁷ Remarkably, for the first nine years of the Tribunal's life, defence counsel practiced on an entirely individual basis,⁴⁸ and were not collectively represented until 2002 with the creation of the 'Association of Defence Counsel' (ADC-ICTY).⁴⁹ This was undoubtedly a *'slow genesis'*.⁵⁰ The formation of such an organisation was instigated by ICTY judges, who were concerned with issues such as the need to attract counsel of quality, who were accountable to the Tribunal, in recognition of the need to become better informed of defence issues.⁵¹ The Association is not an organ of the Tribunal, but a non-profit organisation established under Dutch national law,⁵² although it has been formally recognised as the Tribunal's defence counsel organisation under Rule 44 of the ICTY's RPE.⁵³

Prior to the establishment of the ADC-ICTY, there was insufficient regulation regarding the quality and conduct of defence counsel, which led to unethical practices emerging, perhaps most notably encapsulated by the practice of 'fee-splitting'. In many ways the scandals which emerged marked an *'inescapable watershed in the ethical*

⁴⁶ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p404

⁴⁷ WLADIMIROFF, M. in BEVERS, H. & JOUBERT, C. (2000) pp.37-8

⁴⁸ BOHLANDER, M. BOED, R. & WILSON, R.J. (Eds.) (2006) *'Defense in International Criminal Proceedings: Cases Material and Commentary.'* NY, USA. Transnational Publishers. p483

⁴⁹ See, <http://adc-icty.org/home/history.html> [Last accessed 17.10.2014]

⁵⁰ TUINSTRA, J. T. (2009) p89

⁵¹ *Ibid.*

⁵² BOHLANDER, M. BOED, R. & WILSON, R.J. (2006) p483

⁵³ See, <http://adc-icty.org> [Last accessed 17.10.2014]

and procedural evolution of the tribunals.⁵⁴ Fee-splitting arrangements involved defence counsel giving a percentage of their fee to the accused, or else providing them with other indirect support.⁵⁵ This inappropriate diversion of funds was made possible due to a lack of proper controls and caps in the early stages of the Tribunal's operation, which in turn contributed to its rising costs.⁵⁶ At the time, defence counsel were paid on an hourly basis, without a mechanism of control,⁵⁷ which in turn led to some counsel delaying progress in order to continue receiving payment. Newton argues that this scandal had,

'a visceral power that would in time create a frozen perception of defense dysfunction in the minds of many observers and pundits. Fee splitting became emblematic of a profligate and out of control international bureaucracy seemingly manipulated by a corrupt bar in pursuit of personal enrichment while engaged in the facade of justice'.⁵⁸

Unfortunately, this had damaging repercussions for defence counsel, who were already met with circumspection, suspicion and even abhorrence. As with any professional misconduct, the unethical and improper conduct of the few can collectively damage the reputation of colleagues. The ICTY has since made considerable improvements, including switching to a lump-sum system of payment.⁵⁹ Tougher standards and sanctions, together with the implementation of the 'Code of Professional Conduct for Defence Counsel', have formed a significant '*milestone*' in dealing with the ethical misconduct of counsel.⁶⁰

In addition to unethical and improper conduct, there was also remarkably little in the way of training or support offered to defence counsel. For example, Professor

⁵⁴ NEWTON, M.A. (2011) at 397

⁵⁵ ELLIS, M.S. (2003) 'The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia.' *37 New England Law Review*. 949-973 at 964-5

⁵⁶ DE BERTODANO, S. (2004) 'What Price the Defence? Resourcing the Defence at the ICTY.' *2 Journal of International Criminal Justice*. 503-508 at 504

⁵⁷ NEWTON, M.A. (2011) at 398

⁵⁸ *Ibid.*

⁵⁹ TUINSTRA, J. T. (2009) p34

⁶⁰ ELLIS, M.S. (2003) at 973

Wladimiroff - counsel for the ICTY's first case of *Tadić* - an experienced and highly competent lawyer, lacked experience with skills such as cross-examination by virtue of his domestic legal background in Dutch law.⁶¹ After seeking further training outside of the Tribunal, he nevertheless felt it was necessary to ask Steven Kay QC, to join the defence team.⁶² In recent years, the ADC-ICTY has continued to make considerable efforts to redress the lack of training and support. In 2011, the Association produced the 'Manual on International Criminal Defence', drafted by its members and associates, with particular contribution from Colleen Rohan.⁶³ It has also produced a comprehensive two hundred and forty page document, which offers practical help and advice to those representing an accused at the ICTY, so that the knowledge and experience already gained in this field can be disseminated.⁶⁴ It is also hoped that the Manual will be of use to other practitioners, across the various ICL institutions.⁶⁵

Overall, it is reasonable to argue that the *ad hoc* Tribunal set an unfortunate precedent in terms of the architectural structure of the Defence position, as well as the minimal support offered via the Registry. The lack of organisation of defence counsel for nearly a decade gave rise to haphazard defence representation, which was inherently vulnerable to abuse and unethical behaviour. Although the ICTY has made considerable effort to uphold fair trials in many respects, its precedent in this particular area is, in many ways, a continuance of the shortcomings of the NIMT. As will be examined, other international courts and tribunals similarly have adopted structures in which the defence largely falls into a 'void'.⁶⁶

⁶¹ ELLIS, M.S. (1997) 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defence Counsel.' 7 *Duke Journal of Comparative and International Law*. 519-538 at 525

⁶² *Ibid.*

⁶³ Colleen Rohan is now president of the ADC-ICTY. The 'Manual' can be downloaded at: <http://wcjp.unicri.it/deliverables/manual.php> [Last accessed 21.01.2014]

⁶⁴ *Ibid.* p5

⁶⁵ *Ibid.* p3

⁶⁶ For example, the Iraqi Special Tribunal (IST). See, MCGONIGLE, B. (2005) 'De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia.' 13 *No. 1 Human Rights Brief*. 10-13 at 13

B. The SCSL

The SCSL was the first international criminal court to establish a Defence office, yet it was nonetheless not in existence at the time of its inception. Again, the Defence as a unit is not mentioned within the Statute of the SCSL. Rule 45 of the 'Rules of Procedure and Evidence' (RPE) instructed the Registrar to create a Defence Office, headed by the Principal Defender. Hence, the Office is not an organ under the Statute of the Court, and is now known as the 'Office of the Principal Defender' (OPD). As with previous international criminal courts, the establishment of the OPD occurred comparably 'late' in comparison with the other organs of the Court. Skilbeck highlights that the Principal Defender was not appointed until April 2004, some four years after the UN Security Council passed Resolution 1315,⁶⁷ and a mere week before the opening ceremony of the Court.⁶⁸ The severe financial difficulties that have plagued the SCSL will be explored elsewhere.⁶⁹ Nevertheless, it is worth noting here that the delay in the appointment of a Principal Defender satisfied the budgetary constraints by '*only recruiting the defence at the last possible moment*'.⁷⁰

The aim of creating the Office was to bring together and coordinate the Defence, so as to provide '*a more efficient, effective, and cost-saving system than those in place at the ICTR and ICTY*'.⁷¹ Whilst the primary aim of establishing the Office would at first seem to be an attempt to uphold and improve fair trials at the Court, Jalloh interestingly argues that the OPD was '*hurriedly established as a semi-autonomous unit within the Registry because of a fear of bad publicity on the eve of the*

⁶⁷ UN Security Council Resolution 1315 (2000), 14 August 2000.

⁶⁸ SKILBECK, R. (2004) 'Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone.' **1(1)** *Essex Human Rights Review*. 66-86 at 80

⁶⁹ See Chapter 6.

⁷⁰ SKILBECK, R. (2004) at 80

⁷¹ SAFFERLING, C. (2012) '*International Criminal Procedure*.' Oxford, OUP. p180

Prosecutor's release of his first indictments'.⁷² Although the motivations may have been mixed, the attempt to create such an office should be commended. However, its merits and achievements must be critically analysed.

The crucial issue surrounding the OPD at the SCSL concerns the issue of the Office's placement within the Registry, despite the assertion of independent operation. Safferling describes it as a '*quasi-autonomous entity*'.⁷³ Importantly then, it must be asked, can the Office be sufficiently independent with only a quasi-autonomous status? The very fact that the OPD operated from within the Registry made its mandate '*mixed and inherently tense*'.⁷⁴ This can be attributed to the different driving forces behind the OPD and the Registry. Particularly, the Registry was 'fixated' on keeping costs low.⁷⁵ As Jalloh argues, it was therefore '*inherently contradictory that the two bodies, with such divergent interests and views, were lumped together in the first place*'.⁷⁶

The OPD's autonomy, due to its quasi-independent status, created tension. For example, had the Registrar, in establishing the OPD, divested itself of part of its power and responsibility to create an independent office? In the alternative, could the Registrar act concurrently with the Principal Defender, and thus retain some control? This issue came before the Appeals Chamber, which affirmed that the latter approach was correct, unequivocally stating that the OPD is '*not an independent organ of the Special Court*', which remains '*under the administrative authority of the Registrar*'.⁷⁷ Herein lies the heart of the problem regarding the autonomy of the OPD, which could

⁷² JALLOH, C.C. (2007) 'The Contribution of the Special Court for Sierra Leone to the Development of International Law.' 15 African Journal of International and Comparative Law. 165-207 at 180

⁷³ SAFFERLING, C. (2012) p180

⁷⁴ JALLOH, C.C. (2007) at 182

⁷⁵ JALLOH, C.C. (2010-11) 'Special Court for Sierra Leone: Achieving Justice?' 32(3) Michigan Journal of International Law. 395-460 at 442

⁷⁶ *Ibid.* at 443

⁷⁷ *Prosecutor v. Brima, Kamara & Kanu*. 'Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for *Alex Tamba Brima* and *Brima Bazzy Kamara*.' SCSL-04-16-AR73-441 (8 December 2005) at paras 86; 83

find itself being overruled by the Registrar, who in reality may have divested himself of very little real power.

One particular example, in the trial of *Taylor*,⁷⁸ supports the notion that the OPD lacks meaningful independence. The trial took place in The Hague for security reasons,⁷⁹ far from the seat of the Court in Freetown. The Registrar at the time, Herman von Hebel, refused a request for funding to allow the Principal Defender to travel to the Hague and meet with Taylor, arguing that he felt it was '*not necessary*'.⁸⁰ Such an attitude is troubling, as there can be little value in creating the OPD if the accused is denied access to the Principal Defender. Presiding Judge Sebutinde found the situation to be an '*unhappy*'⁸¹ one, and felt that the request was both reasonable and within Taylor's rights, adding '*the Office of the Principal Defender was set up precisely for reasons like that*'.⁸² Wilson argues that the denial of the single trip '*appeared vindictive and small*'.⁸³ A directive was immediately issued to ensure that the Principal Defender could travel to The Hague.⁸⁴ Thus, in this instance, it fell to the judiciary to redress the Registrar's undue restriction. Unfortunately, the Registrar's actions significantly contributed to a seven month delay to the proceedings.⁸⁵

Overall, it has been argued that, in reality, the Defence Office '*lacked the necessary autonomy to actually fulfil its immense potential*'.⁸⁶ Through its narrow mandate and lack of independence, its ability to secure funding and facilities for counsel was limited.⁸⁷ Jalloh argues that the office '*fell short of what its initial*

⁷⁸ *Prosecutor v. Charles Ghankay Taylor*. Case No. SCSL-03-01-T

⁷⁹ See, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> [Last accessed 17.12.2013]

⁸⁰ *Prosecution v. Charles Ghankay Taylor*. 'Prosecution opening statement' (4 June 2007) Case No. SCSL-2001-01-T p338

⁸¹ *Ibid.* p339

⁸² *Ibid.* p340

⁸³ WILSON, R.J. (2008) "Emaciated' Defence or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?" **15(2) Human Rights Brief**. 6-9 at 7

⁸⁴ *Prosecution v. Taylor* 'Prosecution opening statement' *supra* p340

⁸⁵ WILSON, R. J. (2008) at 7

⁸⁶ JALLOH, C.C. (2010-11) at 438

⁸⁷ *Ibid.* at 439

supporters had envisaged’, and instead the OPD ultimately found itself ‘pitted’ against the Registrar in several instances before the Chambers.⁸⁸ However, in spite of these difficulties the Office has made some notable contributions. It was able to offer initial advice to defendants, and maintained a list of counsel which it appointed.⁸⁹ ‘The Report on the Special Court for Sierra Leone’, produced by Cassese, found that in some ways the office gave an institutional voice to defence teams that was otherwise lacking at the *ad hoc* Tribunals.⁹⁰ Nevertheless, Cassese concluded that for a variety of reasons, ‘*the Defence Office has not lived up to these high expectations. Many efforts within this Office are devoted to the financial management of the defence teams rather than to providing substantive legal support.*’⁹¹ Also recognised were the inherent tensions experienced between the OPD and some teams, which were compounded by ‘*financial, bureaucratic, and resource constraints*’.⁹² As opposed to forming the crucial additional pillar in the structure of the court, the Office instead was ‘*relegated*’ merely to an office subordinated within the Registry.⁹³ The ‘Berkley War Crimes Studies Center’ Report in 2007 found that, as a result, valuable time was spent by the OPD ‘*lobbying the Registrar for funds for the defence teams - time that could be better spent ensuring that the Defence Office is able to be responsive to the needs of the Defence*’.⁹⁴ The report also recommended that independence should be achieved from the Registry, or else it is merely paying ‘*lip service to the needs of the defence*’.⁹⁵

By contrast, it is also possible that the creation of the Office may have had some tangible *negative* effects on the Defence. Tuinstra argues that, as a result of

⁸⁸ The power of the Registrar was often upheld by Chambers. See, JALLOH, C.C. (2007) at 181

⁸⁹ JALLOH, C.C. (2010-11) at 439

⁹⁰ CASSESE, A. ‘Report on the Special Court for Sierra Leone.’ (12 December 2006) p14, para 52

⁹¹ *Ibid.* para 53

⁹² *Ibid.*

⁹³ THOMPSON, A. & STAGGS, M. (26 April 2007) ‘The Defence Office at the Special Court for Sierra Leone: A Critical Perspective.’ Report, War Crimes Studies Center, University of California, Berkeley. p54. Available at: <http://wcsc.berkeley.edu/sierra-leone/thematic-reports/> [Last accessed 11.9.2014]

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* p55

having limited resource and little independence in the allocation of their budget, the Office regrettably ended up restraining defence teams, rather than providing them ‘*with substantive legal support, logistical resources, administrative assistance, or sufficient remuneration*’.⁹⁶ As a result, the creation of a defence office which is independent only in theory, rather than practice, could ultimately do more damage than assigning the responsibilities to the Registry. The OPD at the Special Court provides valuable lessons. The importance of defence independence, from which the Office would have benefitted greatly, cannot be underestimated.⁹⁷ Experiencing a significant decrease in budget at its inception, when the cases were increasing in number, greatly affected its effectiveness.⁹⁸ Such offices must be able to concentrate on how best to support defence teams, rather than be overburdened by how best to cut costs. As Safferling argues, the main lesson to be learned from the OPD is that its success hinges on its ‘*status and mandate*’, as he points out that the Office has been rendered ‘*a somewhat toothless tiger, struggling to find its place within the SCSL*’.⁹⁹

C. The ICC

The Defence does not constitute a ‘pillar’ within the architecture of the ICC.¹⁰⁰ The Rome Statute is *completely silent* concerning the standing, role or duties of the Defence. Considering its important role in ensuring due process, the absence is striking. It can be strongly argued that the omission at least creates the *impression* that the Defence is regarded neither as a primary concern, nor as an integral part of a fair

⁹⁶ TUINSTRA, J. T. (2009) p84

⁹⁷ THOMPSON, A. & STAGGS, M. (26 April 2007) p54

⁹⁸ *Ibid.*

⁹⁹ SAFFERLING, C. (2012) p187

¹⁰⁰ *Ibid.* p186

trial.¹⁰¹ As a result, Groulx has argued that there is a prosecutorial bias inherent in the Rome Statute, and an '*institutional imbalance between the Prosecution and the Defence*'.¹⁰² Buchet asserts that this is a '*regretful omission*', and that when discussing the Defence at the ICC, this acknowledgement must not be forgotten.¹⁰³

The Rome Statute entered into force in 2002, but it was not until 2004 - upon the adoption of the ICC's Regulations - that the Court finally began to recognise the Defence as an entity.¹⁰⁴ This was achieved through the creation of the 'Office of Public Counsel for the Defence' (OPCD). Described as a 'semi-independent' office, it falls structurally within the Registry,¹⁰⁵ according to Regulation 77 of the ICC, '*solely for administrative purposes and otherwise shall function as a wholly independent office*'.¹⁰⁶ In due course, the veracity of this claim concerning defence independence will be examined. Rule 20 of the 'Rules of Procedure and Evidence' (RPE) lays out the responsibilities of the Registrar to the Defence, in that the Registry must be organised '*in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute*'.¹⁰⁷ It should be acknowledged that the development of the RPE meant that the Defence was no longer an invisible '*silent partner*', completely lacking in status.¹⁰⁸ However, these implementations were belated and, it will be argued, cannot fully compensate for the lack of formal structure within the Court's framework.

The Registry has been endowed with a significant responsibility concerning its support of the Defence, yet it must also strive to permit its independent functioning.

¹⁰¹ DUGARD, J.E.D. 'The Role of Lawyers before International Courts' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. p22

¹⁰² GROULX, E. (2010a) at 23

¹⁰³ BUCHET, A. 'Effectiveness and Independence in the Implementation of the Rights of the Defence before the ICC' in BEVERS, H. & JOUBERT, C. (2000) *supra* p72

¹⁰⁴ ICC Newsletter (April 2007) #14 Doc. Reference No. ICC-PIDS-NL-14/07_E#14 p6

¹⁰⁵ SAFFERLING, C. (2012) p180

¹⁰⁶ Regulation 77(2) ICC.

¹⁰⁷ Rule 20(1) RPE ICC.

¹⁰⁸ GROULX, E. (2010a) at 31-2

This role will likely prove difficult to exercise effectively, in addition to the myriad of other responsibilities it must balance and prioritise. As Tuinstra notes, the central problem with burdening the Registry with so many diverse responsibilities is that there is a real possibility that defence issues may be overlooked or undervalued.¹⁰⁹ Furthermore, Registry staff are not required to be legally trained, and so may, quite reasonably, be lacking in due appreciation of fair trial requirements and key principles such as EoA, as well as the overall need to properly equip the Defence.¹¹⁰

It is questionable whether the Registry should have been burdened with obligations towards the Defence, since conceptually it should be providing services in a neutral manner for all parties.¹¹¹ Despite the creation of the OPCD, the Registry nevertheless has an important role to play through the support and management of various issues, such as the legal aid programme.¹¹² Thus, the attitudes held by the Registrar and his/her wider staff have the potential to impact upon defence independence, as well as the support it receives. The concern expressed here is that there is a great deal of reliance on the discretion of those employed in the role. A Registrar who sympathises and understands the difficulties faced by the Defence has the potential to improve conditions, whereas an individual who fails to do so could as a result inadequately support the Defence. Such observations are likewise applicable to the competency of the Principal Defender. The success of the OPCD therefore will be dependent upon the individuals who function at their head.¹¹³ Defence counsel will rely on such personnel, and Tuinstra argues that successful cooperation will be dependent on their personalities.¹¹⁴ Bestowing too much power over defence issues to any given individual could risk an abuse of power, or arbitrary decision making.¹¹⁵

¹⁰⁹ TUINSTRA, J. T. (2009) p82

¹¹⁰ *Ibid.*

¹¹¹ GALLANT, K.S. (2000) 'The Role and Powers of Defence Counsel in the Rome Statute of the International Criminal Court.' **34** *The International Lawyer*. 21-44 at 42-3

¹¹² JALLOH, C.C. (2007) at 182

¹¹³ TUINSTRA, J. T. (2009) p86

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

In order to appreciate the role and functioning of the OPCD, it is first crucial to explore and understand how key discussions and working groups of the ICC came to omit the Defence from the Statute, and subsequently create the OPCD in an *ex post facto* manner. It must be accepted that the ICC, which was unprecedented in its scale and ambition, was created within a very narrow timescale. The key discussions which will be examined are related to the Rome Diplomatic Conference, which took place in 1998, and the subsequent Preparatory Committee ('Prep Comm') in 1999. It appears that the legal profession, in particular the Defence, was not involved in an '*organized and continuous manner*' during the early stages of ICC.¹¹⁶

The early discussions concerning the creation of the Court largely failed to substantively discuss the role of criminal defence lawyers, a topic which too frequently fails to draw attention.¹¹⁷ When dealing with the 'worst' crimes, other issues such as the fight to end impunity and the recognition of victims, were given priority over consideration of the position of the defendant. In fact, the basic rights of the accused were included very late in the process. As Gallant explains, until the 'Zutphen' draft of the Rome Statute prior to the 1998 Conference, there was '*no general requirement that the Court apply internationally recognised human rights as part of its law*'; protections for the accused were added only in the last months of negotiations.¹¹⁸

i. The 1998 Rome Diplomatic Conference for the Establishment of the ICC

The unfortunate omission of the Defence from the discussions can be seen throughout the various stages of the ICC's development, including the crucial stage of the Rome Diplomatic Conference. Unfortunately, as neither minutes nor detailed reports are

¹¹⁶ Likewise, at the *ad hocs*, see GROULX, E. (2010a) at 23-4

¹¹⁷ *Ibid.* at 25

¹¹⁸ The 1998 'Zutphen' (inter-sessional) draft attempted to consolidate the various proposals into a more coherent draft, used as the basis for much of the discussion at the Rome Conference. See, GALLANT K.S. (2003) at 319

readily available of the discussions,¹¹⁹ the main source as to their content must be drawn from the delegates who were present. Strijards attended, representing the Netherlands, and gives an account of how the discussions were formatted and influenced.¹²⁰ He recalls that for '*reasons of expediency*' two groups were created: the 'red room' which was mainly constituted of diplomats and experts in military law, and the 'green room' which consisted of '*legal experts experienced in international criminal law*'.¹²¹ In Strijards opinion, the lack of communication between the two rooms resulted in the '*total absence of 'the defence' as a functional organ of the ICC*'.¹²²

The 'green room' focused its attention on the more 'inflammatory' issues, such as the abolition of the death penalty and the rights of victims.¹²³ Whilst Strijards notes the importance of such issues, the discussion time allocated to them was disproportionately large.¹²⁴ Some attention, however, was given to the accused and his entitlement to legal assistance.¹²⁵ In contrast, the 'red room' also considered defence issues, but in a manner which was more '*accidental*',¹²⁶ and in connection with '*organisational matters*' and the establishment of the Registry.¹²⁷ Ultimately they took the position that, for financial reasons, there was no need to define the Defence at the statutory level.¹²⁸ As a result of the two groups failing to meet and discuss such issues jointly, defence issues once again fell by the wayside. Furthermore, the Rome sessions, being political in nature, were strongly influenced by NGOs relating to '*prosecutorial and victim-related issues*'.¹²⁹ As Strijards observed, '*the politicians*

¹¹⁹ The Official Records are available, which include some summary records of meetings. See, <http://legal.un.org/icc/rome/proceedings/contents.htm> [Last accessed 11.01.2014]

¹²⁰ For his full account, see STRIJARDS, G. 'The Need for an Independent Defence Unit.' in BEVERS, H. & JOUBERT, C. (2000) *supra*

¹²¹ *Ibid.* pp.55-6

¹²² *Ibid.* p59

¹²³ *Ibid.* p56

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* pp.58-9

¹²⁷ *Ibid.* p59

¹²⁸ *Ibid.* p56

¹²⁹ *Ibid.*

seemed to adhere to the virulent tendency of considering the attorneys for the defence as a kind of co-accused, implicitly sympathizing with the defendant who committed the alleged abominable crimes'.¹³⁰ Such an atmosphere was surely less than conducive to encouraging a balanced discussion, which included defence issues.

The Conference took place from the 15th June to the 17th July 1998; a mere five working weeks. Considering the diverse and expansive nature of issues that needed to be discussed and reworked, this narrow and restrictive deadline was arguably vastly inappropriate. It is apparent that the shortness of the time period arose from the agreement between the UN and the Italian Government, largely based on cost restrictions, which also impacted on the number of UN personnel available at the Conference.¹³¹ Walker argues that the process was '*extremely improper*' for a complex international statute.¹³² Unavoidably, certain crucial issues and elements were at risk of being overlooked. The omission of the role of the Defence is of significant importance, particularly as the Rome Statute is now largely fixed with a considerable degree of permanency.¹³³

The demographic of the delegates who attended, from vastly varied legal systems, inevitably affected the quality of the discussions held. Bassiouni observed that many delegates '*lacked expertise in international criminal law, comparative criminal law, or comparative criminal procedure*', and that most failed to have any '*criminal practice experience of any kind*'.¹³⁴ Additionally, he notes, most of the attendees who constituted the working groups, changed daily.¹³⁵ This was coupled with

¹³⁰ *Ibid.*

¹³¹ BASSIOUNI, M.C. (1999) 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court.' **32** *Cornell International Law Journal*. 443-469 at 467, see *fn* 102

¹³² WALKER, A.J. (2003-4) 'When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees.' **106** *West Virginia Law Review*. 245-304 at 294-5

¹³³ The first Review Conferences, held in Kampala in 2010, largely focused on defining the crime of aggression, with little attention afforded to defence issues. For more on the Kampala conference, see: KRESS, C. & HOLTZENDORFF, L. (2010) 'The Kampala Compromise on the Crime of Aggression'. **8(5)** *Journal of International Criminal Justice*. 1179-1218

¹³⁴ BASSIOUNI, M.C. (1999) at 460

¹³⁵ *Ibid.*

the fact that the number of attendees also shrank dramatically from around five thousand, to two thousand.¹³⁶ Bassiouni concludes that certain difficulties could have been circumvented if the delegations had been constituted of more individuals with relevant expertise, and by permitting more time for the drafting of the Statute.¹³⁷

The ICDA, an INGO created in 1997, which focuses on fair trial rights, participated in the discussion.¹³⁸ Concerned with the status of the Defence, it submitted a position paper at the Conference,¹³⁹ proposing the creation of an independent defence office.¹⁴⁰ This was rejected, and no provision for the Defence was made.¹⁴¹ Groulx who made the proposal, and who is now the president of the ICDA, was told that it was *'too late in the game for its addition'*, and that she should *'come back when the rules would be negotiated'*.¹⁴² The avoidance of this issue can perhaps be explained best by the environment in which the proposal was made. Groulx recounts that the discussion of defence issues was notably unwelcome amidst NGOs arguing for victim rights, and that the *'whole experience was far from easy'*; her intervention was seen as *'disruptive, because the unpopular issue of legal defence was what everybody wanted forgotten'*.¹⁴³ Groulx's experience is a clear example of Defence 'otherisation' in practice. The attitude that Defence issues should not be discussed at this juncture can be said to have attributed to the ultimate structural imbalance between the parties.

¹³⁶ *Ibid.* at 449

¹³⁷ *Ibid.* at 467

¹³⁸ For more info on the ICDA, see: <http://www.aiad-icdaa.org> [Last accessed 12.01.2014]

¹³⁹ ICDA 'Proposal for the Establishment of an Independent Office of the Defence' (21 June 1998)

¹⁴⁰ PLACHTA, M. (2000) 'Concerns about the Independence of Defense Counsel before the (Permanent) International Criminal Court.' **16(1)** *International Enforcement Law Reporter*. 576 *et seq.* at 576-7

¹⁴¹ GROULX, E. (2001) at 24

¹⁴² *Ibid.* at 59-60

¹⁴³ *Ibid.*

ii. The Preparatory Commission for the ICC ('Prep Comm')

The 'Prep Comm' was given the task of devising the RPE of the Court, as well as the Elements of Crimes, which took place across several sessions. It was at this stage that more extensive discussion took place regarding the functioning of the Defence, arguably as it could no longer be avoided. At the first session in February 1999, France put forward a working paper on the composition of the Court, which proposed an 'Office of the Defence to the International Criminal Court'.¹⁴⁴ Several months later, in August, in what Strijards describes as a '*tumultuous Friday morning session*'¹⁴⁵ the Netherlands was first to put forward a proposal concerning the establishment of a Defence office.¹⁴⁶ Later that same day, it was replaced by a joint proposal with Canada, France, Germany and the Netherlands.¹⁴⁷ Plachta notes that the new proposal contained '*less categorical*' language regarding the creation of a Defence office, compared with the ICDA proposal.¹⁴⁸ The proposal was discussed in the working group, and according to Strijards, was met with a lot of opposition.¹⁴⁹ The delegations were asked to revise their proposal so that it might be discussed informally at the next Prep Comm session.¹⁵⁰ The revised version was not discussed in the August session, as there was insufficient time.¹⁵¹ In the December session, the proposal was met with '*vehement opposition*' from a '*truly global*' mix of delegates.¹⁵²

¹⁴⁴ 'Working paper submitted by France' (2 February 1999) Doc. No. PCNICC/1999/DP.3 p10

¹⁴⁵ STRIJARDS, G. in BEVERS, H. & JOUBERT, C. (2000) p62

¹⁴⁶ N.B. The Netherlands proposal was unpublished.

¹⁴⁷ 'Proposal submitted by Canada, France, Germany and the Netherlands in connection with article 43 of the Rome Statute of the International Criminal Court concerning the Rules of Procedure and Evidence as regards document PCNICC/1999/DP.1' Doc. No. PCNICC/1999/WGRPE(4)/DP.2 (6 August 1999)

¹⁴⁸ PLACHTA, M. (2000) at 577

¹⁴⁹ STRIJARDS, G. in BEVERS, H. & JOUBERT, C. (2000) p62

¹⁵⁰ 'Proposal submitted by Canada, France, Germany and the Netherlands in connection with article 43 of the Rome Statute of the International Criminal Court concerning the Rules of Procedure and Evidence as regards document PCNICC/1999/DP.1' PCNICC/1999/WGRPE(4)/DP.2/Rev.1 (6 August 1999). See *Ibid.* p62

¹⁵¹ *Ibid.* p66

¹⁵² *Ibid.*

Some of the delegates took issue with the creation of a Defence office on the basis that the Rome Statute does not permit the creation of new institutions within the Court's framework.¹⁵³ Article 43(6) of the Statute states that the Registrar was specifically mandated to set up the 'Victims and Witnesses Unit' within the Registry. Thus, it was argued, the Registrar was prohibited from setting up other entities.¹⁵⁴ However, not all delegates agreed, and instead felt that Registry would have the inherent power to create different units if they were required in order to improve the functioning of the Court.¹⁵⁵ Whilst the creation of the office may have been expressed in such terms, it is possible that behind the robust resistance lay the fear that a '*strong, independent defense unit would present a real threat to the prosecutor's office obtaining convictions*'.¹⁵⁶ Groulx is not satisfied with the resulting language used in relation to the responsibilities of the Registrar, and the professional independence of defence counsel.¹⁵⁷ Frustratingly, although some academics tried to highlight the danger associated with failing to recognise the Defence, their warnings were evidently not heeded.¹⁵⁸

¹⁵³ *Ibid.* p62

¹⁵⁴ *Ibid.*

¹⁵⁵ TOCHILOVSKY, V. (1999a) 'Second Session of the Preparatory Commission for the International Criminal Court.' **1(4)** *International Law Forum Du Droit International*. 189-190 at 190

¹⁵⁶ WILSON, R. (2002) at 192

¹⁵⁷ GROULX, E. (2001) at 24

¹⁵⁸ For example, Plachta in 2000, warns about the dangers of ignoring defence issues: '*Defense, as a crucial element of this process must not be left out as an issue which, as opposed to many other problems being debated at the Rome Conference and within the Preparatory Commission, somehow will be settled and resolved all by itself.*' PLACHTA, M. (2000) at 579

iii. The 'Office of Public Counsel for the Defence' (OPCD)

Despite earlier misgivings about the potential for the Registry to create the OPCD, it was established in 2004.¹⁵⁹ However, the Office took several more years to become properly operational. It first functioned under an Associate Counsel, Melinda Taylor, before the appointment of the first 'Principal Counsel', Xavier-Jean Keïta, in 2007.¹⁶⁰

The creation of the Office was a welcome step in the right direction, yet it lacks the status afforded to the other organs of the Court. Therefore, unless the Office is properly supported by the Court, both financially and logistically, it remains to be seen whether it will be able to provide meaningful support to the Defence, thereby fulfilling its mandate.¹⁶¹ ICC Judge Adrian Fulford, who claims that the OPCD was principally his idea back in 2003, seems somewhat disappointed with the Office.¹⁶² His hope was that it would reduce the legal aid bill and provide an effective legal resource for the accused.¹⁶³ Judge Fulford expressed concern as to whether it is providing sufficient assistance so as to *'justify the considerable costs that are involved'*.¹⁶⁴ These concerns appear to be rooted in financial considerations, rather than consideration for the Office's effectiveness.¹⁶⁵ As Newton powerfully argues, the creation of the OPCD should certainly not be regarded as a 'panacea' to the plight of the Defence. Newton reasons,

'the culture of the ICC has in some ways reverted to the Nuremberg era as the Defence offices are located in a separate building on Saturnestraat, away from the main Arc building that houses the majority of the Court and,

¹⁵⁹ ICC Newsletter (April 2007) #14 ICC-PIDS-NL-14/07_E p6. It is referred to as the 'counterpart' to the Office of Public Counsel for Victims. See, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/defence/office%20of%20public%20counsel%20for%20the%20defence/Pages/the%20office%20of%20public%20counsel%20for%20the%20defence.aspx [Last accessed 7.1.2014]

¹⁶⁰ ICC Newsletter (May 2007) #15 ICC-PIDS-NL-15/07_En p4

¹⁶¹ BOHLANDER, M. (2007) p413

¹⁶² FULFORD, A. (2011) 'The Reflections of a Trial Judge.' **22 Criminal Law Forum**. 215–223 at 222

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

*more significantly, the courtrooms. This has literally led to situations of Defence teams running through the snow back to the Defence office during court breaks in order to use photocopiers (to which they have no access in the Arc building) or access their files.'*¹⁶⁶

Thus, it can be argued that the OPCD is far from a 'fix-all' remedy for the institutionally disadvantaged Defence.

D. The architecture of the modern institutions; some brief conclusions

The modern institutions which have been examined here share the same architectural defect. Additionally, they all share a delay in organising and advancing the Defence in relation to the rest of the institution. Crucially, the creation and development of the Chambers, Prosecution and Registry have taken priority over the Defence.¹⁶⁷ Skilbeck argues that, at the ICC, the Prosecution has been able to build its capacity in a manner which will '*take many years for the Defence to equal*'.¹⁶⁸ The OTP has managed to establish itself remarkably effectively, with a number of different sections set up to deal exclusively with investigations, public relations and media, with a division specifically for appeals, to name just a few.¹⁶⁹ Additionally, the OTP is '*selling itself to the world*', making connections with academic institutions, and consulting with legal experts around the globe.¹⁷⁰ Skilbeck asks: '*This is all extremely admirable and laudable stuff, but when do the defence get to do the same?*'.¹⁷¹ Fedorova argues that due to the lack of support during the initial stages of many of the modern institutions, the Defence has '*struggled to improve its secondary position*'.¹⁷² Overall, it can be argued that it is of

¹⁶⁶ NEWTON, M.A. (2011) at 415

¹⁶⁷ GALLANT K.S. (2003) at 327

¹⁶⁸ SKILBECK, R. (2004) at 78

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² FEDOROVA, M. (2012) 'The Principle of Equality of Arms in International Criminal Proceedings.' Netherlands, Intersentia. p4

paramount importance that the Defence be included *ab initio* in the conceptual structural organisation of a court. Skilbeck asserts that preferably this should be on an equal basis to the Prosecution, '*in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach*', as otherwise '*there cannot be a fair trial*'.¹⁷³

There were a number of options available to the creators of the ICC as to how best to conceive of the defence function. The most direct means would have been to make the Defence its own pillar within the architecture, just as the STL chose to do.¹⁷⁴ An alternative would have been to set up or employ an external independent body, outside the framework of the Court, such as a bar association.¹⁷⁵ Instead, many of the institutions have taken the similar route of placing the Defence unit within the organisational structure of the Registry.

3. Phases of Defence representation at the ICC: '*Ad-hoc*' counsel during the '*Situation*' phase: an ill-considered attempt at protecting defence rights?

Despite the ICC's efforts to protect the rights of the accused via its Statutory provisions, it has encountered unparalleled, and therefore arguably unforeseeable, problems by virtue of its unique composition. In terms of the appointment of defence counsel, the ICC has a highly complex system, due the different '*phases*' of trial. The '*Situation*' phase at the beginning of proceedings at the ICC, which is unique to the Court, poses distinct difficulties concerning the provision of fair trial rights. At this phase, broad investigations are carried out in order to establish whether there are sufficient grounds to trigger a confirmation hearing, which can lead to the issuing of warrants of arrest, or

¹⁷³ SKILBECK, R. (2004) at 86

¹⁷⁴ Statute of the Special Tribunal for Lebanon, Article 7(d); Article 13

¹⁷⁵ TUINSTRA, J. T. (2009) p76

summons to appear.¹⁷⁶ During this phase there are no discernible accused.¹⁷⁷ The ICC's unique jurisdiction over vast and complex Situations necessitates the use of counsel to represent the broader interest of the Defence via *ad-hoc* counsel.¹⁷⁸ The Rome Statute, together with the Regulations, provides that the Pre-Trial Chamber in particular may appoint counsel if the interests of justice so require.¹⁷⁹ This '*revolutionary new framework*' has necessitated a 'new' type of defence representation: '*ad-hoc*' counsel, conceptualised so as to promote the overall fairness of proceedings.¹⁸⁰ Safferling noted the '*genuine interest*' for the Defence, so that the Situation phase could be conducted '*in accordance with the 'rule of law'*'.¹⁸¹ However, it can be argued that despite these good intentions, how the role of *ad-hoc* counsel would work in practice was not properly considered. This becomes evident when examining the accused's transition between the trial phases.

Once charges have been brought, the defendant will require 'traditional' counsel during the 'Case' stage. Whether the Court appoints counsel, or the defendant chooses from the approved list, the OPCD will assist in the process.¹⁸² The Office is designed to provide guidance and support, yet due to problems of underfunding it is arguably '*no match for the robust OTP*'.¹⁸³ As a result of the different phases at the ICC, and the necessary transitioning between them, several issues require greater examination. In

¹⁷⁶ KATZMAN, R. (2009) 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial.' **8(1)** *Northwestern Journal of International Human Rights*. 77-101 at 80

¹⁷⁷ SAFFERLING, C. (2011) 'The Rights and Interests of the Defence in the Pre-Trial Phase.' **9** *Journal of International Criminal Justice*. 651-667 at 665-6

¹⁷⁸ DIECKMANN, J. & KERLL, C. (2011) 'Representing the "General Interests of the Defence": Boon or Bane? - A Stocktaking of the System of the Ad Hoc Counsel at the ICC.' **11** *International Criminal Law Review*. 105-136 at 109

¹⁷⁹ Article 56(2)d of the Rome Statute; Regulation 76(1) of the 'Regulations of the Court'. Diekmann notes that the vast majority of *ad-hoc* defence counsel have been appointed under the more general power under Regulation 76(1). See, *Ibid.* at 110

¹⁸⁰ *Ibid.* at 106

¹⁸¹ SAFFERLING, C. (2011) at 662

¹⁸² KATZMAN, R. (2009) at 77. Regulation 77(4) of the 'Regulations of the Court' places particular emphasis on the OPCD to protect the rights of the defence during the initial stages of investigation.

¹⁸³ Furthermore, Katzman argues '*This system creates a disjointed process of defense representation that places the accused at a disadvantage against the OTP during the "case" stage.*' See, KATZMAN, R. (2009) at 83

particular, is the level and kind of defence representation provided at each phase sufficient to protect the rights of any (future or actual) accused? In addition, is there a smooth transition between these phases, so as to allow cases to progress whilst duly respecting defence rights?

Ad-hoc counsel can be required to deal with a wide range of issues, such as forming responses to forensic examinations and victim's application to participate in the proceedings; making submissions of observations on briefs by amicus curiae; producing submissions regarding the admissibility of evidence.¹⁸⁴ Certain tasks will be of particular difficulty due to the absence of an identifiable accused, such as the examination of witnesses.¹⁸⁵ Safferling argues that, without knowing their identity, this can be '*a rather hypothetical enterprise*', as it will '*not be possible to formulate concrete questions and test the reliability of the witness in a thorough way*'.¹⁸⁶ Thus, the mere provision of *ad-hoc* counsel in this instance cannot guarantee fairness, and '*one should not take the bait and believe all the problems concerning the accused's rights have thus been solved*'.¹⁸⁷

Despite the statutory and regulatory provisions for *ad-hoc* counsel, the parameters of the role are frustratingly vague, which in practice has created uncertainty as to their function and responsibilities.¹⁸⁸ Dieckmann and Kerll argue that this is a result of both the '*rudimentary nature of the provisions*', as well as the lack of precedent relating to their role from other international courts and tribunals.¹⁸⁹ As a result, *ad-hoc* counsel began their operation in a rather vulnerable state, with the Chambers left to interpret their function, and provide or withhold support. Disappointingly, the Pre-Trial Chambers have been '*quick to restrict the procedural*

¹⁸⁴ See, DIECKMANN, J. & KERLL, C. (2011) at 135

¹⁸⁵ Rule 47(2) RPE ICC empowers Chambers to provide for counsel to be '*present during the taking of the testimony in order to protect the rights of the defence*'.

¹⁸⁶ SAFFERLING, C. (2011) at 664

¹⁸⁷ *Ibid.*

¹⁸⁸ DIECKMANN, J. & KERLL, C. (2011) at 106

¹⁸⁹ *Ibid.* at 106;117

standing of *ad-hoc* counsel.¹⁹⁰ This can be observed in relation to various problems faced by counsel by virtue of their transient role. One such issue arose regarding whether subsequent *ad-hoc* counsel could receive documents disclosed to them by their 'predecessors'.¹⁹¹ This question arose in the DRC Situation in 2007, in which the Pre-Trial Chamber held that the decision whether to disclose confidential information regarding victims and witness was solely its own, and as a result the OPCD should '*abstain from directly contacting the former ad hoc Counsel for the defence*'.¹⁹² Whilst such information is of course of a sensitive nature, the refusal to allow communication appears obstructive to the proper functioning of a continuous, and thereby effective, defence effort. It is argued here that as *ad-hoc* counsel will have met the requirements of the Court, they should consequently receive the same degree of trust shown to all employees in the handling of sensitive information. Katzman argues that the decision by the Pre-Trial Chamber demonstrates that '*they viewed the OPCD and ad hoc defense counsel as separate entities with different functions*', yet there was no attempt made to clarify their respective roles.¹⁹³ This led the OPCD to request clarification as to the mandates of the different roles.¹⁹⁴ Regrettably, the Pre-Trial Chamber rejected this request, with Single Judge Steiner stating that the statements made were clear and did not require further clarification when read in the context of the Chamber's other decisions.¹⁹⁵

The reluctance of the Chamber to provide clarification for this matter is questionable considering the continuing ambiguity surrounding the role of *ad-hoc* counsel. During admissibility proceedings in the *Kony et al.* case in 2009, the Appeals

¹⁹⁰ *Ibid.* at 117

¹⁹¹ *Ibid.* at 121

¹⁹² *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I 'Decision on the request by the OPCD for access to previous filings.' (11 September 2007) Doc. No. ICC-01/04-389 p7

¹⁹³ KATZMAN, R. (2009) at 82

¹⁹⁴ *Situation in the Democratic Republic of Congo*, 'Request for Clarification' (12 September 2007) Doc. No. ICC-01/04-390

¹⁹⁵ *Situation in the Democratic Republic of Congo*, 'Decision on the request for clarification by the OPCD' (3 October 2007) Doc. No. ICC-01/04-403 p4

Chamber stated that a client and counsel relationship does not exist for *ad-hoc* counsel, as they do ‘*not act for or as agent of the suspects*’, but instead are appointed to ‘*represent their interests generally in proceedings*’, so that ‘*such counsel cannot speak on their behalf*’.¹⁹⁶ The Chamber went on to specify that the mandate of *ad-hoc* counsel is limited to the somewhat general safeguarding of suspects’ interests and, as a result, the Code of Conduct which applies to OPCD counsel does *not* apply to *ad-hocs*.¹⁹⁷ The Code itself does not specify whether it applies to *ad-hoc* counsel. In contrast, OPCD counsel do not share the same insecurity as to their status due to an explicit Regulation on the matter.¹⁹⁸ Diekmann and Kerll consequently argue that the Pre-Trial Chamber appears to have been at pains to restrict the mandate of *ad-hoc* counsel.¹⁹⁹ Due to the lack of specificity across the different texts of the Court, it is arguable that such an approach was not inexorable, and greater support of the role could have been provided, had the Chamber so desired.

Overall, the scope of *ad-hoc* counsels’ mandate is regrettably narrow. Despite the provision and rationale behind the innovation of such counsel, the representation provided may be limited to the paper rights afforded to the accused during the Situation phase of proceedings. Karnavas feels that the model is ‘*off to a disappointing start*’ as the Court’s approach is seemingly contradictory: ‘*the defence lawyer is appointed to represent the general interests of the accused, yet when he attempts to fulfil his duty, he is told that he has no standing*’.²⁰⁰ A clear example of such an instance occurred more recently in 2010 in the case of *Al Bashir*, which arose as a consequence of an

¹⁹⁶ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhmmbo, Dominic Ongwen*. ‘Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under 19(1) of the Statute” of 10 March 2009’ (16 September 2009) Doc. No. ICC-02/04-01/05-408 para 56

¹⁹⁷ *Ibid.*

¹⁹⁸ Regulation 144(2) of the ‘Regulations of the Registry’. See, DIECKMANN, J. & KERLL, C. (2011) at 111

¹⁹⁹ *Ibid.* at 135

²⁰⁰ KARNAVAS, M.G. ‘Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.’ in BOHLANDER, M. (2007) *supra* pp.87-8

article written in the Guardian newspaper by the then Prosecutor, Ocampo.²⁰¹ *Al Bashir's* acting *ad-hoc* counsel filed a request before the Court that the Prosecutor's statements in the article be condemned, and appropriate action be taken.²⁰² The Pre-Trial Chamber elected to take no action, not in reflection of the seriousness and validity of the issue, but based on the status of the accused's *ad-hoc* counsel before the Court. It held that the request fell '*outside the scope and purpose of the mandate vested with Ms. St-Laurent*', and was '*therefore inadmissible*', preventing the Judge from addressing its merits.²⁰³ Such an approach resulted in a use of the mandate of *ad-hoc* counsel to avoid dealing with what was arguably a very serious error of judgement on the part of the Prosecutor.

It can reasonably be asserted that *ad-hoc* counsel are limited to such an extent that they are prevented from having a meaningful standing before the Court. The lack of clarity surrounding the scope of their role can be seen to have negatively impacted on *Lubanga*, which led to the case suffering significant delays by virtue of stays in the proceedings.²⁰⁴ These events demonstrate that the restrictions on their role '*potentially undermine the well-intentioned efforts to foster equality of arms throughout proceedings*'.²⁰⁵ The restrictions limiting counsels' mandate to issues only specifically mentioned in the Statute meant that counsel was prevented from raising issues relating to the misuse of confidentiality agreements during the Situation phase of proceedings.²⁰⁶ As Katzman explains, between 2004 and 2006, the representation for

²⁰¹ OCAMPO, M. 'Now end this Darfur denial.' (15 July 2010) The Guardian. Available at <http://www.theguardian.com/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur> [Last accessed 14.7.2014]

²⁰² *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, 'Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010' (4 August 2010) Doc. No. ICC-02/05-01/09-103

²⁰³ *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, 'Decision on the "Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010".' (24 August 2010) Doc. No. ICC-02/05-01/09-106 pp.3-4

²⁰⁴ DIECKMANN, J. & KERLL, C. (2011) at 136

²⁰⁵ *Ibid.* at 133

²⁰⁶ KATZMAN, R. (2009) at 85

the Defence in *Lubanga* was provided solely by *ad-hoc* counsel²⁰⁷ - a substantial period of time considering the strict limitations placed on their mandate. Dieckmann and Kerll argue that these proceedings illustrate that the current system can negatively impact upon the fairness of proceedings.²⁰⁸ The shortcomings relating to *ad-hoc* counsel were compounded by the Prosecution's late disclosure of material, which resulted in defence counsel later being unable to challenge it during the 'Case' phase.²⁰⁹ The extensive difficulties experienced in the *Lubanga* trial reveals a 'disjointed' ICC defence system, particularly at the initial stages of the proceedings.²¹⁰

Overall, whilst the provision for *ad-hoc* counsel can be seen as a vital component of ensuring fair trial rights are upheld during the initial stages of proceedings, there is '*no guarantee that ad hoc counsel actually promote equality of arms through adequately and effectively serving the general interests of the defence*'.²¹¹ Katzman warns that the system during the Situation phase '*has led to, and possibly will continue to lead to, large gaps in the fair trial rights of the accused*',²¹² thus creating a serious cause for concern. This appears to be largely a result of the refusal of Chambers to clarify the role, and should serve as a reminder of the importance of giving practical effect to the 'paper' rights provided to the Defence.²¹³ In the *Kony et al.* case, three separate *ad-hoc* counsel have been involved, all in different proceedings, none of whom have had any communication with each other, or the suspects.²¹⁴ It is not unusual for different counsel to be used for different issues, which can be problematic if they later choose to utilise alternative, or even conflicting, strategies.²¹⁵ Furthermore, as Dieckmann and Kerll poignantly observe, there are ongoing

²⁰⁷ *Ibid.* at 78-9

²⁰⁸ DIECKMANN, J. & KERLL, C. (2011) at 136

²⁰⁹ KATZMAN, R. (2009) at 85

²¹⁰ *Ibid.* at 77

²¹¹ DIECKMANN, J. & KERLL, C. (2011) at 133 (emphasis added)

²¹² KATZMAN, R. (2009) at 82

²¹³ As discussed in Chapter 2.

²¹⁴ DIECKMANN, J. & KERLL, C. (2011) at 134

²¹⁵ KATZMAN, R. (2009) at 80

ramifications for the defence team representing the accused at trial, who must build their case *ab initio* due to the lack of procedure regarding the transfer of material from *ad-hoc* counsel.²¹⁶ This disjointed mechanism risks undermining the creation of a coherent and robust defence strategy across the entirety of the proceedings.²¹⁷ Thus, it can be asserted that the system is lacking in continuity, both between *ad-hoc* counsel, as well as during the transition from ‘Situation’ to ‘Case’ phases.

4. Conclusion

The analysis of the institutions’ architecture has revealed an inherent level of inequality concerning the relative position of the Defence.²¹⁸ This includes the consistent omission of the provision for a separate Defence office across the three institutions examined here, which contributes significantly to the hypoplasia of the Defence concerning its eventual establishment, institutional position, and organisation.²¹⁹

It has been argued that the architecture adopted at the institutions creates a systemic imbalance between the Defence and Prosecution.²²⁰ As a result, it can be said that the parties are operating in systems which, by their nature, pose a severe threat to the principle of EoA. Safferling argues that a Defence office must be established by Statute ‘*as an independent organ of the tribunal, and its role and function must be clearly defined*’, so that it may operate independently in an effective manner.²²¹ Despite the particular failure of the ICC (given its permanent nature) to include a separate Defence office, any future international criminal court or tribunal

²¹⁶ DIECKMANN, J. & KERLL, C. (2011) at 134

²¹⁷ *Ibid.*

²¹⁸ GROULX, E. (2010a) at 22

²¹⁹ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p396

²²⁰ *Ibid.* p398

²²¹ SAFFERLING, C. (2012) p187

should undoubtedly provide the Defence with its deserving 'foundational', yet independent, status.

The use of *ad-hoc* counsel has revealed itself to be another area of particular concern, due to the vague parameters of the role which have, in practice, been considerably restricted by a judiciary unwilling to provide clarification.²²² The function of *ad-hoc* counsel appears to have been so restricted, (as demonstrated in cases such as *Lubanga*, *Al-Bashir* and *Kony*) that they are denied from making a meaningful contribution to an accused's ongoing case. Ultimately, the transition of defence representation, from the very initial investigations onwards, reveals a worryingly disjointed system, which '*has created a gap in the advocacy and fair process rights of the accused*'.²²³ The role of *ad-hoc* counsel is yet another manifestation of the lack of consideration given to defence issues. The ICC's unique use of trial phases necessitated extensive reflection by its architects so as to avoid dangerous gaps in the 'chain' of defence representation. This does not appear to have occurred in a meaningful, practical manner, serving as yet another example of measures relating to the Defence having been adopted hastily in an attempt to compensate for a lack of due consideration.

Part II of this thesis has examined the formative influence of the NIMT (Chapter 4), as well as the structural design of the modern institutions (Chapter 5), in order to highlight the extent of the 'institutional otherisation' of the Defence in ICL. The issues raised in these Chapters, when considered collectively, suggest a clear and systemic hypoplasia of the Defence at the modern institutions, as a result of routine marginalization, and even exclusion.

It is worth reiterating that hypoplasia is a congenital restriction, rather than a hereditary trait. Thus, despite the *trend* towards hypoplasia, it remains theoretically

²²² *Situation in the Democratic Republic of Congo*, 'Decision' (3 October 2007) *supra* p4

²²³ KATZMAN, R. (2009) at 82;78

possible for any future court or tribunal to provide a meaningful EoA through the provision of a strong and independent Defence. However, the courts and tribunals which have failed to provide a foundational Defence organ will necessarily struggle to provide a tangible EoA given the ramifications of the 'institutional otherisation'.

Part III of this thesis will now examine whether the modern institutions protect the interests of the accused in practice, despite the regrettable deficiencies in the structural position of the Defence.

Part III.

Fairness and Equality of Arms in Practice

Chapter 6.

Equality of Arms and Resources

*'If the Tribunal is not given sufficient time and money [...] by the international community, then it should not attempt to try those persons in a way which does not accord with those rights.'*¹

1. Introduction

Part III of this thesis (Chapters 6, 7 & 8) will examine the extent to which fair trial provisions, including those embodied by the principle of Equality of Arms (EoA), are transformed into practical protections, beyond the 'paper rights' and guarantees afforded to the accused in ICL. The collective issues raised in this final Part will provide considerable grounds to assert that there is a lack of both institutional and procedural EoA at the modern institutions. The specific implications for the defendant, and his defence team, in practice will be considered throughout the coming Chapters.

This Chapter will examine the ways in which the 'modern institutions' can be said to be struggling with the practical application of the principle of EoA in relation to financing and resources. A '*meaningful interpretation*' of EoA necessitates an in-depth examination of the internal functioning of the courts and tribunals.² Tuinstra argues that '*where resources are concerned, the defence is generally worse off than the prosecution in all legal systems*'.³ The creation and operation of international criminal courts and tribunals is undoubtedly incredibly costly. The sources and extent of funding at the modern institutions are distinctly different; each will be examined in turn in order to appreciate their unique circumstances and challenges. In particular, any disparity

¹ *Prosecutor v Slobodan Milošević*, 'Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the form of written statement.' (21 October 2003) Case No. Case: IT-02-54-AR73.4 para 21

² FEDOROVA, M. (2012) 'The Principle of Equality of Arms in International Criminal Proceedings.' Netherlands, Intersentia. p141

³ TUINSTRA, J.T. (2009) 'Defence Counsel in International Criminal Law.' The Hague, TMC Asser Press. p163

between the parties is of particular importance regarding EoA. The difficulties associated with assessing the extent of any inequality must first be recognised, particularly in light of their different roles in the trial process. Assessing any disparity necessitates defining the parameters of ‘adequate time and facilities’ to prepare a defence which, in the abstract, is ‘*virtually impossible*’.⁴

This Chapter will also touch on the importance of time as an essential component of the resources required by the Defence to prepare its case. The difficulties which arise when balancing the need for trial expediency with defence rights, (such as to be tried without undue delay) will also be examined, including the effect of ‘completion strategies’. Ultimately, the issues explored in this Chapter will suggest that the Defence is routinely under-funded, and under-resourced.

2. The comparative nature of EoA: the difficulty of analysing any disparity

As discussed in Chapter 2, the principle of EoA has a comparative element, and thus necessitates an examination of any disparity in resources. Mégret argues that in the context of ICJ, ‘*penniless defendants with one or two lawyers are pitted against the comparatively very substantial resources of an international prosecuting machinery*’, which gives a ‘*formidable boost*’ to the critique that in practice equality is ‘*vitiated by considerable differences in resources*’.⁵ This is in many ways as a direct result of the extensive and powerful nature of the opposition faced by the Defence. At the ICC in particular, the accused is opposed by an ‘*international system*’, including the combined ‘*resources, authority and normative structures*’ of those States.⁶ Nevertheless, as the

⁴ FEDOROVA, M. (2012) p55

⁵ MÉGRET, F. (2009) ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure.’ **14** *UCLA Journal of International Law and Foreign Affairs*. 37-76 at 62-3

⁶ COCKAYNE, J. (2005) ‘The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.’ **28** *Fordham International Law Journal*. 616-680 at 670

Prosecution has the primary responsibility for investigating Situations in order to build a case, for which it carries the burden of proof, it follows that it should receive a proportionate share of the funding.⁷ Given the finite resources at a court's disposal, this necessitates a difficult balancing process. As Ellis argues, the '*budgetary constraints associated with internationally supported tribunals often run counter to international rights accorded to defendants*'.⁸

Analysing the allocation of funding within an institution has inherent difficulties, and there is a tendency in particular to compare the resources of the Prosecution with those of the Defence. While this represents an important element of EoA, it is both difficult and perhaps anomalous to approach the issue exclusively from this standpoint.⁹ This is because the two entities have different roles and responsibilities, and so discussing their 'equality' in the sense of similar treatment is problematic. The fact that the Prosecution bears the burden of proof at the ICC is often put forward as an argument justifying its superior resources. Karnavas argues that it is '*farcical to suggest that a showing of the prosecution's failure to meet its burden of proof will materialise without a robust challenge to the prosecution evidence, or the presentation of defence evidence proving the contrary*'.¹⁰ As a result, he argues that it may be helpful for the Registry '*to compare the respective resources available*' in a particular case.¹¹ Difficulties with the comparison also arise depending on which stage a particular case has reached; Defence costs '*skyrocket*' once the trial begins.¹² Instead, it is perhaps more fruitful to talk of *equitable* treatment, in the sense that fairness

⁷ TUINSTRA, J.T. (2009) p163

⁸ ELLIS, M.S. (2005) 'Defence Counsel Appearing Before International Tribunals: Past Experiences and Future Challenges.' 4 Journal of Human Rights. 491-512 at 505

⁹ FEDOROVA, M. (2012) p114

¹⁰ KARNAVAS, M.G. 'Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May. pp.91-2

¹¹ *Ibid.*

¹² DE SAMPAYO GARRIDO-NIJGH, D. 'The Defence Unit of the Registry of the ICTY' in BEVERIS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. pp.47-8

should guide what each office receives in terms of funding and resources. However, such an analysis becomes much more subjective, and less tangible, in nature.

In light of its well equipped adversary, adequate resources are of paramount importance to defence teams, particularly as many accused are deemed 'indigent' under the legal aid systems which have been put in place as a result of the extensive costs associated with international criminal trials.¹³ Rather than being '*a question of mathematics*', May and Wierda argue that EoA cannot be '*reduced to an exact equation*' in terms of equality of resources.¹⁴

The primary recognition must be that, in respect of resources, the Defence is generally in a weaker position compared with the Prosecution not just at the international level, but in '*all legal systems*'.¹⁵ The '*manifest inequality that generally exists*'¹⁶ between the two must be acknowledged, along with the recognition that to some extent it should be compensated.¹⁷ Such compensation should, however, be proportionate, taking account of the parties' different roles.¹⁸ Crucially, neither side should be placed at a disadvantage in relation to the other. For the Defence, this means that the difference should not be '*so disproportionate as to infringe upon the fundamental rights of the accused to present his or her case under the same conditions as the prosecution*'.¹⁹ However, many defence teams at international courts and tribunals will often experience '*major difficulties*' in securing suitable facilities, investigators and indeed their own remuneration.²⁰

¹³ TUINSTRA, J.T. (2009) p157

¹⁴ MAY, R. & WIERDA, M. (2002) '*International Criminal Evidence*.' New York, Transnational Publishers. p271

¹⁵ TUINSTRA, J.T. (2009) p163

¹⁶ BOHLANDER, M. (2007) p45

¹⁷ FEDOROVA, M. (2012) pp.114-5

¹⁸ *Ibid.*

¹⁹ KARNAVAS, M.G. in BOHLANDER, M. (2007) p91

²⁰ NEGRI, S. 'Equality of Arms - Guiding Light or Empty Shell?' in BOHLANDER, M. (2007) *supra* p45

3. The difficulties with funding faced by the Defence at the ICTY, SCSL & ICC

The three institutions will be examined in order to appreciate the different problems experienced by defence teams with respect to funding. Three broad issues are deserving of consideration. These include the operational costs of the Defence, the various sources of funding,²¹ and the facilities provided. The latter is of particular interest, as the location and quality of the space allocated to the Defence can create and reinforce '*the perception of a psychological, almost cultural, divide*' between the Defence and the rest of the principal organs of the court.²² This perception is amplified by the Prosecution being firmly and '*comfortably*' housed in most of the available space within the court buildings, as is the case at the ICTY and ICC.²³

A. The ICTY

The cost of the ICTY has '*spiralled*',²⁴ perhaps due in part to the lack of any precedent for this kind of institution that could have provided its contributors with an approximate expectation of expense. The phrase '*never again*', once used as a powerful denunciation of impunity, was transformed in its meaning to reflect a growing dissatisfaction with the cost of such a Tribunal.²⁵ Since it is supported by the UN, the ICTY benefits from regular financial contributions,²⁶ allowing it to budget in advance

²¹ For example, many international courts are dependent on organisations and other contributions to operate. See: COGAN, J.K. (2002) 'International Criminal Courts and Fair Trials: Difficulties and Prospects.' **27(1) Yale Journal of International Law**. 111-140 at 132

²² METTRAUX, G. & CENGIC, A. 'The Role of a Defence Office - Some Lessons from Recent and not so Recent War Crimes Precedents.' in BOHLANDER, M. (2007) *supra* p426

²³ *Ibid.*

²⁴ De BERTODANO, S. (2004) 'What Price the Defence? Resourcing the Defence at the ICTY.' **2 Journal of International Criminal Justice**. 503-508 at 504

²⁵ COCKAYNE, J. (2005) at 616-7

²⁶ ICTY website, available at <http://www.icty.org/sid/16> [Last accessed 25.08.2014]

with financial security. As the Tribunal draws closer to the completion of its mandate, clear emphasis has been placed on the scaling back of costs.²⁷

In terms of internal allocation of funding, academics have noted the disparities between the OTP and Defence. Bertodano pointed out that for 2004-5, the Defence budget stood at \$29,500,000 - less than one third of the cost of the Prosecution, whose budget was estimated at nearly \$100,000,000.²⁸ As McGonigle has emphasised, initial justifications for this disparity were based on the argument that the Prosecution bore the burden of proof, as well as the cost of investigations. However, the latter does not stand up to scrutiny considering that investigations had formally ended by that time.²⁹ The projected resources for the Tribunal in 2014-5 are estimated to be \$191,335,700 (gross).³⁰ Regrettably, the breakdown of figures does not detail how the Registry's budget is allocated, making it impossible to know precisely what the Defence has been assigned. Such omissions, whether deliberate or accidental, contribute to a lack of much needed transparency.

The Statute of the ICTY sets out a clear intention to provide adequate facilities for the Defence and Article 21(4), in particular, states that the accused shall be entitled to '*adequate time and facilities for the preparation of his defence*'.³¹ Karnavas argues forcefully that this '*principle has, in practice, been reduced to a melodious yet vacuous slogan, a consoling though ineffectual mantra*'.³² Some of the problems faced by the

²⁷ The budget for 2014-5 represents a 34.0 per cent drop compared with the 2012-2013 resources at revised rates. UN GA 68th Session, Report of the Secretary-General: '*Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, for the biennium 2014-2015.*' (17 September 2013) Doc. No. A/68/386 para 16.

²⁸ De BERTODANO, S. (2004) at 507

²⁹ MCGONIGLE, B. (2005) 'De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia.' **13 No. 1 Human Rights Brief**. 10-13 at 11

³⁰ UN GA 68th Session, Report of the Secretary-General: '*Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, for the biennium 2014-2015.*' (17 September 2013) Doc. No. A/68/386

³¹ Article 21 (4) 4. b) ICTY Statute

³² KARNAVAS, M.G. in BOHLANDER, M. (2007) p92

accused relating to financing and resources must therefore be examined in order to better understand Karnavas' position.

First, it is worth recounting (as discussed in Chapter 5) that from the outset, the ICTY failed to include even basic provisions for defence counsel. However, over the course of its operation, the ICTY has improved its organisation considerably. In particular, the Prosecution at the ICTY is well resourced, particularly in terms of personnel numbers. Prosecutorial teams consist of '*numerous lawyers, police investigators and inspectors, analysts and in-house experts, case managers and staff*'.³³ Defence teams are comparably much smaller. The original ICTY Directive permitted that the accused's defence may consist of only one lead counsel - a recommendation which was interpreted literally by the Tribunal.³⁴ It was later recognised that, due to the demands of time and location, this was in some instances an unreasonable restriction.³⁵ However, the use of co-counsel must be requested, and will only be permitted '*in the interests of justice*'.³⁶ Most cases at the Tribunal are highly complex and typically last several years into the appeals stage. The Tribunal has actively supported the OTP, for example through its creation of the 'Special Legal Services' division, which provides prosecutors with the help and expertise of legal experts regarding ICL, whereas '*nothing comparable exists for defense counsel*'.³⁷ In actuality, there is little in the way of additional support for the Defence, unless the trial chamber sees fit to provide it, which places the Defence against a '*formidable adversary*'.³⁸

³³ '*It can also rely on UN or international peacekeeping forces on the ground [...] to assist in searching and arresting operations.*' See, *ibid.* p95

³⁴ ELLIS, M.S. (2003) 'The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia.' *37 New England Law Review*. 949-973 at 954

³⁵ This issue was successfully raised by Mr. Wladimiroff in *Prosecutor v Duško Tadic*, Case No. IT-94-1-A; See, ELLIS, M.S. (1997) 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defence Counsel.' *7 Duke Journal of Comparative and International Law*. 519-538 at 528-9

³⁶ Article 16 C) of the Directive on the Assignment of Defence Counsel. IT/73/REV. 11 (29 June 2006)

³⁷ ELLIS, M.S. (1997) at 529

³⁸ KARNAVAS, M.G. in BOHLANDER, M. (2007) p96

Prosecutors at the ICTY are permanent employees of the UN, and thus enjoy the associated benefits and stability. Defence counsel, in contrast, are employed for a particular case and must claim their fees in a lump sum.³⁹ Moreover, difficulties can arise as a result of defence payments being based on the perceived level of complexity which is assigned prior to the start of each case.⁴⁰ There have been instances where defence counsel have, at various trial stages, had to continue to work unpaid in order to fulfil their duty.⁴¹ This presents the mere illusion of choice, as the conscientious defence attorney will doubtless feel bound by their professional obligation to continue represent their client.

In the past, Defence counsel have themselves had to cover certain defence costs upfront, which have later been denied for reimbursement by the Tribunal.⁴² Wladimiroff experienced this during self-funded missions whilst representing *Tadić*, and expressed his dissatisfaction with a system whereby if the Defence is unable to pre-finance such expenses, they are precluded from carrying them out.⁴³ The Defence, under the Rules and Directives, is entitled to advance payments, yet it is claimed that the procedure is so bureaucratic in nature that in reality, there is insufficient time in which to apply.⁴⁴ Translation costs have also been problematic, as the Prosecution has translated documents for their own needs, and yet have disclosed only the originals to the Defence, thereby further depleting their limited resources.⁴⁵

Another important aspect is the provision of defence facilities. All too often, the Defence receives little office space compared with the Prosecution.⁴⁶ At the ICTY, the

³⁹ See, NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** *Stanford Journal of International Law*. 379-440 at 399

⁴⁰ WIPPMAN, D. (2006) 'The Costs of International Justice.' **100(4)** *American Journal of International Law*. 861-881 at 872

⁴¹ KARNAVAS, M.G. in BOHLANDER, M. (2007) p100

⁴² MCGONIGLE, B. (2005) at 12

⁴³ This was similarly experienced by Wladimiroff at the ICTR, in the case of *Musema*. See, WLADIMIROFF, M. 'Position of the Defence: The Role of Defence Counsel before the ICTY and ICTR.' in BEVERS, H. & JOUBERT, C. (2000) *supra* p40

⁴⁴ *Ibid.*

⁴⁵ MCGONIGLE, B. (2005) at 12

⁴⁶ COCKAYNE, J. (2005) at 671

Defence were provided with just two modest rooms for over ten years, which could not accommodate all the teams.⁴⁷ They were later given larger facilities, which were located away from the main Tribunal building, 'affectionately' known as the 'beach' building, or 'hut', due to its location on the North Sea coast. Whilst this was a necessary extension, albeit not without its problems due to remoteness of location,⁴⁸ McGonigle argues this was needed at an earlier stage.⁴⁹ The building was later closed in October 2011,⁵⁰ leaving the defence teams with only their originally allocated two rooms within the main Tribunal. Due to the fact that some of the individuals indicted were evading capture, it was not possible to foresee if and when they might appear before the Tribunal. The apprehension of *Karadžić* and *Mladić*, both of whom are of great significance to the ICTY's mandate, meant that the Tribunal has experienced important cases starting relatively 'late' in its existence.⁵¹ Whilst there are fewer current cases in session than in previous years, they are nonetheless complex and lengthy proceedings. The two adjoining rooms, which were literally knocked through to create additional space, and left in a rather unfinished manner, invite comparisons with Kafka's description of the Defence offices in *The Trial*.⁵² D'Amato, when shown the room with which he was provided, asked rhetorically if the Defence was not permitted to access the OTP in order to prevent defence counsel from '*drawing comparisons*'.⁵³ There is some weight to this, as the Defence are restricted from most areas of the Tribunal, and are thus unlikely to have personally observed any disparity.

⁴⁷ MCGONIGLE, B. (2005) at 12

⁴⁸ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p426

⁴⁹ MCGONIGLE, B. (2005) at 12

⁵⁰ See '*Decision on the Request for Review of Decision on Office Space*.' (10 February 2012) *Prosecutor v Karadžić*, Case No. IT-95-5/18-T wherein Karadžić made a request for further space which was denied.

⁵¹ *Karadžić* and *Mladić* were arrested and brought to the Hague in 2008 and 2011 respectively.

⁵² Kafka, F. (1999) '*The Trial*'. London, Vintage. p129

⁵³ D'AMATO, A. (2000) '*Defending a Person Charged with Genocide*.' 1 *Chicago Journal of International Law*. 459-469 at 462

Over time, the ICTY has attempted to make significant improvements to its rules and procedures in order to alleviate some of the burdens on the Defence.⁵⁴ However, outstanding difficulties still require attention, rather than mere dismissal due to the Tribunal winding down its operations. The ICC in particular should take note of the difficulties, which have been exposed over a prolonged period by the ICTY defence counsel, so as to avoid similar shortcomings. Whilst there is insufficient space to engage in a similarly detailed discussion of funding and resource issues at the ICTR, it should nevertheless be noted that the Tribunal has often been referred to as the '*poor cousin*' of the ICTY, as it has not received the same level of funding, or indeed attention, as its counterpart.⁵⁵ Consequently, issues relating to funding and resources are necessarily compounded. When Wladimiroff first reported to the ICTR, he was '*given the Statute, Rules and Directives of the Tribunal, documents of the case and provided with a badge. They wish you good luck and that's it.*'⁵⁶ One might argue that the support an institution can offer the Defence will be limited by the resources it has been given. Where a lack of funding is institution-wide, all organs will suffer; crucially, however, the Defence should not experience this disproportionately.

B. The SCSL

In light of the high costs of the *ad hoc* Tribunals, there was a pressing need for the 'mixed' Court for Sierra Leone (SCSL) to achieve justice on a much smaller budget. The expectations were high for the SCSL, despite the fact that it was '*being asked to do more than their ad hoc cousins, but with fewer resources*'.⁵⁷ The Court is funded on

⁵⁴ ELLIS, M.S. (2003) at 950-1

⁵⁵ For example, see: Cissé, C. (1997) 'The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison.' **7(1) Transnational Law & Contemporary Problems**. 103-118 at 117

⁵⁶ WLADIMIROFF, M. in BEVERS, H. & JOUBERT, C. (2000) p39

⁵⁷ COCKAYNE, J. (2005) at 618

the basis of voluntary contributions from States, which has in the past caused a great deal of financial uncertainty.⁵⁸ Cassese, in his independent report on the SCSL, felt that the necessity to routinely '*beg for money*'⁵⁹ from donors had '*plagued*' the Court, causing an inability to formulate a long-term strategy.⁶⁰ Due to a significant deficit in the amount of funds needed to function, the UN has had to supplement the court budget to the amount of tens of millions of dollars.⁶¹ Cockayne feels that operating such an institution on the basis of voluntary contributions '*has been tried - and has failed*'.⁶² Such a method of funding is not conducive to the proper functioning of a court, which cannot be expected to achieve its mandate without suitable financial backing. Additionally, voluntary contributions carry with them the potential for external influences to manipulate the workings of a court, thereby risking its autonomy.⁶³ The acceptance of financial 'bail outs' from countries '*may fatally taint the legitimacy of the Court*'.⁶⁴ Furthermore, the timing with which the funds are dispensed has been crucial for the Defence, as wide-ranging cutbacks '*left the defense counsel with drastically reduced budgets on the eve of beginning the defense phases of their cases*'.⁶⁵

The disparity of funding and resources between the Defence and Prosecution is perhaps most manifest at the SCSL, with the OTP taking up a large percentage of the Court's budget.⁶⁶ The disparity was particularly pronounced at the beginning of the Court's operation. Darehshori, when first reporting for duty, recalls the doors being

⁵⁸ *Ibid.* at 630

⁵⁹ Antonio Cassese: 'The Report on the Special Court for Sierra Leone.' (12 December 2006) para 249. Available via <http://www.sc-sl.org/> Herein '*Cassese Report*'. Chief Prosecutor Stephen Rapp even went so far as to tell the press '*With the economic crisis continuing, to get funds is not easy.. If we run out, it is now possible the judges will have to release him. That's our real anxiety.*' Available at: <http://www.reuters.com/article/2009/02/24/us-leone-warcrimes-idUSTRE51N2NF20090224> [Last accessed 25.08.2014]

⁶⁰ '*Cassese Report*' *ibid.* para 43

⁶¹ *Ibid.* para 42

⁶² COCKAYNE, J. (2005) at 675

⁶³ *Ibid.* at 675-6

⁶⁴ *Ibid.*

⁶⁵ JALLOH, C.C. (2010-11) 'Special Court for Sierra Leone: Achieving Justice?' **32(3)** *Michigan Journal of International Law*. 395-460 at 441

⁶⁶ COCKAYNE, J. (2005) at 671

removed from their hinges so as to create makeshift desks.⁶⁷ Sadly, the Defence continued in their struggle to obtain the much needed resources. Jalloh argues that '*the inequality of resources between the two sides led to tangible differences in terms of access to offices, equipment, and money for local and international investigators and experts to assist the various defense teams*'.⁶⁸ Hard-pressed defence teams were forced to petition the Court for increases in funding, with some degree of (albeit, belated) success.⁶⁹

Regarding access to resources, the Prosecution has benefitted from transportation, security, and technology such as satellite phones, as well as a team of translators and investigators,⁷⁰ which has not been the shared experience of the Defence. Rather, they have had to manage with public transport in areas lacking in infrastructure, with a team which can only be paid at the national salary level, causing a disparity in the expertise available.⁷¹ This in turn has meant that the Prosecution has been able to attract those with vital experience gained from the *ad hoc* Tribunals.⁷²

Charles Taylor,⁷³ whose trial took place in the Hague for reasons of security, argued that his defence was '*emaciated*', a criticism which Wilson reasons was '*well founded*'.⁷⁴ Taylor was unhappy with his initial legal aid budget, as it was insufficient to secure an English QC.⁷⁵ Eventually, the budget was increased so as to obtain the

⁶⁷ DAREHSHORI, S. (2008) 'Lessons for Outreach from the Ad-hoc Tribunals, The Special Court for Sierra Leone, and the International Criminal Court.' **14** New England Journal of International and Comparative Law. 299-307 at 299-300

⁶⁸ JALLOH, C.C. (2010-11) at 441

⁶⁹ 'Decision on Sesay Defence Application 1 - Logistical Resources.' (24 January 2007) *Prosecutor v Issa Hassan Sesay*. Case No. SCSL-04-15-T in which the Court ordered that the Defence be provided with a second office, a 'second' networked computer, a vehicle and a witness management officer.

⁷⁰ COCKAYNE, J. (2005) at 670

⁷¹ *Ibid.*

⁷² *Ibid.* at 671

⁷³ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-T

⁷⁴ WILSON, R.J. (2008) "Emaciated' Defence or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?" **15(2)** Human Rights Brief. 6-9 at 7-8

⁷⁵ RAPP, S.J. (2008) 'The Compact Model in International Criminal Justice: The Special Court for Sierra Leone.' **57** Drake Law Review. 11-48 at 29

services of Courtney Griffiths, QC, a barrister of '*great experience*',⁷⁶ the calibre of whom, it could be reasoned, was necessary for such an important and complex case.

C. The ICC

The running costs of the permanent ICC will inevitably be the highest amongst the ICL institutions, due to the number of State Parties and potential situations, the complexity and widespread nature of the crimes, and the number of individuals, such as victims and witnesses, who will be involved in the trials.⁷⁷ The ICC is funded primarily from '*assessed contributions*' made by States Parties, as well as financial support from the UN.⁷⁸ The ICC is, in theory, independent from the UN, yet contributions are made in reflection of the instances where the Security Council may make referrals.⁷⁹ The Court can also accept voluntary contributions from governments, international organisations and individuals.⁸⁰ However, it is the regular assessed contributions which largely provide the ICC with financial stability, although it is not unusual for States to delay, reduce or fail to pay their amount. The total figure of outstanding contributions as of October 2013 by all States Parties (since 2002), amounts to a substantial €8,498,579.⁸¹ Typically, the Court tends to overspend on their annual budget, which in recent years has grown in excess of €100,000,000.⁸² The ICC is also having to plan for

⁷⁶ *Ibid.*

⁷⁷ See, SKILBECK, R. (2008b) 'Funding Justice: The Price of War Crimes Trials.' **15(3) Human Rights Brief**. 6-10 at 6

⁷⁸ Article 115 a) 7 b) Rome Statute

⁷⁹ For example, the 'Situation' in Darfur was referred to the ICC by Security Council Resolution 1593 (31 March 2005) Doc. No. S/RES/1593

⁸⁰ Article 116 Rome Statute ICC

⁸¹ ICC Assembly of State Parties, twelfth session. '*Report of the Bureau on the arrears of States Parties.*' (12 November 2013) Doc. No. ICC-ASP/12/30

⁸² ICC, Assembly of State Parties, eleventh session. '*Report of the Committee on Budget and Finance on the work of its Eighteenth Session.*' (9 August 2012) Doc. No. ICC-ASP/11/5 p7

the future funding of its permanent premises - the annual cost of ownership of which is estimated to be €14,200,000 in 2016.⁸³

As the ICC is in its infancy, and cases have taken (albeit understandably) several years to progress, there is less available information regarding any disparities in financial support and facilities. In terms of resources, the ICC's RPE places a responsibility on the Registrar, to provide '*such facilities as may be necessary for the direct performance of the duty of the defence*'.⁸⁴ The use of the phrase 'direct performance' is troublesome, as it might suggest the duty is to supply only the 'bare minimum' for the Defence to function.

Where the budget is concerned, it is possible to look in a modest level of detail at the breakdown of the ICC's annual spending. An examination of the funding received by the Defence, especially when compared to the Prosecution, is of particular use in understanding the financial support given to each party, as well as to how this has changed alongside the Court's development in recent years. The development and progress of the 'Office of Public Counsel for the Defence' (OPCD), as well as other divisions within the ICC, will be limited by the resources allocated. The OTP is a vast organ, made up of three 'functional' divisions. The 'Investigations Division' is unique to the Prosecution in the sense that it carries this principal burden due to its duty to actively search for both inculpatory and exculpatory evidence.⁸⁵ Due to such differences between the parties, only the 'Prosecution Division' of the OTP will be compared with OPCD, as it is arguably the most directly comparable to the functions of the Defence during trial and appeal stages.

A comparison of the figures from the 2010 and 2013 proposed budgets (in order to demonstrate some of the broader trends), sheds some light on the scale of the

⁸³ *Ibid.* paras 63; 3

⁸⁴ Rule 20 (1) e RPE ICC

⁸⁵ The main responsibility for investigation falling to the OTP is often a justification for restricting Defence funding. See, Article 54 (1) of the Rome Statute concerning the duty to investigate both '*incriminating and exonerating circumstances equally*'.

disparity, and the rate at which the parties have received annual increases in their budgets. Turning first to 2013, the proposed budget for the OPCD stood at €549,500.⁸⁶ In contrast, the proposed budget of the 'Prosecutions Division' was set at €7,109,500.⁸⁷ Thus the Defence is receiving around 8% of the funds allocated to the Prosecutions Division.

Comparing these figures with the 2010 proposals highlights the rate of increase in funds for each party. The Prosecution Division has received a 38.4%⁸⁸ increase between these years, whilst the OPCD has received only a 4.3%⁸⁹ increase. As the capacity of the ICC increases with more Situations and cases being brought before the Court, it is inevitable that an increase in funding for both offices would be required. Any increase in work load would be broadly experienced similarly by both teams. However, it does not appear from these figures that the rate of increase is proportionate even to what each office was already receiving. Safferling argues that vast resources of the OTP compared with the Defence casts a serious doubt on whether the latter is truly in the same position.⁹⁰ The ICC should exercise extreme caution when reviewing funding for the OPCD, as failure to support its growth risks a return to the attitudes present at the NIMT regarding the Defence. The strength of a well-supported and resourced Defence office should be welcomed as an important contribution to a fair and effective Court, rather than face being undermined '*by a financial straightjacket, or by other practical constraints*'.⁹¹

The question of the availability of office space provided for the Defence is more complex, as the OPCD was not properly operational until around 2006. McGonigle

⁸⁶ This is stated as being a 5.9% increase on 2012. ICC, Assembly of State Parties, Eleventh session. '*Proposed Programme Budget for 2013 of the International Criminal Court*' (16 August 2012) Doc. No. ICC-ASP/11/10 p137

⁸⁷ This is stated as being a 15.7% increase on 2012. *Ibid.* p59

⁸⁸ The total approved budget for the 'Prosecution Division' for 2010 stood at €5,137,900. ICC, Assembly of States Parties, Eighth session. '*Proposed Programme Budget for 2010 of the International Criminal Court.*' (30 July 2009) Doc. No. ICC-ASP/8/10 p53

⁸⁹ The total proposed OPCD budget for 2010 stood at €526,500. *Ibid.* p127

⁹⁰ SAFFERLING, C. (2012) '*International Criminal Procedure.*' Oxford, OUP. p18

⁹¹ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p428

argues that the ICTY has '*already set a bad precedent for future international criminal tribunals, such as the ICC*'.⁹² When the ICC moves from its temporary building to its new location, it will be interesting to observe how well the Defence are accommodated in terms of office space and relevant resources. Unfortunately, it can often be the case that the Defence lacks a '*voice*' in the budgetary process at the international courts and tribunals.⁹³ Greater inclusion of the OPCD in all manner of budgetary planning would be welcomed.

D. The crucial importance of adequate funding and resources

The financial resources available to an international court or tribunal will directly impact the effectiveness of its operation. In particular, the Special Panels of East Timor demonstrate the disastrous potential effects that inadequate funding has, for the Defence, as well as the court's legitimacy as a whole.⁹⁴ Realistically, these institutions will be limited to some extent by their allocated budgets, but unfortunately such constraints often run 'counter' to the rights of the accused.⁹⁵ Such is the importance of an effective legal aid system for those defendants who have been declared indigent.⁹⁶

Restrictions on the defence budget is often justified on the basis of the parties' differing roles. Such reasoning carries little weight, as Jalloh argues: '*the fact that the two sides work essentially the same case, albeit from different perspectives, suggests that this argument is not as strong as it might initially appear*'.⁹⁷ The Defence cannot

⁹² MCGONIGLE, B. (2005) at 12

⁹³ GALLANT K.S. (2003) 'Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.' **14** Criminal Law Forum. 317-334 at 328

⁹⁴ See, BIBAS, S. & BURKE-WHITE, W. (2010) 'International Idealism Meets Domestic-Criminal-Procedure Realism.' **59** Duke Law Journal. 637-704 at 701

⁹⁵ ELLIS, M.S. (2003) at 505

⁹⁶ *Ibid.*

⁹⁷ JALLOH, C.C. (2010-11) at 441

perform their crucial role in due process unless supplied with proper financing and facilities. Where strong investment is made in the Prosecution, so too must this correspond to the Defence: '*Systematic prosecutions call for systematic defense.*'⁹⁸

It should be recognised here that better financing could help to alleviate important issues, one example being the difficulties relating to investigations.⁹⁹ However, given the finite budgets of these institutions, how could these additional defence funds be secured? Cockayne suggests that where resources have been exhausted, the '*radical remedy*' needed could be sourcing from the Prosecution budget.¹⁰⁰ Undoubtedly this would not be a 'popular' solution, yet where the Defence is seriously underfunded, with the Prosecution enjoying an exponentially larger budget, in practice it is arguably a just and appropriate remedy. The Defence must be afforded a 'voice' in the budgetary process, which if unheard could contribute to the erosion of the crucial principle of EoA.¹⁰¹ Ultimately, the accused's fair trial rights, which the institutions claim to uphold, will fail to translate into tangible protections at trial without proper funding.

E. Time as resource: Balancing defence rights with expediency

It is worth noting the importance of time as constituting another essential element of the resources needed to prepare the defence case. The right to have adequate time to prepare is closely linked with other crucial fair trial guarantees, such as the right to be informed promptly of the charges.¹⁰² What is deemed to be adequate time to prepare a

⁹⁸ WILSON, R. (2002) 'Assigned Defence Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach.' 2 *International Criminal Law Review*. 145-194 at 190

⁹⁹ Such as State co-operation; transportation access; securing potential defence witnesses etc. See, COGAN, J.K. (2002) p138

¹⁰⁰ COCKAYNE, J. (2005) at 676

¹⁰¹ GALLANT K.S. (2003) at 328

¹⁰² FEDOROVA, M. (2012) p55. See Chapter 2.

defence will depend upon the circumstances of each individual case.¹⁰³ Baccaria argues that the time to prepare at the international level should be sizeable given the complexity of the cases.¹⁰⁴

Perhaps the most challenging aspect for the provision of adequate time concerns the investigation stages at the ICC. During these intervals, it is simply not possible to provide the Prosecution and Defence with broadly similar time frames by virtue of the Prosecution's obligation to carry out pre-investigations in order to initiate charges against specific individuals. Thus, even an approximate equal allowance of time to investigate is '*unattainable*'.¹⁰⁵ This is problematic for the Defence, as it will not be given an opportunity to conduct its own investigations until (often several) years have passed.¹⁰⁶

There is a delicate balance to be sought between allowing an accused adequate preparation time, whilst also ensuring that the judicial process is as expedient as possible. The expediency of trials can be measured in many ways, such as: the cost of each trial, the number of cases processed, or the speed or accuracy with which the verdict is reached.¹⁰⁷ Given the institutions' limited resources, difficult choices must be made regarding the planning and allocating of funds.¹⁰⁸

Trial expediency can be to the advantage of both the defendant and the institution in question, as the former should not be detained for a longer period than is necessary whilst there is '*insecurity about his status*'.¹⁰⁹ Other benefits, such as reducing costs and limiting the degree to which evidence and the accuracy of witness testimony deteriorates, provide powerful incentives to ensure trials progress in a timely

¹⁰³ MAY, R. & WIERDA, M. (2002) p272

¹⁰⁴ BECCARIA, C. (1995) '*On Crimes and Punishments and Other Writings*.' CUP, Cambridge. p77

¹⁰⁵ FEDOROVA, M. (2012) p56

¹⁰⁶ TUINSTRA, J.T. (2009) p164

¹⁰⁷ FEDOROVA, M. p87

¹⁰⁸ *Ibid.*

¹⁰⁹ SAFFERLING, C.J.M. (2001) '*Towards an International Criminal Procedure*.' Oxford, OUP. p374

manner.¹¹⁰ However, ‘speedy’ trials can threaten an accused’s right to a fair trial if his right to adequate time to prepare is diminished.¹¹¹ Notwithstanding, the ‘yardstick’ used to assess ‘speed’ differs between national and international contexts.¹¹² As Damaška explains, if an accused ‘*were to languish in preliminary detention for eight or nine years, or if their trials lasted for three or four years, the observance of their right to fair trial would certainly be questioned*’.¹¹³ Yet in international criminal proceedings, trials will easily extend into several years.¹¹⁴ Given the complexity of the cases and circumstances surrounding the alleged crimes, delays to the proceedings are, to some extent, to be expected.¹¹⁵ Caution, however, should be exercised when accepting this as inevitable given that the accused will often have to wait years in incarceration before their trials begin.¹¹⁶ It can be argued that extensive delays have become to be accepted as the ‘norm’. ICC Judge Fulford has expressed his conviction that ‘*delays and significantly extended proceedings are the single most corrosive problem for the ICC*’, which ‘*arguably stretch the notion of a fair trial*’.¹¹⁷ Furthermore, he has noted that ‘*each time a case is conducted in a particular way, the more difficult it is to break free from the trend of established precedent*’.¹¹⁸ Thus, international criminal trials are likely to continue to be protracted in nature in the years to come.

¹¹⁰ See, BASSIOUNI, M.C. (1992-3) ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions.’ **3** *Duke Journal of Comparative & International Law*. 235-297 at 285

¹¹¹ BASSIOUNI, M.C. (1992-3) p286

¹¹² DAMAŠKA, M. (2012) ‘Reflections on Fairness in International Criminal Justice.’ **10** *Journal of International Criminal Justice*. 612-620 at 616

¹¹³ *Ibid.*

¹¹⁴ The ICTY case of *Haradinaj et al.* Case No. IT-04-84 went on for more than seven years. The ICC trial of *Prosecutor vs. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 began in 2009; In December 2014, the Appeals Chamber confirmed the verdict declaring, sentencing him to 14 years.

¹¹⁵ DAMAŠKA, M. (2012) at 616

¹¹⁶ ARONOFSKY, D. (2005) ‘International War Crimes & Other Criminal Courts: Ten Recommendations for Where We go From Here and How to Get There – Looking to a Permanent International Criminal Tribunal.’ **34** *Denver Journal of International Law and Policy*. 17-32 at 26-7

¹¹⁷ FULFORD, A. (2011) ‘The Reflections of a Trial Judge.’ **22** *Criminal Law Forum*. 215–223 at 223

¹¹⁸ *Ibid.*

It is reasonable to assert that it is generally in the best interests of all parties for proceedings to be as expedient as possible, and as a result the modern institutions have had to find ways to ensure that cases progress. This has been a particular issue for the *ad hoc* Tribunals, given their limited mandates relating to the conflicts. In 2000, the ICTY began implementing its so called ‘completion strategy’ in order to initiate the process of winding down the Tribunal.¹¹⁹ Williams argues that the tension created by the completion strategy concerning the rights of the accused ‘*lies at the centre of the criticisms*’, as it ‘*potentially influences judicial decisions on procedural, and in some cases, substantive rights*’.¹²⁰ It has also been questioned why the strategy was introduced quite so early into the lifespan of the Tribunal.¹²¹ Turner contends that it is ‘*clear that it has reduced the perceived fairness of the tribunals among some defense attorneys and outside observers*’.¹²² Thus, it is apparent that Courts and tribunals must exercise caution regarding their approach to the use of completion strategies, even in the face of considerable external pressure to do so. It is worth reiterating Judge David Hunt’s dissenting opinion in *Milošević*:

*‘If the Tribunal is not given sufficient time and money to [try persons charged with serious violations of international humanitarian law] by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights.’*¹²³

¹¹⁹ At that time, high profile defendants such as *Mladić* (Case No. IT-09-92) and *Karadžić* (Case No. IT-95-5/18) were in hiding.

¹²⁰ WILLIAMS, S. ‘The Completion Strategy of the ICTY and the ICTR.’ in BOHLANDER, M. (2007) *supra* pp.164-5

¹²¹ *Ibid.* p234

¹²² TURNER, J.I. (2008) ‘Defence Perspectives on Law and Politics in International Criminal Trials.’ 48 *Virginia Journal of International Law*. 529-594 at 590

¹²³ *Prosecutor v Slobodan Milošević*, ‘Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the form of written statement.’ (21 October 2003) Case No. Case: IT-02-54-AR73.4 para 21

The ICC has already experienced significant pressure concerning the time it has taken for its first case to be completed.¹²⁴ It would be understandable for external pressures to influence the Court's strategies regarding case progression. The extensive department dealing with press and media would be wise to continue to reiterate the necessarily protracted nature of the proceedings in ICJ, particularly in comparison with the more familiar context of national trials.

4. Conclusion

This chapter has sought to demonstrate the difficulties associated with the institution's budgetary allocations to the Defence, which has particular ramifications for the principle of EoA when considered in relation to the financing of the Prosecution. Concerning the protection of the accused's rights, it is insufficient merely to provide statutory, 'paper' rights and guarantees, without ensuring that they translate into tangible protections at trial.¹²⁵ Adequate defence funding is of primary importance for an institution, as an 'emaciated' defence cannot fulfil its trial function, leaving an accused without the proper means to respond to the charges brought against him. Whilst this Chapter has not attempted to analyse what the Prosecution and Defence should receive in *quantifiable* terms, the degree of disparity between the parties has been examined via the courts' spending and proposed budgets. This disparity is arguably most evident at the SCSL, due to its reliance on voluntary contributions. At the ICC, the considerably disparate rates of annual increases in budgets are of particular interest. Since both parties will experience increasing workloads over the coming years, the discrepancy is difficult to justify.

¹²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06. Lubanga's charges were confirmed in 2006, with the Appeals Chamber confirming the decision in December 2014.

¹²⁵ See, FEDOROVA, M. (2012) p67

An important component in assessing defence funding and resources is adequate time to prepare. The extreme length of proceedings at the modern institutions is often criticised.¹²⁶ This undoubtedly places additional pressures on the courts and tribunals. Zappalà warns that a desire to achieve 'speedy' trials '*can under no circumstances be taken as a justification for reducing the rights of the defendants. It would be dangerous to surrender to the temptation of thinking that greater effectiveness may justify fewer guarantees*'.¹²⁷ Whilst goals of efficiency and expedience carry benefits for both the accused and the institution, caution must be exercised regarding the means utilised to achieve them. If conducting speedy trials affects the fair trial rights of the accused, the lasting legitimacy of the institution will ultimately be placed at risk.¹²⁸

The next Chapter will analyse the extent to which the Defence faces opposition from multiple accusers, particularly at the ICC given its unique and complex composition.

¹²⁶ BIBAS, S. & BURKE-WHITE, W. (2010) at 640

¹²⁷ ZAPPALÀ, S. (2003) 'Human Rights in International Criminal Proceedings.' Oxford, OUP p28

¹²⁸ Fairlie argues that the ICTY has focused on '*efficient convictions than on procedural protections for the accused*'. FAIRLIE, M. (2004) 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit.' 4 International Criminal Law Review. 243-319 at 317

Chapter 7.

An Institutional Inequality of Arms?

Defence Opposition

“The Defence [is] facing the machine - the big machine - of the Office of the Prosecutor.”¹

1. Introduction

This Chapter will now turn to examine the main ‘opponents’ to the Defence during the trial process in order to consider whether there is an Equality of Arms (EoA) at an institutional level. Particular focus will be given to the unique composition of the ICC in its conceptualisation of the role of the Prosecution, as well as the unique means of including victim testimony within the trial process.

This Chapter will begin by analysing the dual obligation which has been placed on the Prosecution at the ICC to both ‘*investigate incriminating and exonerating circumstances equally*’ under Article 54(1)a of the Rome Statute, whilst *also* conducting a prosecution case in a partisan manner. It will be argued that this complex role gives rise to unprecedented difficulties, worthy of rigorous examination. This will include an analysis of the investigatorial approaches used by the OTP in the initial cases brought before the Court. The delay in the implementation of a ‘Code of Conduct for the Office of the Prosecutor’, which has only fairly recently come into force, is a source of concern in relation to the institutional attitudes which could be developing within the Office.

The Prosecution is responsible for bringing charges against the accused,² and carries the burden of proof.³ The OTP is undoubtedly a formidable opponent,

¹ *Verbatim*, per Xavier-Jean Keïta, Principal Defender OPCD, ICC. IBA Video: ‘In the dock - Defence Rights at the International Criminal Court’, available via: <http://vimeo.com/23958341> [Last accessed 18.3.2015]

² Articles 61, 42 Rome Statute of the ICC

³ *Ibid.* Article 67(1)i

particularly given its investigative role. Nevertheless, it must also be questioned whether there is an additional accuser by virtue of the inclusion of victim participation within the trial process. The final section will consider the role of judges and their unique ability to safeguard fair trial guarantees. It will be argued that there is sufficient cause for concern regarding issues such as bias and unprofessional conduct. Ultimately, it will be argued that the cumulative consideration of these issues indicates that the Defence can be observed as operating from within institutional structures which are both architecturally, *and* practically, organised so as to place the accused at a significant disadvantage.

2. The dual role of the Prosecutor at the ICC: a workable and sustainable concept?

This section will analyse the role and influence of the prosecutor, particularly at the ICC, to reveal the extent of the OTP's power and influence over the proceedings. This will in turn provide a greater understanding of the magnitude of the Defence's primary opposition.

A. The role of the Prosecutor at the *ad hoc* Tribunals

There is a vital difference between the role of the Prosecution at the ICC compared with the other modern institutions. At the ICTY, there is no burden on the Prosecution to search for exculpatory evidence.⁴ As a result, the role does not entail acting as a

⁴ Rule 68(1) RPE ICTY states that the Prosecutor must *disclose* to the Defence material which 'may suggest the innocence or mitigate the guilt of the accused' - however, there is no prior duty to *search* for such evidence.

neutral, impartial investigator, but rather as a party to the proceedings.⁵ Thus, there is no duty to assist the Tribunal in its quest to establish the material (or forensic) truth.⁶ Establishing the ‘truth’ will depend on a full respect of the procedural rules.⁷ At the ICTY, the OTP’s aim is to secure a conviction, in line with an adversarial trial system.⁸ Karnavas argues that *‘truth, fairness and due process seem to be lost in the competitive process’*, adding that a *‘win by all means’* attitude is reminiscent of the mentality at the NIMT.⁹ There are certainly few incentives to conduct impartial investigations which consciously search for both inculpatory and exculpatory evidence.¹⁰ It can be argued that this approach is detrimental to the Defence by virtue of its weaker status, and comparatively smaller resources with which to investigate. The Tribunal has ensured that the Prosecution suffers no disadvantage in the investigation process, which McIntyre suggests has contributed to diminishing the appearance of justice at the ICTY.¹¹

The lack of obligation on the Prosecution has wider ramifications for its role, as well as the way in which it conducts itself. One such issue is that of prosecutorial ‘zeal’, which can risk overshadowing the other aims or needs of the Tribunal.¹² For example, the prosecutor for *Barayagwiza* at the ICTR, Carla Del Ponte, made ‘overzealous’ comments in session, which presented the accused’s guilt as undeniable.¹³ The

⁵ LANGER, M. (2005) ‘The Rise of Managerial Judging in International Criminal Law.’ **53(4)** *American Journal of International Law*. 835-909 at 860-1

⁶ KARNAVAS, M.G. ‘Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.’ in BOHLANDER, M. (Ed.) (2007) *‘International Criminal Justice: A Critical Analysis of Institutions and Procedures.’* London, Cameron May. p81

⁷ ZAPPALÀ, S. (2003) *‘Human Rights in International Criminal Proceedings.’* Oxford, OUP. p248

⁸ KARNAVAS, M.G. in BOHLANDER, M. (2007) p81

⁹ *Ibid.* p88 & at *fn. 40*. See Chapter 4.

¹⁰ LANGER, M. (2005) at 860-1

¹¹ MCINTYRE, G. (2003) ‘Equality of Arms - Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.’ **16** *Leiden Journal of International Law*. 269-320 at 282

¹² Regarding judicial ‘prosecutorial zeal’, see Section 4(D) of this Chapter.

¹³ Del Ponte said: “*The accused is responsible for the death of over 800,000 in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty..*” See, FEDOROVA, M. (2012) *‘The Principle of Equality of Arms in International Criminal Proceedings.’* Netherlands, Intersentia. p154

Chamber noted the '*forcefulness*' of her statements, and reiterated that it was for the Trial Chambers to determine the guilt of the accused.¹⁴ Reasonable prosecutorial zeal is natural, and is arguably a necessary part of the role. However, as Creta argues, it '*must not blur the focus on the rights of the accused to fair treatment during every phase of adjudication*'.¹⁵ Extensive prosecutorial zeal can contribute to a bias against the Defence, even if not in an overt manner.¹⁶

Also worthy of consideration are issues such as the attitudes of the Prosecution teams, and the tactics they utilise. As there is no obligation to investigate exonerating evidence, the Prosecution takes a '*rather disdainful attitude*', even if there is awareness of its existence.¹⁷ Karnavas argues that the Prosecution will '*generally not hesitate to push the envelope on what may be fair play, particularly when considering the dearth of resources (human and financial) available to the defence and the disparity in actual and perceived power between the prosecution and the defence*'.¹⁸ An example of questionable prosecution tactics can be seen in the case of *Krstić*. At trial, the Prosecution failed to disclose taped evidence until after the closure of the Prosecution's case and the evidence-in-chief, despite having been in possession of it for some considerable time.¹⁹ The Defence argued that the decision made not to disclose the tape, and use it in cross-examination, was deliberate.²⁰ The Appeals Chamber felt that there were '*sufficient grounds in the circumstances to question the propriety of the Prosecution as regards the disclosure of this evidence*',²¹ and that the Prosecution took '*an inordinate amount of time before disclosing material in this case, and has failed to*

¹⁴ *Barayagwiza v. The Prosecutor*, 'Decision.' (31 March 2000) Case No: ICTR-97-19-AR72 para 35

¹⁵ CRETA, V.M. (1998) 'The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.' **20** *Houston Journal of International Law*. 381-418 at 383

¹⁶ See, KARNAVAS, M.G. in BOHLANDER, M. (2007) pp.88-9

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Prosecutor v. Krstić*, 'Appeal Judgement.' (19 April 2004) Case No. IT-98-33-A para 167

²⁰ *Ibid.* para 173

²¹ *Ibid.* para 174

provide a satisfactory explanation for the delay.²² As the tape was excluded from consideration at the trial stage, the Appeals Chamber held that a retrial was not the appropriate remedy.²³ It did not feel that it could determine whether the Prosecution had deliberately breached its obligations.²⁴ In a then somewhat contradictory statement, it held:

*‘..on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology which, in light of the findings above, must be revised so as to ensure future compliance with the obligations incumbent upon the Office of the Prosecutor. This finding must not however be mistaken for the Appeals Chamber’s acquiescence in questionable conduct by the Prosecution.’*²⁵

The late disclosure was a clear breach of the Prosecution’s duty, for which the Chamber felt that no adequate justification was provided. Why then did the Chamber assume that the Prosecution had acted in good faith, whilst at the same time calling for a revision of the methods of disclosure? It is difficult not to conclude, contrary to the Chamber’s own assertion, that this approach signifies an acquiescence in such behaviour. It also fails to send a strong, deterrent message regarding future conduct. This is highly regrettable, as this prosecution tactic *‘ties up the defence team in reviewing non-important documents, and drains the defence team of its resources’*.²⁶ Whether such behaviour constitutes a deliberate tactic, rather than a mere lapse, remains to be determined.

²² *Ibid.* para 197

²³ *Ibid.* para 174

²⁴ *Ibid.* para 213

²⁵ *Ibid.* para 214

²⁶ KARNAVAS, M.G. in BOHLANDER, M. (2007) p99

B. The role of the Prosecutor at the ICC

The ICC differs from its *ad hoc* predecessors regarding the obligation placed on the Prosecution to '*investigate incriminating and exonerating circumstances equally*' under Article 54(1)(a) of the Rome Statute. As such, the Prosecution is not just a party to proceedings, but must serve as a public organ, functioning in the interests of justice.²⁷ This is largely due to the substantial resources provided to the Prosecution's 'Investigation Division', as well as in recognition of the other advantages provided to the OTP, such as immunity and co-operation with States.²⁸

At first consideration, the obligation is a welcomed and much needed development from the *ad hoc* tribunals, which could strengthen the position of the Defence.²⁹ However, the realities of this burden on the Prosecution must be considered for a variety of reasons. Firstly, there is a risk that because the Prosecution carries out the main bulk of the investigations, they are thereby in both a real and perceived advantageous position with regard to their knowledge of the accuracy and reliability of evidence collected, and later presented in Court. Kay and Swart warn that it would be unwise for the judges to take Article 54 in blind faith, '*believing that in any case before them the prosecution must be right*'.³⁰ However, such an assumption on the part of the judges could be inadvertent.

Secondly, the Prosecutor's dual role could be so difficult³¹ to perform as to render it untenable. As Fedorova explains, the expectation of the Prosecutor to act 'as

²⁷ ZAPPALÀ, S. 'The Rights of the Accused.' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP. p1353

²⁸ As examined in Chapter 6.

²⁹ BUISMAN, C. (2014) 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?' **27(1)** Leiden Journal of International Law. 205-226 at 207

³⁰ KAY, S. & SWART, B. 'The Role of the Defence' in CASSESE, A. *et al* (2002) *supra* p1425

³¹ *The task of the Prosecutor at the ICC has been described as one of the most important and difficult legal offices in the world today.* GROULX, E. (2010b) 'The New International Justice System and the Challenges Facing the Legal Profession. Revue Quebecoise de Droit International. 39-74 at 50

an impartial truth-seeker is easier stated in theory than implemented in practice'.³² It must be recognised that there is an inherent tension in the dual obligation to both neutrally investigate and disclose evidence, whilst also building the Prosecution case in a partisan manner. In terms of investigative capacity, the Defence is heavily reliant on the Prosecution's efforts, not just in terms of funding and resources, but also due to the delay between the opening of an investigation and the later appointment of defence counsel, which can only then begin its own investigations.³³

The origin of this tension can be said to be a direct result of the *sui generis*, mixed process adopted at the ICC. The obligation on the Prosecution under Article 54(1)(a) represents an attempt to achieve a balance between common and civil law traditions. It originated from a German proposal, which found wide support from other civil law jurisdictions, which sought to build a 'bridge' between the adversarial prosecutor, and the inquisitorial investigating judge.³⁴ All too often, the ICC's system is referred to as being primarily adversarial, which fails to reflect the unique mixture nature of the resultant system. Buisman explains the crucial shortcoming of this particular hybridisation:

*'In addition, unlike most civil-law procedures, the ICC procedure does not constitute a joint search for the truth, duly reported in a dossier, in which the defence is an active participant and engages with the prosecution to suggest certain investigative steps. Rather, it is an evidence-gathering exercise carried out by two autonomous parties.'*³⁵

Without the neutrality and accessibility of an open dossier, the Prosecution has been left with a particularly taxing role. Skilbeck has coherently argued that by using a 'pick and mix' approach between the systems, the necessary checks and balances found in domestic systems are absent, thereby creating a '*Frankenstein's monster that fails to*

³² FEDOROVA, M. (2012) p126

³³ BUISMAN, C. (2014) at 207-8

³⁴ *Ibid.* at 206; FEDOROVA, M. (2012) p149

³⁵ BUISMAN, C. (2014) at 224

adequately protect the rights of the defence'.³⁶ Others have argued that not only can this result in confusion, but '*perhaps even systemic failure*'.³⁷ This issue has broad ramifications across the ICC's procedural system. In this context, it is possible that the concept of the dual obligation is fundamentally flawed, or at least 'over-idealistic', as it is arguably '*not in the nature of the beast to investigate, with a high level of diligence and persistence, those elements that undermine one's own case*'.³⁸ If the problem is so manifest within the current system, only a fundamental change in the way the ICC investigates and collects its evidence would provide a meaningful solution.³⁹

The extent to which the Prosecution at the ICC has been able to fulfil its dual investigative role to date must be explored. It is important to try to ascertain a sense of whether the obligation is possible, albeit difficult, or whether the concept is inherently flawed. Whilst the ICC's caseload is, relatively speaking, in its 'infancy' there are nevertheless Situations and cases which illustrate how this role is developing. The cases concerned with the Democratic Republic of Congo (DRC), including *Lubanga* - the first case to be completed at the Court - suggest that the role is causing significant difficulties, which could potentially undermine the legitimacy of the trials themselves. Several shortcomings concerning Prosecution have arisen, including failing to visit important locations and conduct fundamental investigations, such as ascertaining the real ages of the child soldiers who are said to have been involved. The Prosecution failed to take standard measures such as, interviewing their family members, or collecting birth certificates.⁴⁰ The OTP argued that security was their primary concern,

³⁶ SKILBECK, R. (2010a) 'Frankenstein's Monsters: Creating a New International Procedure' **8** *Journal of International Criminal Justice*. 451-462 at 452

³⁷ BIBAS, S. & BURKE-WHITE, W. (2010) 'International Idealism Meets Domestic-Criminal-Procedure Realism.' **59** *Duke Law Journal*. 637-704 at 695

³⁸ BUISMAN, C. (2014) at 224

³⁹ For more on the potential merits of an independent investigating Chamber at the ICC, see: De HEMPTINNE, H. (2007) 'The Creation of Investigating Chambers at the International Criminal Court. An Option worth Pursuing?' **5** *Journal of International Criminal Justice*. 402-418

⁴⁰ BUISMAN, C. (2014) at 219; 215-6

fearing that seeking the information of particular children might put them at risk.⁴¹ To circumvent this issue, the Prosecution instead elected to rely heavily on the use of intermediaries for local investigations. The Court has been particularly critical of delegating such tasks to intermediaries, despite recognising the difficulties with security.⁴² In *Ngudjolo*, the Chamber acknowledged the work of defence investigators in ascertaining evidence in relation to the correct ages of the child soldier witnesses.⁴³ As a result, in both the *Lubanga* and *Ngudjolo* cases, the Court felt it was necessary to disregard *all* the testimonies given by the child soldiers.⁴⁴

The Chambers have not shied away from examining the investigative shortcomings of the Prosecution; in the *Lubanga* judgement, the Trial Chamber examined the deficiencies over 157 pages of the judgement.⁴⁵ The striking out of all testimony which related to the nine child soldiers serves as the clearest condemnation of the methods employed by the Prosecution.⁴⁶ In terms of the failure to investigate important sites and crime scenes, the *Katanga* case provides some worrying examples, in which the Defence team again argued that the Prosecution had failed to visit key areas, instead relying excessively on intermediaries.⁴⁷ This included the crucial crime scene at Bogoro, which was only visited by the Prosecution in a sporadic manner.⁴⁸ Additionally, no investigations whatsoever took place at the locations where the accused were said to have been based.⁴⁹ The Defence observed that ‘any

⁴¹ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment pursuant to Article 74 of the Statute.’ (14 March 2012) Doc. No. ICC-01/04-01/06-2842 para 160

⁴² *Ibid.* para 482

⁴³ *Prosecutor v. Mathieu Ngudjolo*, ‘Jugement rendu en application de l’article 74 du Statut.’ (18 December 2012) Doc. No. ICC-01/04-02/12-3 para 121

⁴⁴ BUISMAN, C. (2014) at 219; 215-6. See, *Prosecutor v. Mathieu Ngudjolo*, ‘Judgment pursuant to article 74 of the Statute.’ (18 December 2012) Doc. No. ICC-01/04-02/12-3-tENG at 516

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment pursuant to Article 74 of the Statute.’ (14 March 2012) Doc. No. ICC-01/04-01/06-2842 pp.63–220

⁴⁶ BUISMAN, C. (2014) at 219

⁴⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘Second Corrigendum to the Defence Closing Brief.’ Doc. No. (29 June 2012) ICC-01/04-01/07-3266-Corr2-Red para 450

⁴⁸ *Ibid.* para 450; *Prosecutor v. Mathieu Ngudjolo*, ‘Jugement rendu en application de l’article 74 du Statut.’ (18 December 2012) Doc. No. ICC-01/04-02/12-3 paras 117-8

⁴⁹ *Prosecutor v. Katanga* ‘Second Corrigendum’ *supra* para 452

investigation into exonerating evidence starts within the proximity of the accused.⁵⁰ There were therefore significant omissions in the search for exculpatory evidence.⁵¹ Whilst the situation has not been made easier by the DRC government refusing to disclose important documents, it can be argued that the Prosecution has '*never made a serious effort to persuade it to disclose at least some of these documents*'.⁵² However, the cases from the DRC are not the only ones in which the Prosecution has claimed similar difficulties.⁵³ Kenya, for example, is in a more stable situation than other, war-torn countries.⁵⁴ By comparison, the government of Sudan has placed significant restrictions on the investigation of evidence through its own lack of co-operation, and has gone as far as criminalising the co-operation of others.⁵⁵ In such extreme circumstances, the Prosecution cannot fairly be criticised for a failure to search for and collect evidence.

Overall, the cumulative effects of the deficiencies across the various ICC Situations creates a worrying picture regarding the Prosecution's efforts to investigate properly for inculpatory and exculpatory evidence alike.⁵⁶ It has been argued that the Prosecution has '*largely ignored its obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally in any of the pending or completed cases*' and has failed to demonstrate that a genuine effort has been made.⁵⁷ This leads to reasonable concerns as to the workability of the concept, particularly in

⁵⁰ *Ibid.*

⁵¹ BUISMAN, C. (2014) at 211

⁵² *Ibid.* at 212

⁵³ For example, *The Prosecutor v. Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11

⁵⁴ BUISMAN, C. (2014) at 213

⁵⁵ *Ibid.* at 215

⁵⁶ Further issues relating to investigation and disclosure will be explored in Chapter 8.

⁵⁷ BUISMAN, C. (2014) at 223

light of the *sui generis* system at the ICC.⁵⁸ Karim Khan QC, during his opening speech representing *Ruto*, argued that Article 54 was in effect '*dead and buried*'.⁵⁹

Within the confines of the Court's current framework, there should be a more conscious effort on the part of the prosecution to investigate lines of inquiry which might reveal exculpatory evidence. Only if the Prosecution is able to keep an open mind as to what investigations might reveal, will it be able to fulfil its role, and satisfy the obligation placed upon it under Article 54(1)(a) of the Rome Statute.⁶⁰

C. The 'Code of Conduct for the Office of the Prosecutor'

Linked with the issue of the Prosecution's dual role at the ICC, is the manner in which it conducts itself. Until fairly recently, there was an absence of specific regulation for the OTP. Prior to the entering into force of the belated 'Code of Conduct for the Office of the Prosecutor' in September 2013,⁶¹ the Prosecution was operating under the general staff rules, with '*no formal ethical constraints in carrying out their day-to-day duties*'.⁶² As Markovic argues, this was unfortunate, as too much discretion allowed the OTP to act in a manner which, albeit not in contradiction of the Statute, did not '*fully take into account the interests of the ICC as a whole*'.⁶³

Given the Prosecution's obligations under Article 54(1)a of the Rome Statute, it is argued here that there is a pressing need for the Office to retain a degree of

⁵⁸ *Ibid.* at 224

⁵⁹ *The Prosecutor v. William Samoei Ruto; Joshua Arap Sang*, Open Session Transcript (10 September 2013) Doc. No. ICC-01/09-01/11-T-27-ENG p58. Khan's statements at pp.52-3 allude to the accused being named prior to investigations, which, he contends, if carried out appropriately would have revealed a very different picture.

⁶⁰ BUISMAN, C. (2014) at 209

⁶¹ 'Code of Conduct for the Office of the Prosecutor'. Available at: <http://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf> Doc. No. OTP2013/024322 [Last accessed 9.02.2014]

⁶² MARKOVIC, M. (2011-12) 'The ICC Prosecutor's Missing Code of Conduct.' 47 *Texas International Law Journal*. 201-236 at 207

⁶³ *Ibid.* at 212

neutrality. Difficulties arise, arguably most strikingly, in connection with the OTP's interactions with the media. Unfortunately, there is no shortage of examples in which members of the team have made statements in direct conflict with their role. One such example is that of a divisional head of the Prosecution, Ms Le Fraper du Hellen, who gave an online interview in 2010, commenting that '*nothing is going to happen. Mr Lubanga is going away for a long time*'.⁶⁴ The Chamber found that such remarks tend to bring the Court into '*disrepute*'.⁶⁵ Despite this finding, regrettably no action was taken beyond the Chamber '*expressing the strongest disapproval*'.⁶⁶

The first Chief Prosecutor, Luis Moreno Ocampo, has been criticised for his tendency for '*grandstanding*' in front of the world media.⁶⁷ Ocampo contributed an article in the Guardian newspaper, using language which suggested the (un)proven guilt of Darfur's *Al Bashir*, stating for example that '*Bashir's forces have raped on a mass scale in Darfur. They raped thousands of women*'.⁶⁸ The Defence argued that his article 'violated and endangered' the accused's right to a fair trial,⁶⁹ and represented to the public that Al-Bashir was both already an accused, as well as being guilty.⁷⁰ The Court responded in a disappointing manner, deeming the Defence request to be inadmissible as it was put forward by an *ad-hoc* defence lawyer, and as such fell outside of her mandate before the Court.⁷¹ It is suggested here that a strong critique of

⁶⁴ See, <http://www.lubangatrial.org/2010/03/15/interview-icc-prosecutors-will-refute-allegations-that-intermediaries-manipulated-evidence-in-lubanga-case/> [Last accessed 9.2.2014]

⁶⁵ *Prosecutor v. Thomas Dyllo Lubanga*, 'Decision on the press interview with Ms Le Fraper du Hellen.' (12 May 2010) Doc. No. ICC-01/04-01/06-2433 para 41

⁶⁶ *Ibid.* para 53

⁶⁷ Rozenberg, J. 'ICC prosecutors should not be grandstanding on their own cases.' Guardian. Available at: <http://www.theguardian.com/law/2010/aug/18/luis-moreno-ocampo-omar-bashir> [Last accessed 15.9.2014]

⁶⁸ Ocampo, M. 'Now end this Darfur denial'. Guardian. Available at: <http://www.theguardian.com/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur> [Last accessed 15.9.2014]

⁶⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010.' (4 August 2010) Doc. No. ICC-02/05-01/09-103 para 19

⁷⁰ *Ibid.* para 8

⁷¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* 'Decision on the 'Requête pour l'obtention d'une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010.' (24 August 2010) Doc. No. ICC-02/05-01/09-106 pp.3-4. See Chapter 5 for the discussion of '*ad-hoc*' counsel.

such behaviour, in lieu of stronger sanctions, would have been preferable in order to prevent future occurrences.

Now that the 'Code of Conduct' for the OTP has been introduced, there are formal guidelines which set out the obligations and duties of the Prosecution. Section 30 states that members of the Office '*shall not publicly express an opinion on the guilt or innocence of a person under investigation or the accused outside the context of the proceedings*'. Concerning the duty under Article 54(1)a of the Statute, it reiterates that investigations should be carried out '*with the goal of establishing the truth, and in the interests of justice*', so that '*all necessary and reasonable enquiries are made and the results disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or the innocence of the suspect*'.⁷² Perhaps most pertinently, the Code of Conduct calls for the Prosecution to '*not strive for a conviction at all costs*'.⁷³ Respect for this ethos is necessary if the Court is to transcend the strictly adversarial competition between two parties, '*where winning would be the only goal*'.⁷⁴

Undoubtedly, the Code of Conduct should have been implemented at a much earlier stage in the Court's development. As a result, ethical problems arising from the Prosecution's behaviour have undermined the ICC's early work.⁷⁵ Whether or not the Code will have had a tangible effect on the Prosecution remains to be determined. Whilst the Code is a necessary framework, there should not be an expectation that it can act as a 'silver bullet', ready to transform the attitudes of the OTP staff.⁷⁶ Furthermore, the delay of roughly a decade in its implementation will inevitably mean that the permanent staff of the OTP will have already developed norms and attitudes, which could prove difficult to change.

⁷² Section 41 'Code of Conduct for the Office of the Prosecutor', Doc. No. OTP2013/024322

⁷³ *Ibid.* Section 71

⁷⁴ FEDOROVA, M. (2012) p173

⁷⁵ MARKOVIC, M. (2011-12) at 236

⁷⁶ Continual training for Prosecution staff, concerning its relationship with the Defence, would be invaluable.

Overall, the Prosecution at the ICC is a redoubtable opponent, with a great deal of influence and control, particularly over the investigation process, which could prove especially detrimental to the Defence. Due to the Court's mixed composition, the Prosecution has been burdened with substantial obligations, which appear in principle to conflict with its other primary role, that of a partial party to the proceedings. It can be argued that the concept of the dual role of the OTP was not given adequate consideration, particularly given the lack of any guiding precedent at other institutions.

3. Victim Participation: A threat to the defendant's fair trial?

Having considered the nature of the Defence's main adversary in the form of the prosecutor, it is also necessary to analyse whether there are, in practice, additional accusers or opponents with which the Defence must contend. This section will examine the extent to which victim participation has the potential to negatively impact upon the due process rights of the accused, with particular focus on the ICC. Johnson suggests that there are three problematic issues, which include the erosion of the presumption of innocence, a lack of notice as to the charges to be brought, and delays to the proceedings.⁷⁷ These issues will be examined, as well as the effect which victim testimony has on the judiciary, and the burden which the provisions place on the operation of the Court. The accumulation of problems associated with the inclusion of victim testimony ultimately gives rise to the concern that the accused is, in practice, unfairly faced with multiple accusers in addition to the Prosecution.

⁷⁷ JOHNSON, S.T. (2010) 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court.' **16** *ILSA Journal of International and Comparative Law*. 489-496 at 490

At the modern international criminal courts and tribunals, the concept of victim participation has evolved dramatically with the ICC's pronounced step towards the inclusion of victims in the trial process.⁷⁸ The *ad hoc* Tribunals attracted criticism due to their lack of provisions regarding both victim participation and reparation.⁷⁹ The change can be said to stem from the ICC's aims regarding restorative justice, among its other diverse objectives.⁸⁰ Whilst it is perhaps axiomatic to observe that international courts are set up in recognition of the terrible suffering of victims, the extent to which these individuals can and should be involved in the judicial process itself must be questioned. There is the risk that the provision of rights for the accused may conflict with the 'rights' of victims. As Damaška pertinently observes, such '*good things*' as these '*are not always compatible*'.⁸¹ With the desire to protect the interests of both accused and victims, it must be questioned whether the ICC's criminal procedure can '*serve two masters*'.⁸²

The Court must strive to balance the frequently conflicting needs of both victims and accused.⁸³ Defrancia argues that these rights '*cannot remain in equipoise; one has to take primacy over the other*'.⁸⁴ Fair trial rights, and corresponding due process protections, will be dependent on their prioritisation in relation to other interests.⁸⁵ Thus, allowing the rights of victims to substantially override those of the accused would be contrary to notions of fairness. As Jouet notes, victim participation is a new concept

⁷⁸ CATANI, L. (2012) 'Victims at the International Criminal Court' **10** Journal of International Criminal Justice. 905-922 at 906

⁷⁹ MEKJIAN, G.J. & VARUGHESE, M.C. (2005) 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court' **17(1)** Pace International Law Review. 1-46 at 11

⁸⁰ DIALA, A.C. (2010-1) "Victims' Justice and Re-Characterizing Facts in the Lubanga Trial at the ICC' **7(1)** Eyes on the ICC. 59-83 at 79

⁸¹ DAMAŠKA, M. (2011) 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals.' **36(2)** North Carolina Journal of International Law and Commercial Regulation. 365-388 at 374

⁸² *Ibid.* at 372-3

⁸³ DAMAŠKA, M. (2009) 'The International Criminal Court Between Aspiration and Achievement.' **14** UCLA Journal of International Law & Foreign Affairs. 19-35 at 28

⁸⁴ DEFRANCIA, C. (2001) 'Due Process in International Criminal Courts: Why Procedure Matters' **87** Virginia Law Review. 1381-1439 at 1394

⁸⁵ *Ibid.* at 1396

in ICL, and the '*defendants' due process rights must trump alleged victims' participatory rights*'.⁸⁶ However, if the accused were to be given primacy, victim involvement could become an entirely '*untenable*' concept.⁸⁷

A. Victim participation at the ICC

Article 68(3) of the Rome Statute provides that the views of victims may be presented and considered by the Court '*in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*'. Rule 85 of the RPE states that 'victim' refers to '*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*'. Under these provisions, victims can participate in the proceedings '*in a very broad and undefined manner*'.⁸⁸ For example, Rule 89(1) of the RPE provides that victims can make both opening and closing statements. Damaška cautions that whilst these might be beneficial to a victim, accounts of mass atrocities:

'can easily generate an atmosphere of revulsion and anger, in which judges could - consciously or subconsciously - neglect alternative explanations of events, attribute blame more easily, or in greater measure than warranted, and might even lower the postulated standard of proof sufficiency'.⁸⁹

Whilst the inclusion of victims at the heart of the ICC's mission is an '*ennobling ambition*',⁹⁰ it must nevertheless be questioned whether their role, and the means of their inclusion, were duly considered. Due to the limitations of the Rome Conference of

⁸⁶ JOUET, M. (2007) 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court.' **26** *Saint Louis University Public Law Review*. 249-308 at 250

⁸⁷ McASEY, B. (2011) 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness.' **18** *Australian International Law Journal*. 105-126 at 124

⁸⁸ ZAPPALÀ, S. (2010) 'The Rights of Victims v. The Rights of the Accused.' **8** *Journal of International Criminal Justice*. 137-164 at 163

⁸⁹ DAMAŠKA, M. (2009) at 28-9

⁹⁰ DAMAŠKA, M. (2011) at 372-3

the ICC,⁹¹ an in-depth debate did not occur.⁹² Zappalà interestingly notes that no State would have dared argue the unpopular position that victim participation should not be incorporated into the Statute.⁹³ As a result of the considerable breadth of the provisions concerning victims, the way in which they ought to be allowed to participate in the proceedings has largely been left to the Chambers.⁹⁴ Thus, a great deal of uncertainty has arisen subsequently due to the adoption of different approaches, and the rendering of decisions which do not clarify adequately the procedural rights of victims.⁹⁵

Although the Rome Statute and RPE do not contain provisions regarding the ability of victims to introduce evidence relating to the guilt or innocence of the accused, or to challenge evidence admissibility or relevance, the Chambers have held that they may do so.⁹⁶ In *Lubanga*, the Trial Chamber ruled that victims '*may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth*'.⁹⁷ This position was later upheld by the Appeals Chamber, reaffirming the breadth of participation permitted, both by the Court's instruments, and the decisions of Chambers.⁹⁸

It must also be acknowledged that victim anonymity, which is arguably necessary in some instances so that individuals feel able to participate, has been '*affirmed on many occasions*', including for those who have made opening and closing statements.⁹⁹ McAsey argues that the ability for anonymous victims to do so could be '*very detrimental*' to the rights of the accused.¹⁰⁰ In the *Lubanga* case, of the one

⁹¹ As examined in Chapter 5.

⁹² ZAPPALÀ, S. (2010) at 159

⁹³ *Ibid.*

⁹⁴ *Ibid.* at 163

⁹⁵ McASEY, B. (2011) at 121

⁹⁶ CATANI, L. (2012) at 910

⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on victims' participation.' (18 January 2008) Doc. No. ICC-01/04-01/06-1119 paras 108-9

⁹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008.' (11 July 2008) Doc. No. ICC-01/04-01/06-1432 paras 86-102

⁹⁹ McASEY, B. (2011) at 120

¹⁰⁰ McASEY, B. (2011) at 120

hundred and twenty-nine victims who participated in the proceedings, only twenty-three of the identities were disclosed.¹⁰¹ Whilst the Trial Chamber recognised the dangers associated with victim anonymity, it also expressed considerable concern for the vulnerability of victims and its responsibility to ensure their safety.¹⁰² It then stated that *'the greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself'*.¹⁰³ Whilst this is a commendable intention, the reality is that many victims were granted anonymity. It is not sufficient to merely state such aims without following through with a robust approach regarding the use of anonymous witnesses in light of their potential adversely to affect the fairness of the proceedings.

B. The term 'victim' and the presumption of innocence

The labelling of an individual as a 'victim' is arguably problematic, as their participation gives rise to a presumption that the crimes in question have occurred. Normally, the factual basis of the crime is something that the Prosecutor must prove beyond reasonable doubt.¹⁰⁴ McAsey considers that this may not be such an issue where the occurrence of the crime is accepted, however, *'in all other cases the danger of prejudgment is present'*.¹⁰⁵ The risk remains that the acceptance of victims could *'adversely affect the perception of the accused and by extension, their right to a fair trial'*.¹⁰⁶ Zappalà argues that as a result, judges must exercise extreme caution in

¹⁰¹ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute.' (14 March 2012) Doc. No. ICC-01/04-01/06-2842 para 18

¹⁰² *Prosecutor v. Thomas Lubanga Dyilo* 'Decision.' *supra* (18 January 2008) paras 130-1

¹⁰³ *Ibid.* para 131

¹⁰⁴ ZAPPALÀ, S. (2010) at 146-7

¹⁰⁵ McASEY, B. (2011) at 118

¹⁰⁶ *Ibid.*

demonstrating in their judgement that they did not take for granted the factual basis of the crimes.¹⁰⁷

This area of procedural law is formulated against a backdrop of the real needs of victims who have been traumatised as a result of devastating atrocities. It would be regrettable if those who were genuinely affected, and who wished to be considered for participation, were to feel at risk of being disbelieved. Whilst this also applies to victims at national levels, the number of potential victims involved with international crimes can stretch into the many hundreds of thousands, particularly in relation to armed conflicts, or genocides.¹⁰⁸ If the Court were to create a culture whereby victims are made to feel almost on trial themselves in respect of their contributions, it could lead to a significant reduction in participation. This could be particularly damaging, especially concerning those who have a dual status as both victim and witness, given their importance to the trial process. Despite the need for sensitivity, it is also important to ensure that victims are truthful in their accounts. This is a cause of tension involving the presumption of innocence as, generally speaking, it will not be easy to maintain that both an alleged victim *and* the defendant are telling the truth: these mutually exclusive claims cannot both be 'true'.¹⁰⁹ Thus, if we must presume the innocence of the defendant as a central concept of a fair trial, it may be irreconcilable to automatically accept that victims are truthful in their accounts. Jouet notes that the treatment of victims as 'actual' rather than 'alleged' could severely undermine the presumption of innocence.¹¹⁰ As a result, he argues that victims should not participate as actual victims until '*it has, at least, been proven beyond reasonable doubt that a crime occurred and that they are victims*'.¹¹¹ Whilst this could be seen as a high threshold to meet prior to victim

¹⁰⁷ ZAPPALÀ, S. (2010) at 146-7

¹⁰⁸ For example, during Rwandan genocide, it is estimated that between 800,000 to 1,000,000 people were killed in as little as one hundred days; between 100,000 and 250,000 women were raped. See, <http://www.unict.org/en/genocide> [Last accessed 18.3.2015]

¹⁰⁹ JOUET, M. (2007) at 296

¹¹⁰ *Ibid.* at 282-3

¹¹¹ *Ibid.* at 296

involvement, it may be required to ensure that participation does not encroach on the fairness of the proceedings. The distinction between actual and alleged could even allow those with an alleged status to participate without violating the rights of the accused.¹¹²

Although this approach may seem, perhaps unnecessarily, sceptical of the reliability of victims, there have already been instances at the ICC which demonstrate a need for caution. In the *Lubanga* case, the Chamber was faced with victims whose statements were inconsistent, and thus found them to be inadmissible on the grounds of unreliability.¹¹³ In addition, the Chamber also concluded that there was a real possibility that the identities of specific individuals were stolen, so as to '*obtain the benefits they expected to receive as victims participating in these proceedings*'.¹¹⁴

C. Proper notice of charges

Intervention on the part of counsel who represent the interests of victims has caused concern regarding the extent to which defendants are denied a fair opportunity to respond adequately to a change in their charges. This arose in the trial of *Lubanga*, where the victims' representative petitioned the Court to change and add charges against the accused.¹¹⁵ At the outset of the trial, the defendant was charged with recruiting, enlisting, and conscripting child soldiers under Article 8(2)(xxvi) Rome Statute. In May 2009, the victims' legal representative asked the Trial Chamber to reconsider the charges¹¹⁶ so as to include sexual slavery, by virtue of the fact that

¹¹² *Ibid.* at 284

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute.' (14 March 2012) Doc. No. ICC-01/04-01/06-2842 paras 499-502

¹¹⁴ *Ibid.* para 502

¹¹⁵ JOHNSON, S.T. (2010) at 493-4

¹¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, 'Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court.' (22 May 2009) Doc. No. ICC-01/04-01/06-1891-tENG

several had testified as having witnessing such acts.¹¹⁷ Johnson notes that the Prosecution did not echo this sentiment, instead preferring to keep the charges ‘narrow’, so as to ease the burden of proof.¹¹⁸ Nevertheless, the majority of the Trial Chamber ruled that it was permissible to add new charges based on trial testimony.¹¹⁹ However, presiding Judge Fulford dissented, arguing that the victims’ representatives were seeking to add five additional charges, rather than modify them.¹²⁰ Zappalà describes the majority decision to add new charges as ‘*perplexing*’.¹²¹ He argues that victim participation ‘*should never entail turning the status of victims into that of parties to the proceedings*’, nor should it ‘*lead to a real confrontation with the defendant on an equal footing*’.¹²² Judge Fulford’s concerns were not without merit, and the Appeals Chamber granted the appeal against the decision, holding that the Trial Chamber had erred in law by finding it to be permissible, under Regulation 55, to include additional facts and circumstances not described in the charges.¹²³ Notwithstanding this decision, the concern remains that if significant changes to the charges are permitted, the Defence will struggle adequately to organise a defence strategy as a result of the uncertainty. The negative impact on the Defence case should not be underestimated; Johnson goes as far as to predict that *Lubanga*’s conviction will be reversed on appeal

¹¹⁷ JOHNSON, S.T. (2010) at 494

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* at 494-5

Prosecutor v. Thomas Lubanga Dyilo, ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.’ (14 July 2009) Doc. No. ICC-01/04-01/06-2049

¹²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Minority opinion on the “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.” (17 July 2009) Doc. No. ICC-01/04-01/06-2054 para 53(iv)

¹²¹ ZAPPALÀ, S. (2010) at 163

¹²² *Ibid.* at 163-4

¹²³ *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.” (8 December 2009) Doc. No. ICC-01/04-01/06-2205 para 112

due the misdirection of the Court's '*efforts to fairly and impartially try the defendant*' caused by the participation of victims.¹²⁴

D. Delays to proceedings

Significant delays to the proceedings can occur by virtue of the time-consuming process by which victims who wish to be considered for participation must be assessed by both the Prosecution and defence teams.¹²⁵ Delays to this 'inefficient' procedure have been compounded by translational requirements, and the absence of a limit on the number victims who may apply to be considered.¹²⁶ The sheer volume of applicants can reach overwhelming levels; the Trial Chamber granted victim status to more than four thousand applicants in the *Bemba* case.¹²⁷ If the inclusion of victims in the trial process is to be retained as a worthwhile goal and endeavour of the Court, it may necessarily follow that, due to the workloads associated with the related assessment, concessions might have to be made regarding the speed at which the cases progress.¹²⁸ Further delays are unlikely to be well received, as the ICC has attracted considerable criticism regarding the time it has taken to process its initial cases, but as Jouet argues '*this may be a reasonable price to pay for victim participation*'.¹²⁹ Greater acceptance of lengthy delays to proceedings could be beneficial, however the right of the accused to an expeditious trial must also be considered.¹³⁰

¹²⁴ JOHNSON, S.T. (2010) at 496

¹²⁵ *Ibid.* at 495

¹²⁶ *Ibid.*

¹²⁷ CATANI, L. (2012) at 917. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08

¹²⁸ JOUET, M. (2007) at 279

¹²⁹ *Ibid.*

¹³⁰ ZAPPALÀ, S. (2010) at 145

E. The effect of victim participation on the judiciary

As the ultimate decision maker, judges could be affected profoundly by victim testimony. As Gordon observes, whilst victim participation must be exercised in a manner which respects the fair trial rights of the accused, '*it is difficult to reconcile this with the extraordinary influences the victims may exert over the process*'.¹³¹ Their accounts will oftentimes concern particularly disturbing events. Damaška observes that this creates an '*atmosphere of revulsion and anger*', which can lead to defence submissions, such as those regarding innocence or mitigation, being obscured by '*burning sympathies for the plight of the victims*'.¹³² The concern is that this could lead judges to attribute a larger role in the crimes than the defendant actually committed.¹³³ Damaška further warns that even the danger of scapegoating the accused '*should not be ruled out*'.¹³⁴ Judges axiomatically have a duty to remain neutral and open-minded as to the guilt or innocence of the accused. However, the difficulties associated with remaining dispassionate should be recognised. As Jouet argues, it would be unrealistic to expect that judges can remain detached, '*especially in high-profile international prosecutions characterized by the unspeakable enormity of atrocities wrought on victims, extreme unpopularity of defendants, critical political stakes, and intense media coverage*'.¹³⁵

Whether out of respect for a victim, or as a result of bias, judges have allowed victims to go beyond that which is strictly relevant to the charges against the defendant.¹³⁶ Defence counsel have been critical of such practices, since testimony of

¹³¹ GORDON, G.S. (2006-7) 'Towards an International Criminal Procedure: Due Process Aspirations and Limitations.' **45(3)** *Columbia Journal of Transnational Law*. 635-710 at 697-8

¹³² DAMAŠKA, M. (2011) at 373

¹³³ *Ibid.*

¹³⁴ *Ibid.* at 373-4

¹³⁵ JOUET, M. (2007) at 294

¹³⁶ TURNER, J.I. (2008) 'Defence Perspectives on Law and Politics in International Criminal Trials.' **48** *Virginia Journal of International Law*. 529-594 at 568

this kind could be damaging to the accused's case.¹³⁷ It is perhaps not unsurprising that victim statements can contain many references to more general historical events, which might become prejudicial though 'guilt by association'.¹³⁸

F. The pressure put on the ICC by victim participation

The goals of the ICC are diverse, and differ from those at the domestic level. These aims include: attempting to bring justice; providing the opportunity for truth-telling '*by letting victims relate their painful experiences*'; compiling an historical record, among many others.¹³⁹ Damaška reasons that as a result of these ambitions, one would suppose the expectations to be modest, when in fact they are '*almost grandiose*'.¹⁴⁰ The ICC is the first modern international criminal institution to elevate the position of victims, and attempts to place restorative justice firmly within the trial process.¹⁴¹ The difficult, and perhaps unpopular, question which must be asked here is whether the Court is best placed to meet the needs of victims, and whether this is being provided at too costly a rate, in some ways at the defendant's expense. Furthermore, considering that many victims do not travel to the Hague, but are instead represented in Court, it must be questioned whether victim participation is genuinely '*effective and meaningful, or merely symbolic*'.¹⁴² If merely symbolic, is the fulfilment of this goal worth jeopardising the right of the accused?

Zappalà contends that the '*overarching purpose*' of criminal procedure is to '*reach a finding of guilt or innocence whilst protecting at the highest level the rights*' of

¹³⁷ *Ibid.*

¹³⁸ FEDOROVA, M. (2012) p136

¹³⁹ DAMAŠKA, M. (2009) at 22

¹⁴⁰ *Ibid.*

¹⁴¹ JOHNSON, S.T. (2010) at 489

¹⁴² CATANI, L. (2012) at 919. See HASLAM, E. & EDMUNDS, R. (2012) 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' **12** International Criminal Law Review. 871-903

the suspects and accused.¹⁴³ This is particularly crucial given the need for the ICC to be perceived as legitimate. If it failed to be perceived as such, the substantial time, effort and money which is invested in the Court annually would constitute a phenomenal waste. Thus, it is argued that any conflict between the rights of the accused and those of the victims should be carefully balanced.¹⁴⁴ Jouet suggests that the role of victim participation should be interpreted narrowly in order to refrain from conflicting with the accused's rights.¹⁴⁵ As a result of the shortcomings of the Court's founding legal texts, the ICC's approach to developing and clarifying the role of victim involvement has had to be developed subsequently, in a piecemeal fashion. This has negatively impacted on the Defence, particularly concerning their time and facilities with which to prepare their case as a result of having to '*constantly adapt its arguments and strategy*'.¹⁴⁶ Johnson argues that the involvement of victims at the guilt phase of proceedings '*places too great a strain upon this fledgling institution and jeopardizes both the defendant's right to a fair trial and the ICC's legitimacy*'.¹⁴⁷

Ultimately, the 'rights' of victims who have been involved in mass atrocities will more readily attract consideration than the accused who stands charged. Jouet rejects as '*flawed*' the argument of 'excessive rights', reasoning that as the defendant is likely to be committed under at least one count of the charges, victim participation is '*not outcome-changing*'.¹⁴⁸ Since we cannot know in advance whether an accused will be acquitted, '*we should not let unfair procedures infect any defendant's trial*'.¹⁴⁹ Zappalà states that under no circumstances '*may the rights of victims prevail over the rights of the defendant*', as one of the main lessons to emerge from the NIMT was that fairness

¹⁴³ ZAPPALÀ, S. (2010) at 140

¹⁴⁴ *Ibid.*

¹⁴⁵ JOUET, M. (2007) at 251

¹⁴⁶ McASEY, B. (2011) at 122

¹⁴⁷ JOHNSON, S.T. (2010) at 489

¹⁴⁸ JOUET, M. (2007) at 290

¹⁴⁹ *Ibid.*

will be *'the main yardstick against which the legitimacy of the whole exercise will be measured'*.¹⁵⁰

G. Multiple accusers of the defendant?

The inclusion of victims within the central framework of the ICC, together with the wide scope of their involvement, raises the concern that the Defence can be said to face multiple accusers. As both the Prosecution and victims can advance incriminating evidence, it would be reasonable for the Defence to feel *'overwhelmed'* as a result.¹⁵¹ Although victims are not afforded the status of a party within the proceedings, Damaška reasons that *'the defendant could easily begin to harbor the feeling that he is engaged in agonistic confrontation with more than one procedural adversary'*.¹⁵² Allowing victims to become direct, active parties in the proceedings can violate the principle of EoA if it causes a *'serious imbalance'*, which *'would be inconsistent with the rights of the accused'*.¹⁵³ As explored in Chapter 6, the Defence have limited funding and resources with which to put forward their case against a very strong OTP. McAsey argues that having to face additional accusers *'would almost certainly be a further strain on their limited resources'*.¹⁵⁴ Furthermore, she notes that much will depend on the Chambers to limit participation if the Defence should become overwhelmed by additional evidence submitted on behalf of the victims, yet recognises that such a dependency on judicial discretion would likely be *'cold comfort'* for the accused.¹⁵⁵ Judge Pikis in his dissenting opinion in *Lubanga* asserted that victims are not a party to the proceedings, arguing that a fair trial is a pre-requisite for victims, which is *'the only*

¹⁵⁰ ZAPPALÀ, S. (2010) at 164

¹⁵¹ DAMAŠKA, M. (2009) at p28-9

¹⁵² DAMAŠKA, M. (2011) at 373-4

¹⁵³ ZAPPALÀ, S. (2010) at 162

¹⁵⁴ McASEY, B. (2011) at 115

¹⁵⁵ *Ibid.* at 115-6

context within which victims may voice their views'.¹⁵⁶ The ultimate impact of victim participation is that through its contribution to creating 'multiple accusers' for the Defence, the Prosecution's burden of proof could consequently be reduced. Jouet argues that due to the deficiencies in the ICC's Statute and RPE, *'there is a risk that victim participation could violate defendants' due process rights, such as by lowering the prosecution's burden of proof, shifting this burden to the defense, and undermining the presumption of innocence'*.¹⁵⁷ It is argued that Chambers can actively attempt to reduce the potential for victim participation to constitute another accuser, or indeed opponent, for the Defence.

4. The influence of the Judiciary on the trial process

The working cultures at the courts and tribunals will inevitably impact heavily upon their operation and ultimate success.¹⁵⁸ The influence of the judiciary is an area worthy of examination, particularly regarding the employment of judges from varied domestic backgrounds in a mixed, international setting. Their independence and neutrality are crucial requirements if the accused is to receive a fair trial. This section will also consider the impact of influential personnel, such as the Registrar, from a wider institutional perspective.

¹⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo* 'Decision on the participation of victims in the appeal Dissenting Opinion of Judge Georgios M. Pikis.' Doc. No. ICC-01/04-01/06-1453-Anx (29 August 2008) para 10

¹⁵⁷ JOUET, M. (2007) at 250

¹⁵⁸ BIBAS, S. & BURKE-WHITE, W. (2010) at 660

A. The appointment criteria for Judges

The criteria regarding the appointment of judges at the ICC can be criticised as failing to be sufficiently rigorous, particularly given the complex nature of their role at the international level. Article 36 3(a) of the Rome Statute states that judges must be of '*high moral character, impartiality and integrity*' and '*possess the qualifications required in their respective States for appointment to the highest judicial offices*'. The appointment of Japanese judge, Fumiko Saiga, illustrates the shortcomings of the selection criteria. Despite her extensive diplomatic experience, she did not possess a law degree, which can under certain circumstances render an individual eligible for appointment to Japan's Supreme Court.¹⁵⁹ However, by virtue Article 36 3(b)ii, there is nevertheless a requirement that candidates '*have established competence in criminal law and procedure, and the necessary relevant experience*'. It can also be criticised that this requirement is relaxed further by the *alternative* that candidates possess '*competence in relevant areas of international law*'.¹⁶⁰ Ambos cites Judge Saiga's appointment as an example of the ICC's '*all-too-generous interpretation*' of the requirements.¹⁶¹ Nevertheless, the current ICC judges appear to have, without exception, substantial and relevant experience for the role.¹⁶²

¹⁵⁹ AMBOS, K. (2008) 'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman.' **21** Leiden Journal of International Law. 911-916 at 915

¹⁶⁰ *Ibid.* Article 36 3(b)ii

¹⁶¹ *Supra.* AMBOS, K. (2008) at 915, *fn* 22.

¹⁶² See, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx regarding the Judges' qualifications and experience. [Last accessed 18.3.2015]

B. The influence of the Judiciary: the need for independence and detachment

As the principle decision makers and triers of fact, the judiciary must not only be guided by principles of fairness, they must also be *perceived* to be fair.¹⁶³ Cockayne argues that the '*cornerstone*' of international criminal justice is '*judicial independence and professionalism*', as without it, the system will '*lose legitimacy and fail*'.¹⁶⁴ If the judiciary is not independent, then their impartiality is '*open to question*'.¹⁶⁵ The judiciary's potential to impact upon the fairness of an accused's trial should not be under-estimated, even where a court's statute and rules provide seemingly adequate protections. Even with a strong set of due process protections, it does not necessarily follow that '*those protections will be strictly adhered to in the process of judicial interpretation*'.¹⁶⁶

Fairlie suggests that the most vital role of the judiciary can be seen to be the application of the rules of procedure '*with a necessary detachment*'.¹⁶⁷ To quote Lord Greene, MR of the English Court of Appeal, a judge who '*descends into the arena*' is '*liable to have his vision clouded by the dust of the conflict*', which could mean that he unconsciously '*deprives himself of the advantage of calm and dispassionate observation*'.¹⁶⁸ In practice, judges cannot be expected to be immune from external pressures and their own intrinsic bias;¹⁶⁹ they cannot perform their role as an

¹⁶³ DAMAŠKA, M. (2012) p614

¹⁶⁴ COCKAYNE, J. (2005) 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.' **28** *Fordham International Law Journal*. 616-680 at 665

¹⁶⁵ BOHLANDER, M. 'The International Criminal Judiciary - Problems of Judicial Selection, Independence and Ethics' in BOHLANDER, M. (Ed.) (2007) *supra* p362

¹⁶⁶ DEFRANCIA, C. (2001) at 1383-4

¹⁶⁷ FAIRLIE, M. (2004) 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit.' **4** *International Criminal Law Review*. 243-319 at 277-8

¹⁶⁸ *Yuill v. Yuill* [1945] 1 All E.R. 183 per Lord Greene, MR. at 189 '*If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.*'

¹⁶⁹ JOUET, M. (2007) at 292

Recognising that everyone is biased in some respect, whether or not they are conscious of the issue.

automaaton. The Extraordinary Chambers in the Courts of Cambodia (ECCC) in particular has been prone to criticism regarding perceived levels of corruption amongst the judiciary, with '*widespread criticism that some of them may have previously allowed political influence to determine the outcome of particular cases*'.¹⁷⁰

C. The effects of a mixed procedural system

The judiciary in ICJ is yet another element of the trial which has been shaped by virtue of its uniquely mixed procedure. Broadly speaking, judges from adversarial systems tend to be passive in their approach, acting as neutral umpires, whereas those from inquisitorial systems tend to be more actively involved.¹⁷¹ It has been observed that the approach taken by judges at the ICC appears to be more active than at the ICTY.¹⁷² The mixed nature of the international institutions inevitably attracts judges from diverse legal backgrounds, with contrasting approaches. Both passive and active styles¹⁷³ have their own respective strengths and weaknesses: the former could mean that judges contribute less to attempting to uncover the judicial (or forensic) 'truth', whereas the latter could result in a reduction of neutrality from the decision making process. The composition of the bench, particularly if dominated by judges from a particular background, could have a marked impact on the direction and management of a case. Ideally, judges will attempt to transcend their own legal systems¹⁷⁴ in a bid to increase

¹⁷⁰ COHEN, D. (2007) 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future.' **43** *Stanford Journal of International Law*. 1-38 at 34

¹⁷¹ See, DAMAŠKA, M. (1973) 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study.' **121** *University of Pennsylvania Law Review*. 506-589 at 570-1

¹⁷² ORIE, A. 'Accusatorial vs. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings of the ICC.' in CASSESE, A. *et al.* (2002) *supra* p1475

¹⁷³ KARNAVAS, M.G. in BOHLANDER, M. (2007) p83

¹⁷⁴ It has also been observed as crucial for defence counsel to transcend their background. See, WLADIMIROFF, M. (2007-9) 'Defending Individuals Accused of Genocide.' **40(1)** *Case Western Reserve Journal of International Law*. 271-280 at 276

uniformity across the Bench, yet this is easier to achieve in theory than reality, and a greater awareness of these tendencies should be encouraged.

There is a particularly important consequence of the adoption of an active judicial approach at the international courts and tribunals. Is the judiciary, by utilising an active approach, helping to dispel the burden of proof which should be 'shouldered' entirely by the Prosecution? Karnavas argues that judges could act as *'the prosecutor's midwife - delivering the requisite proof the prosecution has failed to amass to establish guilt beyond a reasonable doubt'*.¹⁷⁵ He also observes that this situation is not comparable to that of inquisitorial systems, in which it is within the *'exclusive province'* of the judges to be convinced as the fact finder.¹⁷⁶ If the Prosecution's burden of establishing guilt were to be tangibly eased by an active judiciary, a serious imbalance in the proceedings could result unless similar support is provided for the Defence, particularly in light of the already powerful nature of the Prosecution. Zappalà suggests that the best solution to uphold the accused's rights is *'to interpret the power of the judges to search for the truth as a mechanism to be used only in favour of the accused'*.¹⁷⁷ The complex dynamic found here is yet another example of the difficulties encountered in the process of creating a unique international procedure.

Given the weaker position of the Defence in relation to the Prosecution, inevitably there will be instances in which it is appropriate and necessary to provide assistance, which Zappalà maintains does not violate any legal principle. However, there are greater implications where a judge responds to the requests of other participants, such as the OTP or 'Victims and Witnesses Unit' at the ICC. If the judges are consequently *'instrumental'* in gathering evidence against the accused, it could be considered more difficult to challenge as a result of it being *'impartially obtained'*.¹⁷⁸

¹⁷⁵ KARNAVAS, M.G. in BOHLANDER, M. (2007) p83

¹⁷⁶ *Ibid.*

¹⁷⁷ ZAPPALÀ, S. (2010) at 148

¹⁷⁸ *Ibid.*

This could result in at least the *perception* of less objectivity, by virtue of '*developing a sort of natural sympathy for the evidence 'they' obtained*'.¹⁷⁹ In terms of cross-examination, Karnavas contends that allowing judges to question and summon witnesses '*raises the spectre of impartiality*'.¹⁸⁰ He also notes that judges from civil law systems will often '*unstitch what would classically appear as an effective cross-examination, by asking the questions or seeking explanations to matters that were gingerly avoided by the cross-examiner*'.¹⁸¹ This gives rise to uncertainty as to how the role of cross-examination is to be potentially shared between defence counsel and an inquiring judge. It is possible that the latter may encroach on the techniques and strategies employed by counsel.

D. Improper judicial conduct: evidence of bias?

Even amongst judges, it can be observed that those accused of international crimes do not readily receive much '*sympathy*'.¹⁸² As judicial bias need not be overt,¹⁸³ it can be difficult, if not impossible to fully analyse judges' private thought processes. It is possible, however, to assess their conduct, both in and outside of the courtroom. Sadly, there is no shortage of examples of judges in international trials falling short of their obligations to maintain professional and unbiased positions. As a result, it can be argued that there is considerable evidence to suggest a bias, usually in the form of judicial '*prosecutorial zeal*'.¹⁸⁴

¹⁷⁹ *Ibid.*

¹⁸⁰ KARNAVAS, M.G. in BOHLANDER, M. (2007) p83

¹⁸¹ *Ibid.* p115

¹⁸² JALLOH, C.C. (2010-11) 'Special Court for Sierra Leone: Achieving Justice?' **32(3)** *Michigan Journal of International Law*. 395-460 at 442

¹⁸³ (EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' **114(7)** *Harvard Law Review*. 1982-2006 at 1995

¹⁸⁴ *Ibid.*

The ICTY did not have the benefit of precedent concerning how best to ensure judges and senior figures should conduct themselves in the public eye. Antonio Cassese, a highly regarded academic and judge, made questionable statements in a Tribunal press release in 1995, stating that the '*Judges are anxious that a programme of indictments should effectively meet the expectations of the Security Council and of the world community at large*'.¹⁸⁵ Robertson criticised these comments as hardly being the language of a judge, '*whose duty is not to act as avenging angels but to do justice though heavens fall*'.¹⁸⁶

The conduct of Judge Karibi-White during the ICTY '*Čelebići*' case is particularly worrying. The Judge had noticeably fallen asleep while the court was in session, which the Appeals Chamber held represented a '*recurring pattern*' whereby he was not '*fully conscious*' for periods of usually five to ten seconds.¹⁸⁷ The Chamber conceded that this pattern '*repeated over extended periods of ten to fifteen minutes on a number of occasions*'.¹⁸⁸ Furthermore, during an examination of a witness, Judge Karibi-White '*appeared to be asleep for approximately thirty minutes*'.¹⁸⁹ On a separate occasion, Judge Jan had to lean over to '*touch Judge Karibi-Whyte when his head had dropped*'.¹⁹⁰ Despite the Appeals Chamber firmly stating that such conduct could not be accepted as appropriate,¹⁹¹ it nevertheless dismissed the challenge.¹⁹² A reluctance to take meaningful measures in response to inappropriate and unprofessional judicial conduct is regrettable, and only serves to further the disrepute which the original behaviour might have attracted.

¹⁸⁵ ICTY Press Release, '*The Judges of the Tribunal for the former Yugoslavia express their concern regarding the substance of their programme of judicial work for 1995*.' (1 February 1995) Doc. Ref. CC/PIO/003E

¹⁸⁶ Robertson, G. 'War crimes deserve a fair trial.' The Times (June 25 1996)

¹⁸⁷ *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (The '*Čelebići*' case) Appeals Chamber 'Judgement.' (20 February 2001) Case No. IT-96-21 para 628

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* para 629

¹⁹² See, BOHLANDER, M. (2007) p375

Judge Robertson at the SCSL was disqualified as a result of publishing a book in 2002, prior to his appointment at the Court, entitled 'Crimes Against Humanity: The Struggle for Global Justice'.¹⁹³ Cockayne questions the Judge's decision to accept a place on the bench,¹⁹⁴ in spite of his description of the RUF as '*guilty of atrocities on a scale that amounts to a crime against humanity*', and of *Foday Sankoh* as being '*the nation's butcher*'.¹⁹⁵ Judge Robertson refused to withdraw from the Bench, but was nevertheless disqualified by the Appeals Chamber.¹⁹⁶ A more rigorous appreciation of the need for justice being *seen* to be done would have been welcomed. Care must also be exercised with respect to conduct outside the courtroom. In one instance, Judge Vaz, the then Vice-President at the ICTR, allowed an attorney from her home of Senegal - who was appearing before her in court - to reside at her house.¹⁹⁷ Cockayne argues that the occurrence of such '*unfortunate*' instances invites the criticism that the '*failure of judicial propriety may be systemic*'.¹⁹⁸

It is interesting to note that at the *ad hoc* Tribunals, there is '*no clear disciplinary or oversight regime for safeguarding the proper adherence to judicial conduct and ethics*'.¹⁹⁹ In contrast, the ICC has an (albeit brief) 'Code of Judicial Ethics', which sets out basic guidelines covering concepts such as independence, impartiality and integrity.²⁰⁰ Jones *et al.* argue that judges should endeavour to '*go out of their way to demonstrate their impartiality and commitment to helping the Defence overcome the in-built handicaps to which they are prone in defending their clients against the superior*

¹⁹³ ROBERTSON, G. (2002) '*Crimes Against Humanity: The Struggle for Global Justice*', New York, New press. See, BEIGBEDER, Y. (2005) '*International Justice Against Impunity: Progress and New Challenges*.' Leiden, Martinus Nijhoff. p122

¹⁹⁴ COCKAYNE, J. (2005) at 666

¹⁹⁵ ROBERTSON, G. (2002) p469

¹⁹⁶ *Prosecutor v. Issa Hassan Sesay*, 'Decision on Defence motion seeking the disqualification of Justice Robertson from the Appeals Chamber.' (13 March 2004) Case No. SCSL-2004-15-AR15

¹⁹⁷ COCKAYNE, J. (2005) at 669-70

¹⁹⁸ *Ibid.*

¹⁹⁹ BOHLANDER, M. (2007) p325

²⁰⁰ ICC Doc. No. ICC-BD/02-01-05

resources of the OTP'.²⁰¹ The appearance of being 'prosecution-minded' can undermine the integrity of the entire judicial process: '*the well-spring of the Court's legitimacy*'.²⁰² Cogan calls for judges to take a more contextual approach towards the rights of the accused '*through the prism of the structural limitations on these courts*', allowing judges '*to take into account the difficulties inherent in international criminal defense*'.²⁰³

E. An institutional mindset?

Another form of undue influence can occur at a more local, institutional level. The concern is that greater value might be placed on the securing of convictions, rather than the commitment to ensuring a fair and rights respecting procedure.²⁰⁴ Such a mindset could risk undermining the goals of fair and dispassionate decision making.²⁰⁵ This issue can become compounded by a wider culture of 'camaraderie'. Personnel can become '*mission-oriented*' by virtue of their collective task to secure convictions, which can be said to be the case particularly at the *ad hoc* Tribunals.²⁰⁶ Herein lies the potential for the creation of a divisive working culture, in which the permanent and extensive Prosecution, together with other personnel, form their own '*cozy expatriate social community*', from which the Defence are largely excluded.²⁰⁷ In contrast, the

²⁰¹ In particular reference to the SCSL, see JONES, J.R.W.D. CARLTON-HANCILES, C. KAH-JALLOW, H. SCRATCH, S. & YILLAH, I. (2004) 'The Special Court for Sierra Leone: A Defence Perspective.' 2 *Journal of International Criminal Justice*. 211–230 at 230

²⁰² *Ibid.*

²⁰³ COGAN, J.K. (2002) 'International Criminal Courts and Fair Trials: Difficulties and Prospects.' 27(1) *Yale Journal of International Law*. 111-140 at 138

²⁰⁴ BIBAS, S. & BURKE-WHITE, W. (2010) at 661-2

²⁰⁵ *Ibid.* at 662

²⁰⁶ (EDITORIAL) (2001) at 1995

²⁰⁷ STARR, S.B. (2009) 'Ensuring Defense Counsel Competence at International Criminal Tribunals.' 14 *UCLA Journal of International Law and Foreign Affairs*. 169-206 at 191

transient nature of defence representation, together with the associated travel demands can result in a '*culture*' of excluding the Defence.²⁰⁸

In relation to a court's physical architecture,²⁰⁹ the Registrar, Chambers and Prosecution often take up a large proportion of the premises in comparison with the Defence.²¹⁰ Jalloh and DiBella observe that '*the structural position of the defence has been subordinated to the prosecution, as well as to Chambers and the Registry, in each of these courts*'.²¹¹ They argue that the use of framed pictures of Judges, as well as Registry staff, in the lobby of the ICC '*bears symbolic testimony to this*', particularly in light of the notable absence of any defence presence.²¹² In a relatively small city such as The Hague, where a great deal of international criminal trials take place, there are additional benefits of socialisation and support available to permanent staff.²¹³ D'Amato observes that they share a collective '*sense of pride and accomplishment when a war criminal is convicted*'.²¹⁴

Particular roles have the potential to have a substantial impact on the running of an institution. For example, defence counsel at the ICC have found the power of the Registrar to be '*excessively*' concentrated.²¹⁵ This in part is due to the conceptual framework of the Court, which includes the Defence within the Registry. This results in the Registrar being responsible for overseeing all manner of defence requests, such as payment, the hiring of investigators, and the approval of financial plans for travel.²¹⁶ In an ideal world, free from outside influence, this would not be necessarily problematic,

²⁰⁸ (EDITORIAL) (2001) at 1995

²⁰⁹ As opposed to its conceptual architecture, examined in Chapter 5.

²¹⁰ I have observed this to be the case first hand at the ICTY, as of April 2013. See also, D'AMATO, A. (2000) 'Defending a Person Charged with Genocide.' **1** *Chicago Journal of International Law*. 459-469 at 466

²¹¹ JALLOH, C.C. & DIBELLA, A.E. 'Equality of Arms in International Criminal Law: Continuing Challenges' in SCHABAS, W.A. MCDERMOTT, Y. & HAYES, N. (Eds.) (2013) '*The Ashgate Research Companion to International Criminal Law*.' Farnham, Ashgate. p251

²¹² *Ibid.*

²¹³ D'AMATO, A. (2000) at 466

²¹⁴ *Ibid.*

²¹⁵ GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) *Champion*. 20-27 at 23

²¹⁶ *Ibid.*

with the Registrar acting in a neutral and fair manner. However, should there be a lack of sympathy or understanding concerning the needs of the Defence, therein arises a risk that bias on the part of the Registrar could detrimentally affect the Defence. It must be recognised that no individual can guarantee they will be unaffected by the pressures and 'politics' inherent in any institution. However, extreme care should be taken as to the suitability of the Registrar, with a view to ensuring that he or she has a genuine appreciation of the need for neutrality, as well as an understanding of the unique, practical problems with which Defence teams continuously faced.

5. Conclusion

The cumulative effect of the issues discussed throughout this Chapter give rise to the crucial question of whether the modern international criminal courts and tribunals have been constructed in a manner which places the accused at an institutional disadvantage *vis-à-vis* his opponent(s). Newton asserts that a '*perfect equality of arms is a structural impossibility in the current system of international justice*'.²¹⁷ In addition to the structural inequality, there appears to be a '*general atmosphere*' at the modern institutions, in which the '*political and psychological advantages*' are weighed in favour of the OTP.²¹⁸

This Chapter has sought to highlight the problems with the Prosecution's dual role, which can be argued to be conceptually flawed. The deeply conflicted role of the OTP requires it to act as an independent organ, and '*should refrain from considering herself as a classic counterweight to the Defence*'.²¹⁹ If the Prosecution is unable or

²¹⁷ NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** *Stanford Journal of International Law*. 379-440 at 385

²¹⁸ FEDOROVA, M. (2012) p6

²¹⁹ KUSCHNIK, B. (2009) 'International Criminal Due Process in the Making New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC.' **9** *International Criminal Law Review*. 157-185 at 185

unwilling to fulfil its obligations to investigate, as well as later disclose, evidence in a neutral manner then the Defence will be placed at a significant disadvantage.²²⁰ Fedorova argues that the Chambers '*have not paid sufficient (explicit) attention to the shared responsibility of the prosecutor concerning truth finding, fair trial and equality of arms*', adding that the judges should '*arguably be more explicit and consistent as to their vision of the prosecutorial role*'.²²¹

The process for including witness testimony at the ICC raises particular concerns for the Defence, whereby the proceedings can be described as '*multiparty*'.²²² This could become problematic if the inclusion of multiple 'accusers' detracts from the crucial question of whether the accused is guilty of the charges.²²³ Judge Pikis, in his 'partly dissenting' opinion in *Lubanga*, raised similar concerns, stating that the '*adversary of the accused is the Prosecutor and none other. The defendant cannot have more than one accuser. It is not for the accused to prove his innocence*'.²²⁴ Thus, the role of the judges in protecting the overall fair trial rights of the accused is of paramount importance. Bassiouni states that judges being free from bias and prejudice, so as to be '*institutionally and personally independent from political or administrative control and influence*', is '*axiomatically*' linked with the provision of fair trial.²²⁵ The availability of examples relating to inappropriate or ill-considered conduct on the part of international judges indicates that more stringent standards are called for. International courts and tribunals require '*neutral, dispassionate actors*'²²⁶ in order to demonstrate their commitment to their due regard of the rights of the accused.

²²⁰ Such issues will be analysed in depth next in Chapter 8.

²²¹ FEDOROVA, M. (2012) p230

²²² KLIP, A. (2012) 'Confidentiality Restrictions' **10** *Journal of International Criminal Justice*. 645-660 at 660

²²³ *Ibid.*

²²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, 'Partly Dissenting Opinion of Judge G.M. Pikis' (11 July 2008) ICC Doc. No. ICC-01/04-01/06-1432 p41

²²⁵ BASSIOUNI, M.C. (1992-3) 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions.' **3** *Duke Journal of Comparative & International Law*. 235-297 at 270

²²⁶ GORDON, G.S. (2006-7) at 698

Verrijn Stuart argues that the ICC has '*become a fight culture with not enough experienced judges to manage a diverse group of individuals effectively, or to muster the courage to set an example*'.²²⁷ Thus, there is a pressing need for more judges to provide clear and effective guidelines in their rulings.²²⁸

The next Chapter will examine how principles of fairness and EoA affect evidentiary issues at trial. This will include analysing pre-trial investigations, the disclosure of evidence relevant to the Defence, as well as access to other important forms of evidence, such as witness testimony. These aspects of the trial process present the Defence with specific difficulties in practice, which must be considered together with the issues raised in Chapters 6 and 7 in order to analyse comprehensively the extent of any Inequality of Arms.

²²⁷ VERRIJN STUART, H. (2008) 'The ICC in Trouble.' **6** Journal of International Criminal Justice. 409-417 at 416

²²⁸ Judge Pikis and Judge Van den Wyngaert are notable examples of 'brave' rulings against majorities concerning the rights of the accused. See, *Prosecutor v. Thomas Lubanga Dyilo* 'Dissenting Opinion of Judge Georghios M. Pikis.' *supra*; *The Prosecutor v. Germain Katanga*, 'Minority Opinion of Judge Christine Van den Wyngaert.' (7 March 2014) ICC Doc. No. ICC-01/04-01/07-3436-AnxI

Chapter 8.

Equality of Arms and Evidence

*'[T]he idealistic plans of all these tribunals are foundering on practical shoals, overwhelmed by hundreds of cases and protracted proceedings. Their substantive aspirations have not been built upon solid, realistic procedural foundations.'*¹

1. Introduction

This Chapter will focus on the Principle of Equality of Arms (EoA) in relation to three different aspects of evidence crucial to the trial process, namely: the difficulties associated with pre-trial investigations, the problems relating to the disclosure of evidence, and the impact of witness testimony.² There are many forms of both direct and indirect evidence which can be submitted for the judge's consideration.³ The scope of this study necessitates limitations on the analysis of the extent to which evidentiary issues impact upon the fairness of the proceedings.⁴ However, an examination of the aforementioned areas in this Chapter should provide an overview of the evidentiary issues which affect the trial process, and in particular the defence case, most profoundly.

A legitimate fact-finding procedure relies heavily upon the ability of the Court to gather all manner of evidence to be admitted at trial. If, for a variety of reasons, the Defence is routinely restricted or inhibited from accessing and presenting relevant evidence, the overall fairness of the trial will be substantially undermined.⁵ Newton

¹ BIBAS, S. & BURKE-WHITE, W. (2010) 'International Idealism Meets Domestic-Criminal-Procedure Realism.' **59** *Duke Law Journal*. 637-704 at 640

² These three aspects have been selected as they present distinct difficulties to the evidential process.

³ See, MAY, R. & WIERDA, M. (2002) 'International Criminal Evidence.' New York, Transnational Publishers.

⁴ Other important issues relating to evidence include: the use of *affidavit* and oral evidence; forensic testing and medical evidence; evidence at the appeals stage of proceedings etc.

⁵ TUINSTRA, J.T. (2009) 'Defence Counsel in International Criminal Law.' The Hague, TMC Asser Press. p177

observes that in some instances, a '*lack of fair and timely access to information*' may constitute '*the single most troubling aspect of the international criminal justice system*'.⁶

This Chapter will begin by analysing the difficulties experienced by the modern institutions in relation to pre-trial investigations, examining some broader issues, such as state co-operation and the provision of access to investigation teams. As Tuinstra observes, it is usually the case that the Prosecution experiences fewer difficulties with site visits, as defence teams can be perceived as being '*on the side of the enemy*'.⁷ The Prosecution typically carries the primary responsibility for the bulk of investigations. Thus, the budget for additional defence investigations is small. Due to the inevitable delay which arises by virtue of the Prosecution's pre-trial investigations (which are required in order to bring charges against individuals), it will be argued that the Defence is in a strategically weaker position *ab initio*.⁸

The second issue to be analysed is that of disclosure. International criminal trials invariably involve many thousands of documents, the sheer volume of which can be overwhelming for small defence teams with few personnel. It is also worth noting that due to the advances in technology, evidentiary material is increasingly catalogued via electronic means, yet the degree to which this has improved organisation must be questioned. Furthermore, the implications of the use of confidentiality agreements will be examined, particularly given their controversial use in the first trial to be completed at the ICC.⁹ There have also been instances of *non*-disclosure, whereby the Prosecution has failed to disclose evidence; these must be considered, particularly in light of the Prosecutor's dual role to investigate both exculpatory and inculpatory evidence. These issues are of great importance given that access to information and

⁶ NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2) Stanford Journal of International Law**. 379-440 at 416

⁷ TUINSTRA, J.T. (2009) p164

⁸ See, TUINSTRA, J.T. (2009) pp.163-4

⁹ *Prosecution v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

the disclosure of evidence are closely linked with the right to adequate time and facilities to prepare.¹⁰

The final aspect of evidence to be explored will be witness testimony. Instances in which witness may have been remunerated for their testimony, or else have falsified their accounts, highlight the need for scrupulous care to be taken with the inclusion of such evidence, whilst remaining sensitive to the terrible ordeals some individuals will have endured. An area of particular tension is that of witness anonymity and its potential to impact detrimentally on the rights of the accused.¹¹

It will be argued that the collective consideration of these issues indicates a worrying trend, whereby the principle of EoA fails to be translated into meaningful protections for the accused at trial in relation to accessing and presenting evidence.

2. EoA and access to evidence: Pre-trial investigations

This section will focus primarily on the ICC in light of its commitment to investigate broad geographic regions, in conflicts or disruption that may be continuing, which could involve many victims and witnesses. The Prosecutor can initiate an investigation if there is a 'reasonable basis to proceed',¹² provided this decision is later authorised by the Pre-Trial Chamber.¹³ This Chamber is responsible for the subsequent proceedings, and will issue warrants of arrest or summons to appear, where appropriate.¹⁴ As and when a named individual is brought before the Court, a hearing to confirm the charges will take place.¹⁵ These stages, which will be referred to collectively here as the pre-

¹⁰ SAFFERLING, C. (2012) 'International Criminal Procedure.' Oxford, OUP. p346

¹¹ See, DAMAŠKA, M. (2012) 'Reflections on Fairness in International Criminal Justice.' **10** *Journal of International Criminal Justice*. 612-620 at 617-8

¹² Article 53 Rome Statute of the ICC.

¹³ Article 15(3)

¹⁴ Article 58(1)

¹⁵ Article 61(1)

trial/investigation phase of the proceedings, trigger the rights relating to investigations set out in Article 55 of the Statute.¹⁶ The Prosecution has a statutory duty to disclose the evidence which it intends to rely on at the confirmation hearing.¹⁷ As Ambos has observed, the concept of the judicially controlled pre-trial can be seen as a mixture of the French and German systems, and is therefore inquisitorial in origin.¹⁸

The Prosecution carries the primary responsibility for conducting investigations.¹⁹ The manner and extent to which it carries out its investigative duty will have one of the biggest impacts on the direction and fairness of an accused's trial.²⁰ The Prosecution is allocated an extensive investigation budget, yet it also benefits from other advantages which are not shared by the Defence. These are set out in the Statutes and RPEs, and include the ability to seek assistance from State authorities, such as co-operation with the seizure of evidence and the arrest of suspects.²¹ Whilst such measures do not necessarily guarantee the full co-operation of States, or access to all evidence and witnesses, its power '*certainly enables the prosecution to conduct a vigorous and robust investigation.*'²² Caianiello reasons that whilst some might argue that the disparate investigative means between the Prosecution and Defence are no cause for concern, this is '*not a well-founded opinion*' due to the structural advantage given to the OTP under the Rome Statute during the investigation phase.²³

¹⁶ SAFFERLING, C. (2011) 'The Rights and Interests of the Defence in the Pre-Trial Phase.' **9** *Journal of International Criminal Justice*. 651-667 at 653

¹⁷ Article 61(3)b Rome Statute; Rule 77 RPE ICC

¹⁸ AMBOS, K. (2003) 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' **3** *International Criminal Law Review*. 1-37 at 8

¹⁹ As is the case at the *ad hocs*.

²⁰ ZAPPALÀ, S. (2003) '*Human Rights in International Criminal Proceedings.*' Oxford, OUP. p252

²¹ ICTY: Article 16(2); Article 18(2) ICTY Statute. Rule 39-40 RPE ICTY. ICC: Article 54 Rome Statute

²² KARNAVAS, M.G. 'Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.' in BOHLANDER, M. (Ed.) (2007) '*International Criminal Justice: A Critical Analysis of Institutions and Procedures.*' London, Cameron May. pp.93-4

²³ CAIANIELLO, M. (2011) 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models.' **36** *North Carolina Journal of International Law and Commercial Regulation*. 287-318 at 295-6

At the ICTY, the OTP has benefitted from the Tribunal issuing broad search and seizure warrants, yet the Defence have not shared the same level of access to evidence.²⁴ The privileged position of the Prosecution also allows it to expedite the organisation of its investigations. Stephen Kay QC, counsel in the ICTR case of *Musema*,²⁵ noted the ‘*stark contrast*’ in the defence’s efforts to plan their travel and security arrangements to Kigali. The Prosecution was able to mobilise itself with ease to the very sites that the Defence had planned to visit.²⁶ Furthermore, the reception which the Defence receives can impede substantially its ability to investigate, as they can be ‘*at risk of obstruction, threats and physical abuse*’.²⁷ Wladimiroff, who has worked at both the ICTY and ICTR, recounts instances of local authorities blocking the defence investigation by harassing potential witnesses, refusing to produce documents and causing delays of almost nine months before granting leave to visit sites.²⁸

At the ICC, the Defence must likewise operate on an un-level playing field with respect to the Prosecution, as they are given fewer powers, privileges and immunities.²⁹ As a result, the OTP draws an advantage from its broader and more effective means of investigation.³⁰ This imbalance includes the Prosecution having at its disposal a standing staff of investigators and experts on hand.³¹ The same cannot

²⁴ MCINTYRE, G. (2003) ‘Equality of Arms - Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.’ **16** *Leiden Journal of International Law*. 269-320 at 319

²⁵ *Prosecutor v. Musema*, Case No. ICTR-96-13-T

²⁶ See, KAY, S. & SWART, B. ‘The Role of the Defence’ in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) ‘*The Rome Statute of the International Criminal Court: A Commentary*.’ VOLUME II. Oxford, OUP. p1424

²⁷ *Ibid.*

²⁸ WLADIMIROFF, M. ‘Position of the Defence: The Role of Defence Counsel before the ICTY and ICTR.’ in BEVERS, H. & JOUBERT, C. (2000) BEVERS, H. & JOUBERT, C. (Eds.) (2000) ‘*An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999*.’ Amsterdam, Thela Thesis. p39

²⁹ GALLANT, K.S. (2000) ‘The Role and Powers of Defence Counsel in the Rome Statute of the International Criminal Court.’ **34** *The International Lawyer*. 21-44 at 29

³⁰ CAIANIELLO, M. (2011) at 295

³¹ GALLANT K.S. (2003) ‘Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.’ **14** *Criminal Law Forum*. 317-334 at 328

be said for a defence team, which will only come into ‘existence’ once a particular accused has been charged.

Defence teams at the Court will similarly face difficulties with State authorities who are reluctant to co-operate, particularly if there is a desire to stop information from surfacing.³² Unfortunately, a lack of co-operation by State authorities could keep important evidence from the hands of the defence team, and thereby compromise the fairness of an accused’s trial.³³ As Gallant contends, the act of funding defence investigations is not sufficient alone to ‘*create all the conditions necessary for fully fair proceedings*’.³⁴ However, the amount of funding and resources allocated to the Defence for investigations is clearly of crucial importance. There is no clear statutory right for the accused to be provided with investigation funding, despite the general ‘guarantee’ of adequate time and facilities for the preparation of the Defence under Article 67(1)b.³⁵ At the time of writing, each defence team is given a fixed budget of €73,006 for the entirety of a case with a single accused. This budget is held ‘on trust’ by the Registry, meaning that defence counsel cannot freely access this money.³⁶ It includes all fees for one investigator and one ‘resource person’, including all associated travel expenses and subsistence for team members who need to travel to the field.³⁷ The Registry states that this core budget is ‘*for identifying potential witnesses and reaching a decision regarding their testimony, or acquiring relevant evidence for an average of 30 prosecution witnesses*’.³⁸ Even if this amount could be considered adequate for such objectives, a typical case can surpass these ranges. For example, the Prosecution in *Lubanga* called thirty-six witnesses at trial.³⁹ Turner argues that the

³² GALLANT, K.S. (2000) at 35

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ ICC, Assembly of State Parties, twelfth session. ‘Registry’s single policy document on the Court’s legal aid system.’ (4 June 2013) Doc. No. ICC-ASP/12/3 para 46

³⁷ *Ibid.* para 47

³⁸ *Ibid.* para 48

³⁹ *Prosecutor v Thomas Lubanga Dyilo*, ‘Judgment pursuant to Article 74 of the Statute’ (14 March 2012) Doc. No. ICC-01/04-01/06-2842 para 11

fact that some defence attorneys have continued with their investigations even after exhausting the allocated funds '*affirms their belief in the importance of an inquiry into the facts*'.⁴⁰ She also notes that the '*frequent failure by tribunals to reimburse attorneys*', has resulted in their having to spend their own money in order to provide what they feel is an adequate defence.⁴¹ A sufficient investigation budget is of crucial importance if the Defence is to undertake a thorough examination into the reliability of the Prosecution's evidence, and to search for exculpatory material, which can be a costly process.⁴² It is therefore extremely regrettable that the Registry has recently recommended a significant cut to the defence investigation budget.⁴³

Defence counsel have much to do during the pre-trial phase of proceedings, when they will often not be located near the vicinity of the Court.⁴⁴ Investigations in order to probe the allegations which have been made by the Prosecution, and to search for exonerating evidence, must be undertaken.⁴⁵ As the collection of evidence by the Defence is a crucial part of its role, it must carry out tasks similar to the Prosecution, without the benefit of an entire division devoted to investigations.⁴⁶ Safferling emphasises the essential nature of these early defence investigations.⁴⁷ Whether a case is won or lost depends greatly on the evidence which is uncovered during this phase.⁴⁸ Effective investigations require '*significant time, patience, and effort*'.⁴⁹ Buisman argues that whilst the Prosecution may be best equipped to deal with

⁴⁰ TURNER, J.I. (2008) 'Defence Perspectives on Law and Politics in International Criminal Trials.' **48** *Virginia Journal of International Law*. 529-594 at 555

⁴¹ *Ibid.* at 556

⁴² BUISMAN, C. (2014) 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?' **27(1)** *Leiden Journal of International Law*. 205-226 at 225

⁴³ ICC Assembly of State Parties, Thirteenth Session, 'Registry report on ways to improve the legal aid procedures.' (22 May 2014) Doc. No. ICC-ASP/13/6 p1

⁴⁴ TUINSTRA, J.T. (2010) 'Defending the Defenders. The Role of Defence in International Criminal Trials.' **8** *Journal of International Criminal Justice*. 463-486 at 479

⁴⁵ *Ibid.* at 478

⁴⁶ SAFFERLING, C. (2012) p186

⁴⁷ *Ibid.* p188

⁴⁸ JONES, J.R.W.D. (2004) 'The Gamekeeper-Turned-Poacher's Tale.' **2** *Journal of International Criminal Justice*. 486-494 at 488

⁴⁹ BUISMAN, C. (2014) at 224

the reluctant state authorities, the same cannot be said of the '*community, family, and friends of the accused who may not be as open to a prosecution investigator as they would be to someone representing the interests of the individual accused*'.⁵⁰ As a result, there will be numerous instances in which the defence team are in the stronger position to collect exculpatory evidence.

Another issue of importance to defence investigations is the, arguably unavoidable, investigative delay it experiences in comparison with the the Prosecution. This delay is typically a numbers of years after the OTP, as the latter will not issue the arrest warrant or summons to appear until sufficient evidence has been collected.⁵¹ The period of time which elapses allows a competent Prosecution to examine and collect significant amounts of evidence.⁵² Karnavas observes that any evidence which may have been deemed to be unhelpful may not have been collected, and this could include exculpatory evidence.⁵³ Additionally, by the time the Defence can access the sites and follow important leads, evidence may already be either lost or beyond their grasp.⁵⁴ As a result, Ambos argues that the Defence '*never has the same or even similar possibilities as the Prosecution to prepare its case*'.⁵⁵ This issue is deserving of much greater recognition due to its potential to impact upon the fairness and legitimacy of the proceedings, both real and perceived. As the investigation and collection of evidence is '*based on uneven legal grounds*', Safferling contends that the only remaining course of action for the Defence is to challenge the admissibility of evidence at the trial stage.⁵⁶ It can thus be argued that the Defence begins the trial process at a real disadvantage, and must try to '*reduce the advantage of the Prosecution, which has been involved in the case for a long time*'.⁵⁷

⁵⁰ *Ibid.*

⁵¹ TUINSTRA, J.T. (2009) pp.163-4

⁵² KARNAVAS, M.G. in BOHLANDER, M. (2007) p97

⁵³ *Ibid.*

⁵⁴ *Ibid.* p85

⁵⁵ AMBOS, K. (2003) at 35-6

⁵⁶ SAFFERLING, C. (2011) at 659

⁵⁷ SAFFERLING, C. (2012) p188

It is argued here that the obligation placed on the Prosecution to search for both inculpatory and exculpatory evidence is a difficult and, arguably ‘unnatural’ or illogical, requirement. The utilisation of a more neutral investigative body, even within the Prosecution, could address the current shortcomings.⁵⁸ The introduction of neutral investigators in international criminal justice systems would allow their investigators to be more readily relied upon as ‘*even-handed*’.⁵⁹ However, expectations that such a body could, in practice, be capable or willing to investigate in a neutral manner is perhaps overly-idealistic. Nonetheless, reform of the current investigative system is clearly needed. This was perhaps best articulated by Karim Khan QC, lead counsel for *Ruto*, in his opening statement:

*‘There may be a time, your Honours, again after this case - it's too late for Mr Ruto, he's come too far - that the OTP may wish to appoint an independent lawyer [...] in every case whose only job it is, is to research and investigate exonerating material in order to show how real are the efforts to discharge the Article 54 responsibility. [...] [I]t shouldn't be relegated into an inconvenience of the Prosecution.’*⁶⁰

3. EoA and disclosure of evidence

The duty of the Prosecution to search for both inculpatory and exculpatory evidence is closely connected with the obligation of disclosure. The very concept of disclosure is a ‘*subtle admission*’ that the system is imbalanced, which it serves to attempt to equalise.⁶¹ Safferling argues that disclosure is one of the most ‘*complex and time-consuming procedural issues in international criminal procedure*’.⁶² Due to the

⁵⁸ McIntyre made this suggestion in relation to the ICTY in 2003. MCINTYRE, G. (2003) at 320

⁵⁹ BIBAS, S. & BURKE-WHITE, W. (2010) at 700

⁶⁰ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Open Session Transcript, Case No. ICC-01/09-01/11 (10 September 2013) Doc. No. ICC-01/09-01/11-T-27-ENG p58

⁶¹ FEDOROVA, M. (2012) ‘The Principle of Equality of Arms in International Criminal Proceedings.’ Netherlands, Intersentia. p115

⁶² SAFFERLING, C. (2012) p374

Prosecution's investigative advantages, it consequently enjoys greater access to a wide range of evidence, giving it a '*far freer hand in shaping the contours of the case*'.⁶³ The huge volumes of evidence inevitable in international trials means that the proper disclosure of evidence is crucial. Three key issues will be examined here: the problems associated with confidential agreements; the duty on the Prosecution to disclose exculpatory evidence; the problems of late and non-disclosure.

The Defence will rely heavily on Prosecution disclosure, and the mass of documents made available can be '*overwhelming*'.⁶⁴ Newton observed in 2011, that the ICTY had over six million documents in its database.⁶⁵ The ICTY set up the 'Electronic Disclosure System' (EDS) in 2003, whereby documents and other forms of evidence could be placed on the electronic server, together with an identification code. Karnavas argues that whilst this '*sounds idyllic, the EDS is far from the silver bullet acclaimed by the Prosecution*'.⁶⁶ This is due, he argues, to a lack of identification data attached to each file by the Prosecution, which consists of a '*rather rudimentary indexing capability*', and '*cumbersome search features*'.⁶⁷ Perhaps most importantly, there is no expectation on the OTP to notify the defence team routinely as to the existence of new disclosure material, including to what it refers, and how it might be located.⁶⁸ This can potentially have serious negative ramifications for a defence team, who '*at worst, may not be aware of the existence of the new material, and even if alerted, may spend precious hours finding the new material on the EDS*'.⁶⁹ Thus, unless such an electronic system is properly administered, the practical difficulties associated with disclosing large volumes of documents will not be addressed.

⁶³ NEWTON, M.A. (2011) at 391-2

⁶⁴ ELLIS, M.S. (2003) 'The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia.' **37** *New England Law Review*. 949-973 at 964

⁶⁵ NEWTON, M.A. (2011) at 391

⁶⁶ KARNAVAS, M.G. in BOHLANDER, M. (2007) p100

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* pp.100-1

The ICC has also developed an electronic disclosure system, referred to more generally as ‘e-court’ facilities, which seems to be improving gradually. The defence team in the Court’s first case, *Lubanga*, repeatedly protested against the lack of adequate electronic systems to search through the fifteen-thousand documents available to them.⁷⁰ The Trial Chamber responded accordingly by ordering improvements to the facilities.⁷¹ As of July 2012, the ICC has a revised ‘e-Court protocol’,⁷² which sets out a more detailed framework as to how materials are to be placed onto the system, in what format, and with a specifically structured form of referencing. Such protocols should in theory make the system more consistent, and in turn easier for all parties to search for specific items, provided that the protocol is followed. Included at the request of the Defence is the creation of a new metadata field, namely ‘*related to witness*’, which should allow a more efficient retrieval of witness statements, summaries and transcripts.⁷³ Overall, it has been suggested by Safferling that the ICC has at its disposal ‘*the most comprehensive disclosure system*’.⁷⁴

Whichever technical means of disclosing evidence is used, only the materials which the Prosecution has chosen to place on the system will be available to the Defence. There is the potential for the Prosecution, whether through a technological failing, or by deliberate choice, to omit important evidence. Perhaps the crucial weakness with the system of disclosure as it now stands, is the monitoring of the OTP’s disclosure behaviour. As Caianiello points out, ‘*only the prosecutor knows the entirety of the evidence gathered by his office before trial. Judges cannot search in the prosecutors’ files to gather more information relevant to a case*’.⁷⁵ This is arguably yet

⁷⁰ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 See, SWOBODA, S. (2008) ‘The ICC Disclosure Regime - A Defence Perspective.’ **19 Criminal Law Forum**. 449-472 at 459

⁷¹ *Prosecutor v Thomas Lubanga Dyilo*, ‘Decision on the E-Court Protocol.’ (24 January 2008) Doc. No. ICC-01/04-01/06-1127 para 30

⁷² For details on the ‘e-Court protocol’, see: ICC Doc. No. ICC-01/09-02/11-449-Anx1

⁷³ *Prosecutor v Francis Kirimi Muthaura & Uhuru Muigai Kenyatta*, ‘Defence Submissions on the status conference agenda items contained in the Trial Chamber’s “Order scheduling a status conference” of 14 May 2012.’ (28 May 2012) Doc. No. ICC-01/09-02/11-427

⁷⁴ SAFFERLING, C. (2012) p374

⁷⁵ CAIANIELLO, M. (2011) at 313

another manifestation of the ‘Frankenstein’ effect and the unanticipated problems which have arisen through the mixing of systems in ICJ.⁷⁶

A. Disclosure and Confidentiality Agreements

The use of confidentiality agreements has proved to be a highly contentious issue, particularly at the ICC.⁷⁷ Under Article 54(3)e of the Rome Statute, the Prosecutor may agree ‘*not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence*’.⁷⁸ The latter part refers to what is more commonly known as ‘springboard’ evidence. Such material should only be of a preparatory nature, in the sense that the Prosecution ‘*hopes to find more (direct) evidence by evaluating the information presented*’ by virtue of the agreement.⁷⁹ Problems will arise if the Prosecution makes liberal use of this power, which could seriously jeopardise the rights of the accused.⁸⁰

Any analysis of the effects of confidentiality agreements is inherently difficult due to the nature of such information being withheld from entering the public domain. Thus, as Klip contends, ‘*the exact impact of confidentiality restrictions cannot ever be analysed*’.⁸¹ Whilst the extent to which important evidence might remain undisclosed due to confidentiality agreements is unknown, there are nevertheless incidents which have occurred at the ICC which are worthy of concern. Extreme examples have arisen

⁷⁶ As argued by SKILBECK, R. (2010a) ‘Frankenstein’s Monsters: Creating a New International Procedure’ **8** *Journal of International Criminal Justice*. 451-462

⁷⁷ In relation to the case of *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

⁷⁸ Section d also provides the Prosecutor may: ‘*Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person.*’

⁷⁹ SAFFERLING, C. (2012) p269

⁸⁰ *Ibid.*

⁸¹ KLIP, A. (2012) ‘Confidentiality Restrictions’ **10** *Journal of International Criminal Justice*. 645-660 at 645

in the *Lubanga* case. In one instance, the Defence pointed out that the Prosecution had included within its list of protected material a document which was already in the public domain.⁸² This amounts to a misuse of such agreements,⁸³ and such behaviour can reasonably be said to raise suspicion as to the Prosecution's practices. Fedorova speculates that the Prosecution might have found itself under considerable pressure due to the difficulties of collecting evidence amidst the on-going conflict in the DRC, coupled with the expectations of an expensive Court, which is perceived by many as taking '*too long to warm up*'.⁸⁴ Despite these practical difficulties and pressures, it is argued here that securing evidence under a cloak of confidentiality risks damaging the legitimacy of the proceedings.

It must be acknowledged that confidentiality agreements play an important role in obtaining co-operation from States, organisations and individuals in complex and difficult circumstances. The most important problem in this context is that there are limited means to prevent abuse, to the detriment of the accused, which can '*easily compromise the fairness and balance of the proceedings*'.⁸⁵ Bibas and Burke-White argue that Prosecutors should reject such restrictive agreements, despite the inculpatory and exculpatory evidence which may not be attainable through any other means.⁸⁶ This view is particularly pertinent considering the fact that confidentiality rules remain applicable throughout the duration of the trial.⁸⁷ As a result, Klip feels that this causes a '*marked inequality between the ability of the prosecutor and the defence to access information*' most prominent during the investigation phase, for which there is

⁸² *Prosecutor v Lubanga*, Transcript of Status Conference, Open Session. (10 June 2008) Doc. No. ICC-01/04-01/06-T-89 p19, lines 6-12.

⁸³ KATZMAN, R. (2009) 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial.' **8(1) Northwestern Journal of International Human Rights**. 77-101 at 93

⁸⁴ FEDOROVA, M. (2012) p178

⁸⁵ SWOBODA, S. (2008) at 468

⁸⁶ BIBAS, S. & BURKE-WHITE, W. (2010) at 699

⁸⁷ KLIP, A. (2012) at 659

no later compensation.⁸⁸ The concealment of information important to the Defence can therefore be said to infringe upon his right to a fair trial.⁸⁹

B. Disclosure of exculpatory evidence

At the ICTY, the Prosecution must disclose '*as soon as practicable*' any material which '*may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence*'.⁹⁰ The Rome Statute of the ICC has utilised very similar wording, with the somewhat broader addition that the material '*shows or tends to show the innocence of the accused*'.⁹¹ Safferling states that as a result of this provision, the Prosecution is under a corresponding duty to assess carefully '*every piece of evidence vis-à-vis every reasonably conceivable line of defence*'.⁹² As a result of the breadth of the obligation, the OTP is under a substantial burden to consider properly how evidence might be useful for the Defence. Whilst this may seem burdensome, negative consequences could stem from the Defence failing to receive material which, alone, may appear to be of small significance, yet taken together with other material, could prove invaluable.⁹³ Jackson argues that the principle of EoA will not in practice be achieved simply through the disclosure of some of the evidence which the Prosecution '*deems to be exculpatory or useful to the defence*'.⁹⁴

It can be argued that the lack of a requirement for the Prosecution to disclose *all* evidence collected, results in a lack of incentive for the Prosecution to search

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Rule 68 (i) RPE ICTY

⁹¹ Article 67(2) ICC Rome Statute. Emphasis added.

⁹² SAFFERLING, C. (2012) p356

⁹³ WHITING, A. (2009) 'Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case.' *14 UCLA Journal of International Law and Foreign Affairs*. 207-223 at 231

⁹⁴ JACKSON, J. (2009) 'Finding the Best Epistemic Fit for International Criminal Tribunals.' *7 Journal of International Criminal Justice*. 17-39 at 37

'equally' for both inculpatory and exculpatory evidence in an impartial manner.⁹⁵ Instead, as Jackson argues, the goal is to '*make one's own case within the rules as strongly as possible and leave it to the defence to pursue their case*'.⁹⁶ The mind-set of the Prosecution is interesting. No 'Code of Conduct' for the OTP was introduced until September 2013.⁹⁷ Thus, for over a decade, the permanent Prosecution staff have been developing their own norms and work ethic regarding how they approach discharging the dual obligation. As a result, Katzman argues that leaving the evaluation of exculpatory evidence to the Prosecution is a '*violation of the accused's fair trial rights*'.⁹⁸ In the system as it currently stands, the only means of redress is judicial intervention, in so far as it is possible.

C. Timing issues; late disclosure

Difficulties can arise for the Defence whereby evidence is disclosed in an untimely manner, namely at such a late stage in the proceedings as to leave the team with insufficient time and resources to investigate and respond. The OTP's investigation methods have been widely criticised by Chambers.⁹⁹ Karnavas notes that an '*unfocused, haphazard or incompetent investigation*' contributes to the problems of late or untimely disclosure.¹⁰⁰ Additionally, as the Prosecution's investigations can be ongoing until a final disposition, new evidence can continue to come to light.¹⁰¹ As a

⁹⁵ *Ibid.* at 25

⁹⁶ *Ibid.*

⁹⁷ 'Code of Conduct for the Office of the Prosecutor'. Available at: <http://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf> Doc. No. OTP2013/024322 [Last accessed 9.2.2014]

⁹⁸ KATZMAN, R. (2009) at 93

⁹⁹ See for example, *Prosecutor v Thomas Lubanga Dyilo*, 'Judgment' (14 March 2012) *supra* pp. 63–220

¹⁰⁰ KARNAVAS, M.G. in BOHLANDER, M. (2007) pp.89-90

¹⁰¹ *Ibid.*

consequence, the Defence will be required to respond, yet will often lack the necessary funds to do so adequately.¹⁰² Karnavas argues that to compound problems,

'requests to the Registrar for additional funds are likely to be met with scepticism, followed by a bureaucratic memo-writing obstacle course; an unnecessarily taxing and frustrating process which results in defocusing the defence to the advantage of the prosecution'.¹⁰³

Thus, the Defence would benefit from increased awareness of the potentially damaging effect of such obstructive requirements. This is particularly problematic as it seems that disclosure problems related to timing are unfortunately *'the nature of the beast: more the norm than the exception'*.¹⁰⁴

Potential unfairness stemming from the problems associated with the timing of disclosure may prove particularly difficult to change. This is because, as Verriijn Stuart asserts, the Prosecution 'habit' of disclosing large amounts of evidence at a late stage of the proceedings *'does not stem from a misinterpretation of the Statute and the Rules'*, but instead suggests *'prosecutorial mismanagement and disregard for fundamental rights of the accused, while at the same time excluding the Chamber from verifying the materials'*.¹⁰⁵ This observation has been raised with reference to the DRC cases of *Katanga* and *Ngudjolo Chui*,¹⁰⁶ in which the non-disclosure of evidence has been an important issue. Just four days before the original fixture of the confirmation hearing, the Prosecution presented the Chamber with an additional 1172 documents, of which it was claimed *none* contained potentially exculpatory evidence.¹⁰⁷ Single Judge Steiner was distinctly unimpressed, noting that the documents which were 'suddenly' discovered had in fact been *'unregistered within the Office of the Prosecutor for*

¹⁰² *Ibid.* p90

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ VERRIJN STUART, H. (2008) 'The ICC in Trouble.' **6** *Journal of International Criminal Justice*. 409-417 at 413

¹⁰⁶ *The Prosecutor v Germain Katanga*, ICC-01/04-01/07; *The Prosecutor v Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12. See, KATZMAN, R. (2009) at 95

¹⁰⁷ VERRIJN STUART, H. (2008) at 412

years'.¹⁰⁸ Additionally, the OTP failed to inform either the Judge or the Defence until after the expiration of its deadline for effective disclosure.¹⁰⁹ Overall, the Judge recognised the continuous re-occurrence of such incidences, which she strongly recommended the Prosecution take measures to address.¹¹⁰

If the Prosecution is not overtly breaching the Statute or RPE, particularly where there is a legitimate claim of on-going discovery of evidence, it will be difficult for the Chamber to both monitor and improve the system as it stands. As a result, the Prosecution's disorganised and unfocused approach to investigations could mean that ultimately it is in violation of its obligation under Article 54(1)a.¹¹¹

D. Non-disclosure (failure to disclose)

The principle difficulty with the Prosecution failing to disclose material in breach of its obligations under the Rome Statute and RPE is awareness. It is not possible for either the Defence or the Chamber to '*effectively police the OTP's compliance with its disclosure obligations*'.¹¹² The Defence is quite simply not in a position to know the extent or detail of what has been withheld from them in any given case. Due to this unfair barrier between the parties, it could be argued that the dual role placed on the Prosecution is unworkable as a result of the serious conflict between neutrality and partiality. Should the OTP be expected to make reasoned decisions on disclosure when, by virtue of its partisan role, it is pursuing the accused's conviction? Markovic

¹⁰⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54 (3)(e) and 67 (2) of the Statute and rule 77 of the Rules.' (25 June 2008) Doc. No. ICC-01/04-01/07-646 para 21 iii). Emphasis added.

¹⁰⁹ *Ibid.* at para 21 iv). The Prosecution also lost documents, see paras vii) and viii).

¹¹⁰ *Ibid.* p17

¹¹¹ VERRIJN STUART, H. (2008) at 413

¹¹² MARKOVIC, M. (2011-12) 'The ICC Prosecutor's Missing Code of Conduct.' 47 *Texas International Law Journal*. 201-236 at 219-20

argues that this could lead the Prosecution to '*undervalue or simply dismiss evidence that does not cohere with the defendant's guilt*'.¹¹³ The issue of non-disclosure is far more than a 'technical' issue; it goes to the very heart of fairness in international criminal proceedings.¹¹⁴ Thus, some important examples of problems which have arisen in relation to non-disclosure must be examined.

One example of the Prosecution withholding evidence at the ICC can be seen in *Muthaura*.¹¹⁵ In March 2013, the proceedings against him were formally terminated, due in part to a key witness recanting his evidence, having also admitted to accepting bribes.¹¹⁶ An important disclosure issue arose, as the Prosecution was found to be in possession of this statement, but had failed to make it available to the Defence, who alleged that this was done in bad faith as a strategic move in order to strengthen the case against the accused.¹¹⁷ The Prosecution responded that it had '*erred in not disclosing the affidavit at the pre-trial stage and in not alerting the Single Judge*', which it admitted '*could and should*' have occurred.¹¹⁸ However, it rejected the assertion that this decision was taken in bad faith.¹¹⁹ Ultimately, whether dishonest practices are employed by the Prosecution could be difficult to substantiate.

This area cannot be addressed without looking at the now infamous disclosure problems encountered by the initial ICC cases concerning the DRC, in particular that of

¹¹³ *Ibid.* at 220

¹¹⁴ KUSCHNIK, B. (2009) 'International Criminal Due Process in the Making New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC.' 9 *International Criminal Law Review*. 157-185 at 158

¹¹⁵ See, *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* 'Decision on the withdrawal of charges against Mr Muthaura.' (18 March 2013) Doc. No. ICC-01/09-02/11-696

¹¹⁶ See, 'Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura.' (Released 11/03/2013) Available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx [Last accessed 13.02.2014]

¹¹⁷ See, BUISMAN, C. (2014) at 222

¹¹⁸ *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* 'Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber.' (25 February 2013) Doc. No. ICC-01/09-02/11-664-Red2 paras 37;41

¹¹⁹ *Ibid.* para 41

Lubanga.¹²⁰ The principle difficulty arose as a direct result of the Prosecution's 'wholesale and serious abuse' of the provision for obtaining material via confidentiality agreements.¹²¹ Pursuant to such agreements under Article 54(3)e of the Rome Statute, the Prosecution was able to obtain documents, but did not have the authorisation to disclose them without the consent of the provider. The extent to which the Prosecution was reliant on evidence collected in this manner was extensive. In a submission before the Chamber it stated that approximately fifty percent of all documents relating to the DRC Situation were secured via confidentiality agreements.¹²² Thus, the OTP found itself in a serious bind,¹²³ as did the Chamber. The latter could not order the Prosecution to hand over the documents, nor could it easily apply an appropriate remedy without their inspection.¹²⁴ However, due to the Prosecution's abuse of Article 54(3)e, the Chamber presented the OTP with a clear choice: either to disclose '*all the potentially exculpatory material in its possession (in accordance with the Statute) to the accused*',¹²⁵ or else face a permanent stay of proceedings in the future.¹²⁶ At this stage, the Chamber felt it necessary to impose a stay.¹²⁷ This was later upheld by the Appeals Chamber, (albeit without ordering the release of the accused) explaining that the Trial Chamber had been justified in its decision to implement a *conditional* stay on

¹²⁰ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

¹²¹ Quoting the Trial Chamber I in *Prosecutor v Thomas Lubanga Dyilo* 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008.' (13 June 2008) Doc. No. ICC-01/04-01/06-1401 para 75

¹²² *Prosecutor v Thomas Lubanga Dyilo*, 'Decision Regarding the Timing and Manner of Disclosure and the Date of Trial.' (9 November 2007) Doc. No. ICC-01/04-01/06-1019 para 6

¹²³ WHITING, A. (2009) at 208-9

¹²⁴ *Ibid.* at 217

¹²⁵ *Prosecutor v Thomas Lubanga Dyilo* 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008.' (13 June 2008) Doc. No. ICC-01/04-01/06-1401 para 75

¹²⁶ See, WHITING, A. (2009) at 217

¹²⁷ *Prosecutor v Lubanga* 'Decision on the consequences of non-disclosure' (13 June 2008) *supra*, paras 92-5

proceedings.¹²⁸ Wishing to avoid a continuation of the stay, the Prosecution found suitable means of both disclosing evidence to the Trial Chamber for review, as well as ensuring the safety of the information providers should disclosure occur.¹²⁹ As a result, the stay was quickly lifted in November 2008, allowing the trial to continue. Whiting notes that, unfortunately, these proceedings did little to enhance the Court's early reputation.¹³⁰

The *Lubanga* case demonstrates the ongoing conflict between confidentiality agreements and the Prosecutor's subsequent use of 'springboard' evidence, with its disclosure obligations.¹³¹ Swoboda finds it disquieting that the Prosecution would attempt to build the case on what was '*in essence, secretive evidentiary regime – a regime which even tried to drape vital exculpatory evidence into a cloak of confidentiality*'.¹³² The misuse of Article 54(3)e of the Statute has profound implications for trial fairness. In fact, it is not possible to know whether *Lubanga's* defence team received all the documents to which they were entitled to have access.¹³³ As Markovic alludes,¹³⁴ it is somewhat questionable that of the thousands of documents obtained under confidentiality agreements, the Prosecution felt it was only able to disclose around two hundred documents to the Defence that *it* felt contained potential exculpatory evidence.¹³⁵

¹²⁸ *Prosecutor v Thomas Lubanga Dyilo*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"' (21 October 2008) Doc. No. ICC-01/04-01/06-1487 paras 32-3

¹²⁹ KATZMAN, R. (2009) at 77-8

¹³⁰ WHITING, A. (2009) at 209

¹³¹ *Ibid.*

¹³² SWOBODA, S. (2008) at 472

¹³³ MARKOVIC, M. (2011-12) at 218-9

¹³⁴ *Ibid.*

¹³⁵ *Prosecutor v Thomas Lubanga Dyilo*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008".' (21 October 2008) Doc. No. ICC-01/04-01/06-1486 para 21

E. The disclosure pitfall: the need for ongoing awareness

The issues relating to the disclosure of evidence, if not duly recognised and addressed, could have the potential to undermine trial fairness. This is particularly the case at the ICC, due to the complex and conflicting obligations on the Prosecution. The initial cases demonstrate a legitimate cause for concern as to the potential for exculpatory evidence to be either unduly withheld, released in an untimely manner, or to remain beyond the reach of the Defence due to confidentiality agreements. Ultimately, with the system as it currently stands, the Defence can only rely on the good faith of the Prosecution, yet there is undoubtedly the potential for a '*prosecutorial abuse of power*'.¹³⁶ The Prosecution, particularly in the *Lubanga* case, has demonstrated a tendency to err on the side of non-disclosure.¹³⁷ Not only is this contrary to its role as envisioned by the Rome Statute, but it could also lead to the distortion of the 'truth' finding process, and could ultimately contribute to the erosion of the rights of the accused. In order to strengthen the current system of disclosure and confidentiality agreements, active observation of inappropriate conduct must be carried out. In *Lubanga*, the Trial Chamber served as the principle check on the Prosecution's power.¹³⁸ Nonetheless, there appears to be a judicial reluctance to sanction instances of prosecutorial negligence.¹³⁹ However, as Caianiello argues, a pro-active judicial approach can only achieve so much.¹⁴⁰ The Prosecution is ultimately the only organ which can ensure its powers are conducted appropriately, in accordance with its obligations. The OTP must, as Swoboda contends, '*play with open cards*'.¹⁴¹

¹³⁶ KATZMAN, R. (2009) at 78

¹³⁷ WHITING, A. (2009) at 231

¹³⁸ KATZMAN, R. (2009) at 92

¹³⁹ See, CAIANIELLO, M. (2011) at 313

¹⁴⁰ *Ibid.*

¹⁴¹ SWOBODA, S. (2008) at 472

4. EoA and witness testimony: issues of locating witness and anonymity measures

According to Cryer, the process of including witness testimony at trial can be '*beset by difficulties*'.¹⁴² Issues of particular importance to the Defence will be discussed, such as the problems associated with locating defence witnesses, and the use of witness anonymity. It is first worth recognising that live testimony, through the physical presence of a witness in court, is considered preferable to *affidavit* evidence.¹⁴³ This was recognised at an early stage of the ICTY proceedings in *Tadić*. The Trial Chamber held that '*physical presence of a witness at the seat of the International Tribunal enables the Judges to evaluate the credibility of a person giving evidence*', and that furthermore, their physical presence '*may help discourage the witness from giving false testimony*'.¹⁴⁴ This allows for important cross-examinations, and allows the witnesses' demeanour to be observed. Difficulties arise in the balancing process of protecting the fair trial rights of the accused, with the needs of witnesses who could have experienced particularly harrowing ordeals. Courts and Tribunals can respond through a variety of measures, which often centre around anonymity. The impact that such measures have on the defendant must be carefully considered.

A. The difficulty of locating defence witnesses

As international crimes are often committed during complex conflicts and periods of instability, locating witnesses can be a difficult task, particularly as institutions do not

¹⁴² CRYER, R. (2003) 'Witness Evidence Before International Criminal Tribunals' **2(3)** Law and Practice of International Courts and Tribunals. 411-439 at 438

¹⁴³ See, NGANE, S. N. (2009) 'Witnesses Before the International Criminal Court'. **8** The Law and Practice of International Courts and Tribunals. 431-457 at 439

¹⁴⁴ *Prosecutor v Duško Tadić*, 'Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link.' (25 June 1996) Case No. IT-94-1-T at para 11

have direct control over the territory in question.¹⁴⁵ Witness reluctance may arise through an unwillingness to travel to and appear in court, a fear for their personal safety, or for those with whom they associate, or else an apprehension regarding facing the accused.¹⁴⁶ It can be extremely difficult for defence teams and investigators to locate witnesses due to limited available funds which can restrict contact with those who could be of help to the accused's case.¹⁴⁷ It is not unusual for potential witnesses to be reluctant to testify on behalf of an accused, with whom they fear association.¹⁴⁸ The extent of the stigma¹⁴⁹ associated with such individuals can contribute to a tangible unwillingness to testify, even where their testimony is both probative and helpful to a case.¹⁵⁰ Furthermore, as Karnavas contends, witnesses can decline to co-operate through a fear of '*being designated as suspects by the prosecution*'.¹⁵¹ Even where a potential witness may be willing to co-operate, it might be too cost-prohibitive to locate that person, making them beyond the reach of the team.¹⁵²

If a witness can be persuaded to appear before the court, problems for the Defence can still arise whereby a witness will happily respond to the Prosecution's questions, yet when cross-examined they become elusive and uncommunicative.¹⁵³ As Newton explains, witnesses at the international tribunals have been '*famously unresponsive and difficult to control*', which is arguably a result of external pressures on witnesses who '*do not wish to assist the acquittal of those charged with destroying the social and economic fabric of society*'.¹⁵⁴ The *ad hoc* Tribunals have rejected any legal obligation to compensate the Defence for difficulties experienced which are outside the control of the Tribunal, even if such factors significantly harm the defence

¹⁴⁵ ZAPPALÀ, S. (2003) p233

¹⁴⁶ NGANE, S. N. (2009) at 449

¹⁴⁷ TUINSTRA, J.T. (2009) p169

¹⁴⁸ *Ibid.*

¹⁴⁹ See Chapter 3 regarding the stigmatisation of ICL defendants.

¹⁵⁰ NEWTON, M.A. (2011) at 388-9

¹⁵¹ KARNAVAS, M.G. in BOHLANDER, M. (2007) p97

¹⁵² *Ibid.* p8

¹⁵³ NEWTON, M.A. (2011) at 388-9

¹⁵⁴ *Ibid.*

case more than that of the Prosecution.¹⁵⁵ Tuinstra argues that, as a form of compensation in recognition of the difficulties faced by the Defence, judicial discretion could be used to exclude evidence in certain situations, such as where the Defence has received markedly disparate levels of co-operation.¹⁵⁶ Whilst this would go some way to readjusting an inequality in practice, it is doubtful whether an approach which involves the exclusion of otherwise admissible evidence would be well received in light of the aim of truth finding.

B. Witness testimony at the modern institutions

Whilst the Statute of the *ad hoc* Tribunals emphasises the duty of the Chambers to provide witnesses with protection, there was initially no explanation as to how this was to be achieved.¹⁵⁷ The Victims and Witnesses Unit (VWU) at the ICTY became operational in 1995 in an attempt to provide more support and protection for victims and witnesses, to include protective/confidentiality measures such as the redaction of witnesses' names, addresses, current locations, and other data which might reveal their identity.¹⁵⁸ The ICC developed on the practices of the *ad hoc* Tribunals, yet as Ngane observes, a more thorough and well organised scheme appears to have been created.¹⁵⁹ This is certainly the impression given by the Rome Statute and RPE of the ICC, which provides the Court with the ability to take measures to ensure the safety and psychological well-being of witnesses.¹⁶⁰ Rule 87(3) RPE sets out some of the main protective measures which can be taken by the Court, including: the removal of

¹⁵⁵ *Prosecutor v Tadić*, 'Judgement' Case No. IT-94-1-A (15 July 1999) para 49. Reaffirmed by: *Prosecutor v Kayishema*, 'Judgement (Reasons)' Case No. ICTR-95-1-A (1 June 2001) para 73. See, TUINSTR, J.T. (2009) p176

¹⁵⁶ *Ibid.* p177

¹⁵⁷ See, Article 22 ICTY Statute. Interestingly, it does not provide a definition of 'witnesses'.

¹⁵⁸ ZAPPALÀ, S. (2003) p237

¹⁵⁹ NGANE, S. N. (2009) at 451

¹⁶⁰ Article 87(4) ICC Rome Statute

names and other information from Court records; provisions for presenting evidence via electronic means¹⁶¹; the use of pseudonyms and *in camera* proceedings.

Whilst some witnesses may be reluctant to testify, others may identify various associated advantages, which could affect their motivations. This can have important implications with regard to the payment, or 'expense reimbursement', offered to witnesses in return for their testimony. The SCSL in particular has experienced difficulties with Prosecution witnesses being provided with clothing, food, accommodation and healthcare - all of which are of great value to the average Sierra Leonean.¹⁶² The provision of such 'expenses' can give the impression that witnesses are being paid for their testimony, which both undermines their reliability, and creates controversy.¹⁶³ Knowles warns that such practices result in the Prosecution securing allegiances with the witness, and creates a superior-subordinate relationship.¹⁶⁴ This is not conducive to encouraging witnesses to speak openly and uninhibitedly before the court, who should not be given the impression, overtly or otherwise, that they must testify with a particular objective in mind.

Another important factor to consider in the context of international trials is the potential for witnesses to have experienced horrendous events, which may have caused extensive physical and psychological suffering.¹⁶⁵ Additionally, due to the protracted nature of the trials, together with the time it may take for individuals to appear before a court, a significant amount of time may have elapsed between the occurrence of the events and the moment when a witness is asked to recall them. As Cryer suggests, memories will decay over time, and the further away events are, the more difficult recalling them becomes.¹⁶⁶ The extent of this is illustrated by the temporal

¹⁶¹ See also Rule 67 RPE. Rule 68 RPE also provides for pre-recorded testimony, as long as both parties have had the opportunity to cross examine the witness.

¹⁶² KNOWLES, P. (2006) 'The Power to Prosecute: the Special Court for Sierra Leone from a Defence Perspective.' 6 *International Criminal Law Review*. 387-417 at 401

¹⁶³ COCKAYNE, J. (2005) at 658

¹⁶⁴ KNOWLES, P. (2006) at 402

¹⁶⁵ CRYER, R. (2003) at 431

¹⁶⁶ *Ibid.* at 430

jurisdiction of the ICTY, which began in 1991, meaning that the witnesses involved in the on-going trials could be asked to recall incidents which took place some twenty-four years previously. The compounded difficulties of trauma and time elapsing should not be taken to mean that witnesses in such positions are not capable of providing meaningful testimony, yet it is advisable to exercise caution in the most extreme cases, particularly where their evidence may be given high evidentiary weighting by the judges.

Another issue, which is common to the inclusion of victims in the trial process, is that either due to a desire to encourage involvement, or else in sympathy for the experiences witnesses claim to have undergone, judges may be tempted to allow a witness to testify beyond what is directly relevant to the charges. Individuals may understandably be inclined to testify in a broad manner, rather than focus on one particular individual or event.¹⁶⁷ However, Cryer warns of the risks associated with the admission of evidence which is not relevant to the specific charges, since to stray from these issues is to risk prejudicing the defendant.¹⁶⁸ It would be a mistake for judges to think that they can remain immune from the often highly emotional and potentially unfocused evidence to which a witness testifies.¹⁶⁹

A final issue worthy of consideration here is the potential for witnesses to falsify their evidence. The reliability of a witness must be tested in the judicial process so that their testimony can be accorded sufficient weighting. Unfortunately, there have been several instances over the past few decades where witnesses have falsified their testimony, highlighting the need for a robust approach. This was particularly notable in the ICTY case of *Tadić*, in which Witness 'L', who was given full anonymity, was later disqualified for lying about the death of his father.¹⁷⁰ Defence counsel Wladimiroff

¹⁶⁷ *Ibid.* at 419

¹⁶⁸ *Ibid.* at 418-9

¹⁶⁹ *Ibid.* at 420

¹⁷⁰ *Prosecutor v Tadić*, 'Decision on Prosecution Motion to Withdraw Protective Measures for Witness L.' (5 December 1996) Case No. IT-94-1-T para 4

recalls how the father was later found alive as a result of defence investigations, which revealed multiple inconsistencies in his testimony.¹⁷¹ Thus, the Defence must be empowered to investigate such matters, again highlighting the importance of adequate funding for defence investigations. However, Wladimiroff notes that such successful detection, as in the instance of witness 'L', is the exception rather than the norm.¹⁷² At the ICC, Chambers found in *Lubanga* that intermediaries '*persuaded, encouraged, or assisted witnesses to give false evidence*',¹⁷³ suggesting that there are broader issues concerning the professional and proper conduct of court officials. Ultimately, the truthfulness of witness testimony cannot go unquestioned, despite any inclination to accept their accounts unconditionally by virtue of what they claim to have experienced.

C. Witness anonymity

Anonymising witnesses' identities is the most common means of providing protection. Without the ability to provide anonymity, the courts would be at far greater risk of witnesses refusing to testify, thereby eliminating an important form of evidence.¹⁷⁴ Damaška describes the use of anonymous witness as '*one of the thorniest issues*' in terms of the potential impact on the accused, who is '*greatly restricted if he is unfamiliar with their identity*'.¹⁷⁵ It becomes difficult for defence counsel to cross-examine a witness effectively without knowing their identity, background, and location

¹⁷¹ WLADIMIROFF, M. (May 2002) 'Challenges for Defence Lawyers Taking Cases for an International Tribunal.' 53 *Deutscher Anwaltstag*. Available online at: http://www.wlaws.com/Challenges_for_defence_lawyers_taking_cases_before_an_international_tribunal.pdf [Last accessed 1.9.2014]

¹⁷² *Ibid.*

¹⁷³ *Prosecutor v Thomas Lubanga Dyilo*, 'Judgment' (14 March 2012) *supra* para 483

¹⁷⁴ (EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' 114(7) *Harvard Law Review*. 1982-2006 at 1990

¹⁷⁵ DAMAŠKA, M. (2012) at 617-8

at the time of the events.¹⁷⁶ Furthermore, information which identifies the witness necessarily must also be withheld from the public domain. The use of closed *in camera* sessions, or else considerable redactions to the court records, undermines the public nature of trials, which is one of the safeguards to ensuring fair process.¹⁷⁷ This lack of public scrutiny, Pozen argues, ‘*can allow witnesses to give false or misleading testimony that can prejudice the outcome of a trial*’.¹⁷⁸ A public trial is an important means of ensuring that the accused’s fair trial rights are being respected.¹⁷⁹

The use of anonymity has been most extensively explored in the ICTY case of *Tadić*, in which the Trial Chamber ordered various anonymity measures.¹⁸⁰ Interestingly, it noted that the ‘*International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some prejudice is inevitable*’.¹⁸¹ Judge Stephen received praise for his dissenting opinion critiquing the extent of witness anonymity and its inconsistency with the rights of the accused.¹⁸² Robertson has openly criticised the majority’s decision as being a ‘*woeful piece of jurisprudence*’, which misconstrues the Statute, as well as case precedent.¹⁸³ Zappalà argues that the views of Judge Stephen can be confirmed as being ‘*correct*’ upon examination of Article 67 of the Statute concerning the right to a public hearing, which should not impact on the fairness of the proceedings, despite acceptable limitations.¹⁸⁴ Leigh contends that the RPE ‘*clearly do not contemplate so drastic a procedure as withholding from the accused the names of his accusers*’.¹⁸⁵ Furthermore, he argues

¹⁷⁶ LEIGH, M. (1996) ‘The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused.’ **90** *American Journal of International Law*. 235-238 at 236

¹⁷⁷ KNOWLES, P. (2006) at 403

¹⁷⁸ POZEN, J. (2005-6) ‘Justice Obscured: The Non-Disclosure of Witnesses’ Identities in ICTR Trials.’ **38(1)** *New York University Journal of International Law and Politics*. 281-322 at 291

¹⁷⁹ *Ibid.*

¹⁸⁰ *Prosecutor v Tadić*, ‘Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses.’ (10 August 1995) Case No. IT-94-1-A

¹⁸¹ *Ibid.* para 66

¹⁸² (EDITORIAL) (2001) at 1987-8

¹⁸³ Robertson, G. ‘War crimes deserve a fair trial.’ *Times* (June 25 1996)

¹⁸⁴ ZAPPALÀ, S. ‘The Rights of the Accused.’ in CASSESE, A. *et al* (2002) *supra* p1333

¹⁸⁵ LEIGH, M. (1996) at 236

that Rules 69 and 75 RPE in fact '*point in the opposite direction*' so as to suggest that the rights of the accused must be respected, nor is it specified that the identities of victims may be withheld from the accused.¹⁸⁶

Caution should be exercised in the issuing of anonymity. The *Fofana* case at the SCSL revealed the '*the absurdity of the blanket approach*', whereby thirteen witnesses had testified under protective measures despite only one of them expressing a fear of reprisals.¹⁸⁷ In fact, numerous witnesses had expressed that they were unafraid to testify.¹⁸⁸ Ultimately, although there is a need to provide genuine witnesses of horrific crimes with anonymity for their own protection, they must still testify in a manner which accords with rigorous due process protections.¹⁸⁹

5. Conclusion

This Chapter has attempted to provide an overview of a number of issues which unbalance the EoA in relation to evidentiary matters in ICJ. The proper and timely disclosure of evidence is of fundamental importance to the Defence. There is particular cause for concern regarding the approach taken by the Prosecution at the ICC. Where the OTP fails to disclose exculpatory evidence in a manner which is '*repeated and blatant*', Caianello argues that '*it should lead to the dismissal of the charges against the accused*'.¹⁹⁰ Certainly a much tougher stance should be taken by the judges. The inappropriate use of confidentiality agreements to create 'springboard' evidence must also be firmly rejected by the Court. As Swoboda argues, the '*ICC must combat*

¹⁸⁶ *Ibid.* at 236-7. N.B. the phrasing of Rule 75, which states: (a) A Judge or a Chamber may, [...] order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. *Emphasis added*.

¹⁸⁷ KNOWLES, P. (2006) at 400 & see *fn* 48 for more detail.

Prosecutor v Fofana and Kondewa 'CDF Case', Case No. SCSL-04-14

¹⁸⁸ *Ibid.* at 400

¹⁸⁹ Robertson, G. (1996) *supra*

¹⁹⁰ CAIANIELLO, M. (2011) p312

secretiveness at the disclosure stage'.¹⁹¹ Late disclosure by the Prosecution is arguably deserving of most criticism. Although the Prosecution could be seen to be technically acting within the Statute and Rules, the fairness of the proceedings could be jeopardised. Defence teams have complained that the Prosecution will reveal thousands of pages of documents, with no indication as to which might be relevant or exculpatory.¹⁹² Certainly some defence attorneys believe that the delaying of disclosure is an intentional tactic '*designed to overwhelm them and exhaust their resources*'.¹⁹³ Thus, issues of disclosure can impact significantly on the fairness of the proceedings which, as Swoboda argues, '*will almost inevitably vitiate the whole trial*'.¹⁹⁴

There are clear examples across the institutions which serve as a warning regarding the potential dangers associated with witnesses who falsify their evidence, or accept bribes. Wherever possible, there should be an emphasis on live testimony over written, so that the accused's right to '*examine or cross-examine witnesses*' is '*respected in the most practicable way possible*'.¹⁹⁵ The incidents of untruthful witnesses further confirms the need for a defence investigation budget which provides a meaningful opportunity to verify the truthfulness of their statements.

Part III of this thesis has considered a vast array of issues relating to the practical application of fair trial principles, in particular EoA. Chapter 6 examined the comparative funding of the Prosecution and Defence at each of the modern institutions, consistently revealing worrying discrepancies between the two parties. Chapter 7 highlighted crucial shortcomings concerning institutional EoA, exploring issues such as the dual role of the Prosecutor at the ICC, the impact of victim participation and the influence of the judiciary. Chapter 8 then analysed the problems associated with

¹⁹¹ SWOBODA, S. (2008) at 472

¹⁹² TURNER, J.I. (2008) at 577-8

¹⁹³ *Ibid.*

¹⁹⁴ SWOBODA, S. (2008) at 472

¹⁹⁵ CAIANIELLO, M. (2011) p314

evidentiary matters, highlighting the numerous difficulties associated with pre-trial investigations, the disclosure of evidence, and the impact of witness testimony.

The issues explored across the Chapters in Part III strongly suggest that it is reasonable to assert that the theoretical commitment to crucial principles of fairness, and the corresponding rights of the accused, have failed to translate into meaningful, practical protections throughout the trial process. Evidence of an Inequality of Arms with respect to just one of these important aspects could risk undermining the fairness of the proceedings. That there is a marked disparity between the parties with respect to such a vast array of issues indicates that there is an extensive and systematic Inequality of Arms at the modern institutions. This is perhaps most vehemently expressed by Xavier-Jean Keïta, the Principal Defender at the OPCD at the ICC:

*“Equality of arms doesn’t exist at all in ICC. Why? It’s natural and it’s not only ICC, it is in all systems. The Defence arriving is not organised like the Prosecutor; it’s just a counsel, freely chosen by his client, who organises his defence team, facing the machine - the big machine - of the Office of the Prosecutor.”*¹⁹⁶

The true extent of the InEquality of Arms in ICL is deserving of far greater recognition. The inherent conflict between idealistic fair trial aspirations, and the anxiety which surrounds the international accused, could threaten the legitimacy of the modern institutions if the latter is permitted to corrode the important principles upon which the courts and tribunals have been founded.

¹⁹⁶ Xavier-Jean Keïta, Principal Defender OPCD, ICC. IBA Video: ‘In the dock - Defence Rights at the International Criminal Court’, available via: <http://vimeo.com/23958341> [Last accessed 25.8.2014]

Chapter 9.

Conclusion

The Hypoplasia of the Defence in ICL: An Institutional (in)Equality of Arms?

*'No system is perfect. All war criminals will not be caught.
Fair trials can never be taken for granted.'*¹

1. Introduction

This thesis has sought to demonstrate that the inferior position of the Defence has arisen as a result of a profound conflict at the heart of ICL, which has led to its institutional 'otherisation'. The tension arises as a result of a conflict between the anxiety which surrounds the international accused and his trial, and the substantial international effort and commitment to the realisation of important '*cosmopolitan ideals and practices*',² including fair trial rights and protections. Despite the impressive developments in ICL over recent decades, it is argued that the anxieties which surround the accused have placed at risk the commitment to important principles of fairness, due process and Equality of Arms (EoA). The institutional 'otherisation' has resulted in the Defence having been marginalised, forgotten and even excluded at the modern institutions. This Conclusion will begin by reflecting in Section 2 on the extent of the 'otherisation' of the defendant in ICJ, whereby the tendency is to treat the accused as less than human, and thus undeserving of fair trial protections and guarantees.

¹ GROULX, E. (2010b) 'The New International Justice System and the Challenges Facing the Legal Profession. *Revue Quebecoise de Droit International*. 39-74 at 65

² HAYDEN, P. (2009) '*Political Evil in a Global Age: Hannah Arendt and International Theory*.' Oxon, Routledge. p9.

Section 3 will address the other concept central to this thesis: the ‘hypoplasia’ of the Defence in ICL. The institutional otherisation has contributed towards the systemic hypoplasia which, in turn, has created an Inequality of Arms at the modern institutions. The limited and delayed development of the Defence has given rise to significant and long-lasting disparities with the Prosecution in regards to many issues such as architectural structure, financial resources and complex procedural issues.³

Section 4 will then consider the most difficult challenges which are unique to the Defence at the ICC, as well as some wider lessons which would be of value to any future ICL institution. In Section 5, the seductive danger of the ‘aura of credibility’ which surrounds many of the international institutions will be highlighted, arguing that true legitimacy cannot be achieved through rubber-stamping convictions. Thus, a healthy degree of scepticism and incisive critique is required to ensure that the modern institutions create lasting and meaningful legacies of justice. Ultimately, this thesis will conclude that the unique nature of ICL poses particular and complex difficulties for the provision of an accused’s defence. Greater awareness of the structural ambiguity which surrounds the international accused is indispensable if the theoretical commitment to fair trials is to translate into a genuine opportunity for the accused to defend himself of the charges.

2. The institutional ‘otherisation’ of the Defence in ICL

The rejection of those accused of international crimes, who are deemed to be ‘evil’ or ‘monstrous’, can perpetuate a culture of Defence ‘otherisation’. The dichotomy of good and evil greatly oversimplifies the profound complexity of international crimes. It has been observed that the most important legacy of the NIMT, despite its delayed impact,

³ As discussed in Part III.

is that the international criminal trial has come to be regarded as the dominant response to the perpetrators of serious crime.⁴ Through such trials, idealisations of ‘*pure guilt and pure innocence*’⁵ are sought in an attempt to rationalise the actions of individuals. Yet, as Groulx reminds us, ‘*very few cases are clear-cut*’ in the international context, as they often comprise ‘*many shades of grey*’.⁶ Furthermore, the lengthy decisions of the modern institutions will not provide clear answers for many issues, as such judgements will ‘*encompass a wide range of possible states of the world, from clear innocence and scant evidence of guilt, to its substantial probability*’.⁷

The process of ‘otherisation’ can have profound consequences for the ICL accused. In order to be considered worthy of human rights, an individual must be regarded as *being* human. Labelling another as ‘monstrous’⁸ can in turn suggest that it is ‘*considered acceptable to eradicate this threat*’.⁹ Svendsen observes that, as a result, it is essential to recognise the ‘*humanity of each and every person*’.¹⁰ In addition, he argues that our perception of their evil does not in turn guarantee our own virtue, nor does it follow that ‘*whatever means we use to fight them is good*’.¹¹ Thus, any ‘*thirst for revenge*’ must not amount to an eagerness for a guilty verdict.¹² As Wladimiroff argued in his opening remarks in defending *Tadić* at the ICTY, the danger is that this thirst is ‘*satisfied at the well of polluted justice*’.¹³ Furthermore, Newton

⁴ NIELSEN, C. (2008) ‘From Nuremberg to the Hague: The Civilizing Mission of International Criminal Law.’ **14** *Auckland University Law Review*. 81-114 at 102

⁵ SVENDSEN, L. (2001) ‘A Philosophy of Evil.’ Champaign, IL., Dalkey Archive. p156

⁶ GROULX, E. (2010a) “Equality of Arms”: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System.’ *Revue Quebecoise de Droit International*. 21-38 at 34

⁷ DAMAŠKA, M. (2011) ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals.’ **36(2)** *North Carolina Journal of International Law and Commercial Regulation*. 365-388 at 372

⁸ At the ICC - Ntaganda has become known as the ‘terminator’. See, *The Prosecutor v. Bosco Ntaganda*, ICC Case No. ICC-01/04-02/06. *Ntaganda* surrendered to the ICC in March 2013; publicly known as the ‘terminator’, the name still dominates headlines. See, BBC News article ‘Profile: Bosco Ntaganda the Congolese Terminator’. Available at: <http://www.bbc.co.uk/news/world-africa-17689131> [Last accessed 11.9.1014]

⁹ SVENDSEN, L. (2001) ‘A Philosophy of Evil.’ Champaign, IL., Dalkey Archive. p132

¹⁰ *Ibid.*

¹¹ *Ibid.* p126

¹² *Prosecutor v. Tadić*, Opening Remarks, (7 May 1996) Case No. IT-94-1-T at 53

¹³ *Ibid.*

observes that '*authentic justice is not achieved on the wings of societal vengeance, innuendo, or external manipulation*'.¹⁴

This thesis has sought to highlight the institutional nature of the otherisation of the Defence in ICL. The profound lack of interest in Defence issues has given rise to a culture of exclusion at the modern institutions. For example, at the ICTY, the Defence has been omitted routinely from various events, such as press briefings and working groups relating to the scheduling of cases, which has caused difficulties with developing strategies and allocating funding.¹⁵ The Defence units at the modern institutions are often physically located either off-site, or at a significant distance from the main organs, such as the Registry, Prosecution and Chambers.¹⁶ Tolbert asserts that this is '*perhaps a metaphor for where the defense fits into the scheme of things*'.¹⁷ Starr observes that the isolation of the Defence '*may undermine performance*', since counsel are '*less able to build a collaborative community with institutional memory that may improve the quality of representation*'.¹⁸ Ultimately, defence counsel appear to be '*less integrated*',¹⁹ and even excluded at an institutional level. This is regrettable given the invaluable and substantial role of defence counsel in the trial process.²⁰

It has been argued here that the strength of the hostility towards the accused in ICJ exceeds that which is experienced by the accused at national levels. As observed in Chapter 3, defence counsel are far more likely to be '*stigmatised than praised*' in the

¹⁴ NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** *Stanford Journal of International Law*. 379-440 at 383

¹⁵ MCGONIGLE, B. (2005) 'De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia.' **13** No. 1 *Human Rights Brief*. 10-13 at 12

¹⁶ TOLBERT, D. (2003) 'The ICTY and Defence Counsel: A Troubled Relationship.' **37** *New England Law Review*. 975-986 at 976

¹⁷ *Ibid.*

¹⁸ STARR, S.B. (2009) 'Ensuring Defense Counsel Competence at International Criminal Tribunals.' **14** *UCLA Journal of International Law and Foreign Affairs*. 169-206 at 176

¹⁹ *Ibid.*

²⁰ KAY, S. & SWART, B. 'The Role of the Defence' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) '*The Rome Statute of the International Criminal Court: A Commentary*.' VOLUME II. Oxford, OUP. p1423

course of representing their clients.²¹ This is evidenced by the fact that, for example, during the course of the Iraqi High Tribunal, four defence lawyers were murdered.²² Defending an accused is by no means an easy task, as they must ‘*act with due diligence regarding the truthfulness of his or her own strategies and statements*’, whilst still striving to secure the ‘*best result possible*’ with the client in mind.²³ As Safferling argues, these ‘*antagonistic tasks are not easy to bridge*’, making the role of defence counsel one of the ‘*most challenging amongst all the participants in a criminal trial*’.²⁴

The stigma which attaches to those accused of international crimes, even when later acquitted, demonstrates the longevity of the otherisation. The internationalisation of courts and tribunals presents unique difficulties for the relocation of the acquitted. Van Wijk notes that at the time of writing in 2013, *Ntagerura*, who was acquitted at the ICTR in 2006, had little choice but to reside in a safe-house in Tanzania.²⁵ The acquitted are at risk of being left ‘stranded’, with institutions having to rely on the ‘*benevolence of individual states*’, which are ‘*not known for basing their policy on compassion*’.²⁶ It will be difficult for the modern institutions to continue to claim that rehabilitation is amongst their expressed objectives, if ‘*such rehabilitation can de facto not take place*’.²⁷

Unfortunately, the problem of the Defence in ICL is unlikely to become a topic which will readily attract a level of concern commensurate with its importance to the

²¹ ‘*One is far more likely to be stigmatised than praised for engaging with them.*’ GOODE, E. & BEN-YEHUDA, N. (1994) ‘*Moral Panics: The Social Construction of Deviance.*’ Oxford, Blackwell. p71

²² SKILBECK, R. (2008a) ‘Defending the Khmer Rouge.’ *8 International Criminal Law Review*. 423-445 at 438. See also, Human Right’s Watch article: ‘Iraq: Court Must Act to Protect Defense Counsel’ <http://www.hrw.org/news/2006/06/26/iraq-court-must-act-protect-defense-counsel> [Last accessed 11.9.2014]

²³ SAFFERLING, C. (2012) ‘*International Criminal Procedure.*’ Oxford, OUP. p192

²⁴ *Ibid.*

²⁵ *Prosecution v. André Ntagerura*, Case No. ICTR-96-10A.

VAN WIJK, J. (2013) ‘When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released.’ *26 Leiden Journal of International Law*. 173-191 at 185

²⁶ *Ibid.*

²⁷ *Ibid.* at 190

trial process. Damaška argues that there is a reluctance to critique the shortcomings of international justice, since it *'implies the frustrating abandonment of noble intentions'*.²⁸ When discussing issues relating to the unpopular plight of the accused, these feelings are compounded. As discussed in Chapter 5, Groulx recalled the unwelcome response provoked by the proposal calling for a separate defence office at the Rome Conference of the ICC, which *'everybody wanted forgotten'*.²⁹ Arguments for the importance of fair trial rights and procedures are even more unpalatable when they question, for example, the suitability of including victims at the *'centre of the mission'* of the modern institutions.³⁰ Damaška reflects on the *'unenviable position'* of maintaining such a critique, which can *'easily be interpreted as evincing a gravedigger's indifference to human suffering'*.³¹ Regrettably, the otherisation of the Defence therefore can be said to extend as far as academic commentary. Increased insightful discussion of issues, such as those explored in this thesis, would help to draw attention to the plight of the Defence, in turn strengthening and legitimising the work of the modern institutions, rather than damaging their hard-won achievements.

3. The institutional 'hypoplasia' of the Defence and EoA

The institutional 'otherisation' of the Defence has significantly limited and delayed its development at the modern institutions. This thesis has sought to explore the concept of 'hypoplasia', which arises as a result of the systemic institutional otherisation. Hypoplasia best represents the resultant arrested development of the Defence in ICL, as well as the ongoing struggle to progress and mature as a unit. This hypoplasia

²⁸ DAMAŠKA, M. (2009) 'The International Criminal Court Between Aspiration and Achievement.' **14** *UCLA Journal of International Law & Foreign Affairs*. 19-35 at 34-5

²⁹ GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) *Champion*. 20-27 at 24

³⁰ As argued by DAMAŠKA, M. (2009) at 32

³¹ *Ibid.* at 34-5

poses a serious threat to upholding the principle of EoA given the significant and enduring disparities in comparison to the Prosecution, which in contrast benefits from a strong institutional standing, and considerable resources.³²

Chapter 5 of this thesis examined the structural position of the Defence, revealing a consistent hypoplasia in the unit's formation within the institutions' frameworks. As Newton observes, EoA is a '*structural impossibility in the current system of international justice*'.³³ This issue is troublesome, not just from a theoretical perspective; defence teams have, '*over and over again*', suffered the '*same problems and frustrations*'.³⁴ Particularly at the permanent ICC, it was crucially important that the architectural design of the institution be carefully considered. As Groulx has noted, the structure needed to '*stand the test of time*', and the inclusion of a defence organ would have strengthened '*the system itself*'.³⁵ It is somewhat disheartening to note that both academics and practitioners forewarned of the need for a separate, independent defence unit.³⁶ For example, Creta advised in 1998 that the design adopted at the *ad hoc* Tribunals '*should not serve as a model for a permanent international criminal court*'.³⁷ The Rome Statue of the ICC, and thus the Court's structure, is now almost irrevocably fixed in practical terms. An amendment is unlikely due to the '*lengthy process of ratification*' which would be required,³⁸ let alone the lack of impetus to

³² These issues have been explored across Chapters 6, 7 & 8.

³³ NEWTON, M.A. (2011) at 385

³⁴ METTRAUX, G. & CENGIC, A. 'The Role of a Defence Office - Some Lessons from Recent and not so Recent War Crimes Precedents.' in BOHLANDER, M. (Ed.) (2007) '*International Criminal Justice: A Critical Analysis of Institutions and Procedures*.' London, Cameron May. p419

³⁵ GROULX, E. (2001) at 24

³⁶ See, *ibid.* at 27

³⁷ CRETA, V.M. (1998) 'The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.' *20 Houston Journal of International Law*. 381-418 at 384

³⁸ BASSIOUNI, M.C. (1999) 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court.' *32 Cornell International Law Journal*. 443-469 at 466

strengthen the position of the Defence.³⁹ Nevertheless, some commentators are convinced that an amendment, giving the Defence the status of a truly independent organ, is still necessary.⁴⁰ Ultimately, due to the lack of institutional presence of the Defence, together with limited financial support, there is the risk that the '*legitimacy of the international criminal justice system will erode*'.⁴¹

The most significant manifestation of the hypoplasia of the Defence from a practical, operational perspective relates to funding, as discussed in Chapter 6. As Mettraux and Cengic explain, the provision of '*adequate resources*' for the Defence does not necessitate extravagance.⁴² Rather, funding should be '*proportionate to the tasks and responsibility assigned to the defence office, and should not be disproportionately lower than those attributed to the prosecution having taken into account the difference in their respective mandate and obligations*'.⁴³ Regrettably, the Registry has more recently recommended reducing the Defence investigation budget from €73,006 per team, to €50,000⁴⁴ - a decrease of more than thirty percent. The risk inherent with inadequately funding the Defence is that justice which is '*obtained too cheaply, risks becoming no justice at all*'.⁴⁵ As Cohen asserts, the '*final question must always be, "cheaper, but at what cost?"*'.⁴⁶ Ultimately, Mettraux and Cengic argue that if there is a lack of commitment to properly fund the Defence, so as to '*meet the basic requirements of fair trial and guarantee effective representation for the accused*', then

³⁹ The Defence was given little attention at the Review Conference held in 2010 in Kampala, Uganda. The focus largely fell to defining the crime of aggression. See, IBA 'What did the ICC Review Conference achieve? (November 2010) Volume 2(2) EQ: Equality of Arms Review. Available at: <http://goo.gl/np5RQK> [Last accessed 12.9.2014]

⁴⁰ GALLANT K.S. (2003) 'Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.' **14** *Criminal Law Forum*. 317-334 at 328

⁴¹ MCGONIGLE, B. (2005) at 13

⁴² METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p423

⁴³ *Ibid.*

⁴⁴ ICC Assembly of State Parties, Thirteenth Session, 'Registry report on ways to improve the legal aid procedures' (22 May 2014) Doc. No. ICC-ASP/13/6 p1

⁴⁵ COHEN, D. (2007) 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future.' **43** *Stanford Journal of International Law*. 1-38 at 19

⁴⁶ *Ibid.* at 37-8

the trials should simply not be conducted.⁴⁷ Groulx echoes this view, arguing that '*if the trial is worth conducting, it is worth conducting fairly*'.⁴⁸ However, in fairness to the ICC, if Member States paid their assessed contributions on time and in full, which many fail to do,⁴⁹ the Court might be more willing to allocate increased funding to the Defence.

It should also be recognised that a well-funded, and therefore strong Defence should not be met with apprehension, as it would '*help ensure that international Prosecution can more effectively fulfil its own mandate*'.⁵⁰ In the *Lubanga* decision, the Chamber was overtly critical of the Prosecution, particularly with regard to the use of intermediaries, highlighting its '*negligence in failing to verify and scrutinise*' the relevant material.⁵¹ Thus, it can be argued that a stronger Defence would help to encourage better practices on behalf of the Prosecution, and thus the system as a whole. A meaningful EoA relies upon respect for the role of the Defence, as well as adequate funding and support during the trial process in order to provide the accused with a reasonable opportunity to defend the accusations against him.

⁴⁷ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p423

⁴⁸ GROULX, E. (2001) p24

⁴⁹ NEGRI, S. 'Equality of Arms - Guiding Light or Empty Shell?' in BOHLANDER, M. (Ed.) (2007) *supra* p49

⁵⁰ (EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' **114(7)** *Harvard Law Review*. 1982-2006 at 2006

⁵¹ *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) Doc. No. ICC-01/04-01/06-2842 para 482

4. Unique challenges for the Defence at the ICC, and valuable lessons for future institutions

A. Problems unique to the Defence at the ICC

Due to the ICC's permanency, and thus its longevity in comparison with the other modern institutions, a rigorous programme of self-critique and self-improvement is essential in order to avoid complacency. Regarding defence issues, this necessitates questioning institution-wide attitudes. The NIMT demonstrated a '*dichotomy between prosecutors and defence counsel*', which Sarvarian argues, '*largely continues before the ad hoc tribunals and the ICC*'.⁵² Perhaps the key to addressing the '*fight culture*' which has emerged at the Court,⁵³ lies with all personnel who must make a conscious effort to 'transcend' their own legal backgrounds. As discussed in Chapter 7, this is particularly true of the Prosecution, whose role extends beyond a mere party to the proceedings,⁵⁴ by virtue of its complex dual role, obligating them to investigate in a neutral manner. As a result, the fairness of the proceedings is, to great extent, at the discretion of the judiciary.⁵⁵ The *Lubanga* case has demonstrated the pressing need for judges to '*watch very carefully over the investigative activities of the prosecutor*'.⁵⁶ However, judges cannot shoulder this burden alone, nor can they oversee all the activities of the parties. The improper use of confidentiality agreements by the

⁵² SARVARIAN, A. (2012) 'Ethical Standards for Prosecution and Defence Counsel before International Courts. The Legacy of Nuremberg.' **10** Journal of International Criminal Justice. 423-446 at 445

⁵³ VERRIJN STUART, H. (2008) 'The ICC in Trouble.' **6** Journal of International Criminal Justice. 409-417 at 416

⁵⁴ ZAPPALÀ, S. (2003) 'Human Rights in International Criminal Proceedings.' Oxford, OUP. p251

⁵⁵ FAIRLIE, M. (2004) 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit.' **4** International Criminal Law Review. 243-319 at 292-3

⁵⁶ SAFFERLING, C. (2011) 'The Rights and Interests of the Defence in the Pre-Trial Phase.' **9** Journal of International Criminal Justice. 651-667 at 666-7

Prosecution has meant that the '*core role of the judges to guarantee a fair trial and to be the custodian of the custodians, has become moot*'.⁵⁷

The ICC is an unique system, without parallel in ICL. Fedorova argues that, in recognition of this, '*one should look beyond the procedural adversarial-inquisitorial dichotomy*'.⁵⁸ Attempts to balance and combine the two systems should be abandoned in favour of establishing a system which is '*autonomous and coherent*', as well as '*effective in the achievement of its objectives*'.⁵⁹ Certain features of the Court are now largely fixed, such the internal architecture. Thus, the Defence will have to operate from within the Registry, which requires organisational measures to enhance its independence, as well as to ensure a '*just distribution of powers*' between the organs of the Court.⁶⁰

Chapter 5 examined the role of 'ad-hoc' counsel, unique to the ICC by virtue of its trial structure, which is arguably one of the most pressing concerns relating to the rights of the accused. As Katzman argues, the current system is '*disjointed*', and thus '*creates an opportunity for prosecutorial abuse of power*'.⁶¹ The gap which is created in the fair trial process needs to be addressed without delay. Dieckmann and Kerll suggest the appointment of a lead *ad-hoc* counsel, who would be given a broad mandate to address all manner of issues of concern to the Defence.⁶² Furthermore, they suggest that the *ad-hoc* counsel should be given funds for '*co-counsel, legal*

⁵⁷ VERRIJN STUART, H. (2008) at 414

⁵⁸ FEDOROVA, M. (2012) p133

⁵⁹ *Ibid.*

⁶⁰ BUCHET, A. 'Effectiveness and Independence in the Implementation of the Rights of the Defence before the ICC.' in BEVERS, H. & JOUBERT, C. (2000) (Eds.) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis. p79

⁶¹ KATZMAN, R. (2009) 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial.' **8(1) Northwestern Journal of International Human Rights**. 77-101 at 78

⁶² DIECKMANN, J. & KERLL, C. (2011) 'Representing the "General Interests of the Defence": Boon or Bane? - A Stocktaking of the System of the Ad Hoc Counsel at the ICC.' **11 International Criminal Law Review**. 105-136 at 134

assistants and a case manager to provide support as required for every potential pre-trial procedure'.⁶³

Ultimately, the ICC's *sui generis* system has produced unique 'pitfalls'. Chapter 7 examined some of the key examples of these pitfalls, including: the dual role of the Prosecutor; the differences in judicial approaches; and the way in which victim testimony is actively included in the trial process. Arguably, recognising the Court as being without parallel could help to encourage more incisive discussion regarding such issues.

B. Wider lessons concerning the Defence in ICL

Chapter 5 highlighted the lack of consideration given to the Defence in the formation of the modern institutions; its late implementation in comparison to the other organs;⁶⁴ and its lack of institutional independence; all of which are just some examples of the profound hypoplasia of the Defence in ICL. The difficulties experienced by the Defence to date '*provide current and future international tribunals with ample opportunity to avoid mistakes*'.⁶⁵ Emphasis should be placed on the individuals involved with making critical decisions regarding the formation of an institution's structure and operation, as they '*must understand the particular difficulties and challenges*' which are specific to the Defence.⁶⁶ Mettraux and Cengic argue that defence offices which operate from within the Registry have often '*been the source of much of their administrative headaches*', '*rather than helping them out of the paper forest*'.⁶⁷ The inclusion of an

⁶³ *Ibid.*

⁶⁴ '*The suggestion that a Defence office only needs to be set up once a case is before the court demonstrates either a very limited understanding of defence work, or a casual disregard for the rights and interests of the accused.*' METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p396

⁶⁵ ELLIS, M.S. (2003) at 506

⁶⁶ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) p424

⁶⁷ *Ibid.* at p417

independent defence office at every such institution would provide invaluable support, particularly during the early stages of representation.⁶⁸ A defence office must be created '*as early as possible into the life*' of a court or tribunal, and should go beyond dealing with mere administrative or financial matters.⁶⁹

In terms of institutional attitudes, Karnavas argues that actors involved with trials, such as the judiciary, Prosecution and Registry personnel, '*express only the faintest of interest*' in levelling the '*playing field*'.⁷⁰ Unfortunately, it may be the case that an internal '*institutional bias*' with respect to the Defence has now become deeply '*entrenched*' amongst the '*permanent prosecutorial, judicial, and administrative staff*'.⁷¹ From an external perspective, Cogan argues that '*court proponents*', would '*do well to speak more of the rights of the accused*'.⁷² In addition, particular care should be taken to avoid issuing statements which impute the guilt of the accused prior to their trial, and the issuing of the judgement.⁷³ Particularly where the Prosecution has the benefit of spokespeople, or a public relations office, any '*unfortunate utterances*' which are made in relation to an accused cannot be justified easily.⁷⁴

Ultimately, the many difficulties associated with defence representation which arise in the international context, including the organisation and funding of the Defence, provide important lessons for any future institutions. However, the perpetual risk that the anxiety which surrounds those accused of serious international crimes will influence the institutions to the detriment of the accused, still remains.

⁶⁸ HIGGINS, G. (2007) 'Fair and Expeditious Pre-Trial Proceedings.' **5** Journal of International Criminal Justice. 394-401 at 399

⁶⁹ METTRAUX, G. & CENGIC, A. in BOHLANDER, M. (2007) pp.427-8

⁷⁰ KARNAVAS, M.G. 'Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.' in BOHLANDER, M. (2007) *supra* p92

⁷¹ (EDITORIAL) (2001) at 2005

⁷² COGAN, J.K. (2002) at 139

⁷³ ASHWORTH, A. (2006) 'Four Threats to the Presumption of Innocence.' **10** International Journal of Evidence & Proof. 241-279 at 244

⁷⁴ WLADIMIROFF, M. (2007-9) at 277-8

5. Demanding more than a ‘veneer of respectability’

The presumption of innocence has been observed as being ‘*often taken for granted, and thus only paid lip service*’.⁷⁵ Damaška persuasively articulates its importance for the modern institutions:

*‘In order to preserve their moral muscle, international criminal tribunals must maintain a degree of suspense in regard to the final outcome. If the perception were to spread that they stack the deck against the defendant, or that their proceedings are programmed to lead to convictions, their legitimacy in the eyes of their audiences would be doomed.’*⁷⁶

If the modern institutions are perceived to deteriorate into mere sentencing mechanisms, designed only to convict individuals without due process protections, there will be little justice for any of the interested parties. The institutions’ legitimacy would be substantially endangered.⁷⁷ Groulx warns of the perils of ‘*rubber stamping*’ convictions.⁷⁸ Some of the pressures on the modern institutions arguably would be relieved if ‘*international criminal justice were more modest in its ambitions*’.⁷⁹ Damaška notes that even national systems, which have far greater institutional support and enforcement powers, ‘*could buckle under the weight of a comparable agenda*’.⁸⁰

The influence of ICL’s ‘reputation’ is worthy of consideration. Law is imperialistic by virtue of its ability to legitimise the use of force and control over individuals, through all manner of institutions, particularly the trial process.⁸¹ It should be questioned whether the modern institutions maintain only a ‘veneer of legitimacy’. As Fedorova

⁷⁵ WLADIMIROFF, M. (2007-9) ‘Defending Individuals Accused of Genocide.’ **40(1)** *Case Western Reserve Journal of International Law*. 271-280 at 271

⁷⁶ DAMAŠKA, M. (2011) at 387

⁷⁷ ELLIS, M.S. (2003) ‘The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia.’ **37** *New England Law Review*. 949-973 at 507

⁷⁸ GROULX, E. (2010b) at 53

⁷⁹ DAMAŠKA, M. (2011) at 377

⁸⁰ *Ibid.* at 376

⁸¹ ROCK, P. (1973) ‘*Deviant Behaviour*.’ London, Hutchinson & Co. pp.131-2

explains, *'the state retains the legitimacy aura through the process'*.⁸² This *'initial credibility'*, she argues, *'is already present in citizens who believe that a State is democratic and legitimate'*.⁸³ Mégret has warned of the dangers of assuming that the international institutions *'can do no wrong'*, arguing that this attitude may have contributed to them taking *'liberties with rules based on a faith in the ethics and good faith of international judges and prosecutors, and the self-correcting virtues of the system'*.⁸⁴ Ultimately, the modern courts and tribunals should always be analysed with a healthy degree of scepticism, looking beyond any veneer of respectability. As Cogan argues, all *'observer-participants'* must act as *'watchdogs'* in *'sniffing out injustice to the internationally-accused and working to keep all the relevant actors on their toes'*.⁸⁵

6. Conclusion

*'The defense should never again be stereotyped as an ignoble and inconvenient afterthought.'*⁸⁶

This thesis has sought to draw attention to the extent of the otherisation and hypoplasia suffered by the Defence in ICL at all stages of its development. Its arrested development can be observed from the NIMT onwards, which, it has been argued, formed a defective blueprint regarding the role of the Defence at the subsequent modern institutions.

The collective consideration of the manifestations and consequences of the Defence's hypoplasia suggest there is an *Inequality of Arms* in ICL today, which is

⁸² FEDOROVA, M. (2012) *'The Principle of Equality of Arms in International Criminal Proceedings.'* Netherlands, Intersentia. p5

⁸³ *Ibid.*

⁸⁴ MÉGRET, F. (2009) *'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure.'* 14 *UCLA Journal of International Law and Foreign Affairs*. 37-76 at 72

⁸⁵ COGAN, J.K. (2002) *'International Criminal Courts and Fair Trials: Difficulties and Prospects.'* 27(1) *Yale Journal of International Law*. 111-140 at 139

⁸⁶ NEWTON, M.A. (2011) at 409

deserving of wider recognition. Whilst the Defence is provided with fair trial protections and guarantees in the statutes and working instruments, there is particular cause for concern regarding the practical manifestation of these rights into meaningful protections at trial. The procedures which are developed are of paramount importance, given that the '*very essence of a fair trial is a verdict based on regularized process*'.⁸⁷ The Principle of EoA is crucial in ensuring that the Defence is able to assist the accused in confronting the charges brought against him. EoA is at odds with the concept of seeking convictions regardless of culpability, since '*a battle between two equally equipped persons may well end undecided, or with the death of both.*'⁸⁸

Whilst there may be a theoretical agreement concerning the vital importance of the Defence to the functioning of fair trials, the mixed, *sui generis*, nature of the procedure at the modern institutions can be said to constitute one of the biggest threats to the fairness of the proceedings.⁸⁹ The aim of blending adversarial and inquisitorial features in order to produce a '*new hybrid*' system should ideally incorporate '*the best of both worlds*'.⁹⁰ However, the reality is that without the appropriate checks and balances, the system can include the worst features of both, as well as producing entirely new pitfalls of its own.⁹¹ Fairlie has referred to this as '*cafeteria inquisitorialism*', whereby adopting features which (at least in theory) can speed up trials, they in turn bypass important '*inherent procedural safeguards*'.⁹² To the detriment of the accused, it can be observed that '*bureaucratic considerations have clearly been given priority over due process and adversarial ones*'.⁹³

⁸⁷ *Ibid.* at 383

⁸⁸ SAFFERLING, C.J.M. (2001) 'Towards an International Criminal Procedure.' Oxford, OUP. p265

⁸⁹ As discussed in Chapter 2.

⁹⁰ SKILBECK, R. (2010a) 'Frankenstein's Monsters: Creating a New International Procedure' **8** Journal of International Criminal Justice. 451-462 at 452

⁹¹ *Ibid.*

⁹² FAIRLIE, M. (2003-4) 'Due Process Erosion: The Diminution of Live Testimony at the ICTY.' **34** Californian Western International Law Journal. 47-84 at 82

⁹³ VOGLER, R. (2005a) 'A World View of Criminal Justice.' England, Ashgate. p283

As the statutes and internal structures of the modern institutions are now largely 'set in stone', the burden of ensuring the Defence is supported in its difficult role must fall, at least in part, to the judiciary. Judges must recognise the limitations of the institutions, and become more actively aware of the '*difficulties inherent in international criminal defense*'.⁹⁴ They should therefore be ready and willing to provide meaningful support in order to begin to take account of the perpetually disadvantaged position of the Defence.

Whilst the denial of impunity is undoubtedly an important aim for ICJ, this should not be sought at any cost. To fail to uphold fair trial protections is to risk placing the modern institutions '*under a cloud*',⁹⁵ whereby they fail to be perceived as legitimate. This would be the most profound waste of the collective effort and resources which have given rise to the development of ICL over the past half century. Ultimately, the desire to convict those who are perceived to be guilty of serious crime will conflict with the provision of fair and dispassionate trials. Despite this tension, arguably the two are not fundamentally disconnected. As Zappalà observes, there is '*no truth outside the process; there is no truth that can be reached without full respect of the rights of the accused*'.⁹⁶

In conclusion, it is worth reiterating that hypoplasia is a congenital restriction, rather than a hereditary trait. Thus, the message for future institutions is one of hope; the arrested development of the Defence can be circumvented *if* it is provided, *ab initio*, with the necessary institutional standing and continuous support. The provision of a meaningful EoA is indispensable to conducting fair trials. The commendable international effort which has been invested into establishing the modern institutions must not be undermined by the pervasive fear which surrounds the accused in ICL.

⁹⁴ COGAN, J.K. (2002) at 138

⁹⁵ DAMAŠKA, M. (2011) at 381

⁹⁶ ZAPPALÀ, S. (2010) 'The Rights of Victims v. The Rights of the Accused.' **8** Journal of International Criminal Justice. 137-164 at 145

Bibliography

AMBOS, K. (2003) 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' **3** International Criminal Law Review. 1-37

AMBOS, K. (2008) 'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman.' **21** Leiden Journal of International Law. 911-916

ARBOUR, L. (2006) 'Legal Professionalism and International Criminal Proceedings.' **4** Journal of International Criminal Justice. 674-685

ARENDT, H. (1958) 'The Human Condition.' University of Chicago Press, USA.

ARENDT, H. (1963) 'Eichmann in Jerusalem: A Report on the Banality of Evil.' Penguin, USA.

ARENDT, H. *et al* (1992). 'Hannah Arendt - Karl Jaspers - Correspondence 1926-1969.' New York, Harcourt Brace.

ARONOFSKY, D. (2005) 'International War Crimes & Other Criminal Courts: Ten Recommendations for Where We go From Here and How to Get There – Looking to a Permanent International Criminal Tribunal.' **34** Denver Journal of International Law and Policy. 17-32

ASHWORTH, A. (2006) 'Four Threats to the Presumption of Innocence.' **10** International Journal of Evidence & Proof. 241-279

BAILLIET, C. & AAS, K.M. (Eds.) 'Cosmopolitan Justice and its Discontents.' New York, Routledge.

BASSIOUNI, M.C. (1986) 'Nuremberg: Forty Years After.' **80** American Society of International Law Proceedings. 59-64

BASSIOUNI, M.C. (1992-3) 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions.' **3** Duke Journal of Comparative & International Law. 235-297

BASSIOUNI, M.C. (1994-5) 'Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal.' **18** Fordham International Law Journal. 1191-1210

BASSIOUNI, M.C. (1999) 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court.' **32** Cornell International Law Journal. 443-469

BECCARIA, C. (1995) 'On Crimes and Punishments and Other Writings.' CUP, Cambridge.

BECKER, H.S. 'Labelling Theory Reconsidered' in ROCK, P. & McINTOSH, M. (Eds.) (1974) 'Deviance and Social Control.' London, Tavistock Publications.

BEIGBEDER, Y. (2005) 'International Justice Against Impunity: Progress and New Challenges.' Leiden, Martinus Nijhoff.

DE BERTODANO, S. (2004) 'What Price the Defence? Resourcing the Defence at the ICTY.' **2** Journal of International Criminal Justice. 503-508

BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

BIBAS, S. & BURKE-WHITE, W. (2010) 'International Idealism Meets Domestic-Criminal-Procedure Realism.' **59** Duke Law Journal. 637-704

BIDDLE, F. 'The Nürnberg Trial.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP.

BIRKETT, N. (1947) 'International Legal Theories Evolved at Nuremberg.' **23** International Affairs. 317-325

BLATTMANN, R. & BOWMAN, K. (2008) 'Achievements and Problems of the International Criminal Court: A view from Within.' **6** Journal of International Criminal Justice. 711-730

BOAS, G. (2011) 'Self-representation before the ICTY.' **9** Journal of International Criminal Justice. 53-83

BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

BOHLANDER, M. 'The International Criminal Judiciary - Problems of Judicial Selection, Independence and Ethics' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

BOHLANDER, M. BOED, R. & WILSON, R.J. (Eds.) (2006) 'Defense in International Criminal Proceedings: Cases Material and Commentary.' NY, USA. Transnational Publishers.

BRANTS, C. (2011) 'Guilty Landscapes. Collective Guilt and International Criminal Law.' in BAILLIET, C. & AAS, K.M. (Eds.) 'Cosmopolitan Justice and its Discontents.' New York, Routledge.

BUCHET, A. 'Effectiveness and Independence in the Implementation of the Rights of the Defence before the ICC.' in BEVERS, H. & JOUBERT, C. (2000) (Eds.) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

BUISMAN, C. (2014) 'The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?' **27(1)** Leiden Journal of International Law. 205-226

BURKE-WHITE, W.W. (2002) 'A Community of Courts: Towards a System of International Criminal Law Enforcement.' **24** Michigan Journal of International Law. 1-101

CAIANIELLO, M. (2011) 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models.' **36** North Carolina Journal of International Law and Commercial Regulation. 287-318

CAMIER, N.L. (2010) 'Controlling the Wrath of Self-Representation: The ICTY's Crucial Trial of Radovan Karadžić.' **44** Valparaiso University Law Review. 957-1013

CARTER, K. (1993) 'Proof Beyond a Reasonable Doubt? Collecting Evidence for the International Criminal Tribunal for the Former Yugoslavia.' **31** Canadian Year Book of International Law. 235-263

CASSESE, A. (1998) 'Reflections on International Criminal Justice.' **61(1)** Modern Law Review. 1-10

CASSESE, A. (2003) 'International Criminal Law.' Oxford, OUP.

CASSESE, A. (2009) 'The Oxford Companion to International Criminal Justice'. Oxford, OUP.

CASSESE, A. (2012) 'The Legitimacy of International Criminal Tribunals and Current Prospects of International Criminal Justice.' **25** Leiden Journal of International Law. 491-501

CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP.

CATANI, L. (2012) 'Victims at the International Criminal Court' **10** Journal of International Criminal Justice. 905-922

CHANEY, K.R. (1995) 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials.' **14** Dickinson Journal of International Law. 57-94

CISSE, C. (1997) 'The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison.' **7(1)** Transnational Law & Contemporary Problems. 103-118

COCKAYNE, J. (2005) 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.' **28** Fordham International Law Journal. 616-680

COGAN, J.K. (2002) 'International Criminal Courts and Fair Trials: Difficulties and Prospects.' **27(1)** Yale Journal of International Law. 111-140

COHEN, S. (1972) 'Folk Devils and Moral Panics: The Creation of the Mods and Rockers.' Oxford, Robertson.

COHEN, D. (2007) 'Hybrid' Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future.' **43** Stanford Journal of International Law. 1-38

CONOT, R.E. (1983) 'Justice at Nuremberg.' Washington D.C., Weidenfeld & Nicolson.

COOPER, D. 'Collective Responsibility, "Moral Luck" and Reconciliation.' in JOKIĆ, A. (Ed.) (2001) 'War Crimes and Collective Wrongdoing. A Reader.' Massachusetts, Blackwell.

CRETA, V.M. (1998) 'The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.' **20** Houston Journal of International Law. 381-418

CROQUET, N.A.J. (2011) 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' **11(1)** Human Rights Law Review. 91-131

CRYER, R. (2003) 'Witness Evidence Before International Criminal Tribunals' **2(3)** Law and Practice of International Courts and Tribunals. 411-439

D'AMATO, A. (2000) 'Defending a Person Charged with Genocide.' **1** Chicago Journal of International Law. 459-469

DAMAŠKA, M. (1973) 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study.' **121** University of Pennsylvania Law Review. 506-589

DAMAŠKA, M. (2005) 'Assignment of Counsel and Perceptions of Fairness.' **3** Journal of International Criminal Justice. 3-8

DAMAŠKA, M. (2009) 'The International Criminal Court Between Aspiration and Achievement.' **14** UCLA Journal of International Law & Foreign Affairs. 19-35

DAMAŠKA, M. (2011) 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals.' **36(2)** North Carolina Journal of International Law and Commercial Regulation. 365-388

DAMAŠKA, M. (2012) 'Reflections on Fairness in International Criminal Justice.' **10** Journal of International Criminal Justice. 612-620

DAREHSHORI, S. (2008) 'Lessons for Outreach from the Ad-hoc Tribunals, The Special Court for Sierra Leone, and the International Criminal Court.' **14** New England Journal of International and Comparative Law. 299-307

DEFRANCIA, C. (2001) 'Due Process in International Criminal Courts: Why Procedure Matters' **87** Virginia Law Review. 1381-1439

DE SAMPAYO GARRIDO-NIJGH, D. 'The Defence Unit of the Registry of the ICTY' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

DIALA, A.C. (2010-1) "Victims' Justice and Re-Characterizing Facts in the Lubanga Trial at the ICC' **7(1)** Eyes on the ICC. 59-83

DIECKMANN, J. & KERLL, C. (2011) 'Representing the "General Interests of the Defence": Boon or Bane? - A Stocktaking of the System of the Ad Hoc Counsel at the ICC.' **11** International Criminal Law Review. 105-136

DODD, T.J. 'The Nuremberg Trials.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP.

DOUGLAS, L. (1995-6) 'Film as Witness: Screening *Nazi Concentration Camps* Before the Nuremberg Tribunal.' **105(2)** Yale Law Journal. 449-482

DOUZINAS, C. (2000) 'The End of Human Rights: Critical Legal Thought at the Turn of the Century.' Oxford, Hart.

DUGARD, J.E.D. 'The Role of Lawyers before International Courts' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

DURKHEIM, E. (1997) 'The Division of Labor in Society.' New York, The Free Press.

(EDITORIAL) (2001) Developments in the Law, International Criminal Law: III 'Fair Trials and the Role of International Criminal Defense.' **114(7)** Harvard Law Review. 1982-2006

ELLIS, M.S. (1997) 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defence Counsel.' **7** Duke Journal of Comparative and International Law. 519-538

ELLIS, M.S. (2003) 'The Evolution of Defence Counsel Appearing before the International Criminal Tribunal for the Former Yugoslavia.' **37** New England Law Review. 949-973

ELLIS, M.S. (2005) 'Defence Counsel Appearing Before International Tribunals: Past Experiences and Future Challenges.' **4** Journal of Human Rights. 491-512

FAIRLIE, M. (2003-4) 'Due Process Erosion: The Diminution of Live Testimony at the ICTY.' **34** Californian Western International Law Journal. 47-84

FAIRLIE, M. (2004) 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit.' **4** International Criminal Law Review. 243-319

FARRELL, B. (2009) 'Habeas Corpus and the Drafting of the Universal Declaration of Human Rights.' **11** Journal of the History of International Law. 81-101

FEDOROVA, M. (2012) 'The Principle of Equality of Arms in International Criminal Proceedings.' Netherlands, Intersentia.

FEDOROVA, M. & SLUITER, G. (2009) 'Human Rights as Minimum Standards in International Criminal Proceedings.' **3(1)** Human Rights & International Legal Discourse. 9-56

FICHTELBERG, A. (2005) 'Crimes Beyond Justice? Retributivism and War Crimes.' **24** Criminal Justice Ethics. 31-46

FICHTELBERG, A. (2009) 'Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy.' **28(1)** Criminal Justice Ethics. 5-24

FOUCAULT, M. (1995) 'Discipline and Punish. The Birth of the Prison.' New York, Vintage.

FOUCAULT, M. (2002) 'Power.' Volume 3. London, Penguin.

FREEMAN, M. (1994) 'The Philosophical Foundations of Human Rights.' **16** Human Rights Quarterly. 491-514

FULFORD, A. (2011) 'The Reflections of a Trial Judge.' **22** Criminal Law Forum. 215–223

GALLANT, K.S. (2000) 'The Role and Powers of Defence Counsel in the Rome Statute of the International Criminal Court.' **34** The International Lawyer. 21-44

GALLANT K.S. (2003) 'Politics, Theory and Institutions: Three Reasons why International Criminal Defence is Hard, and What Might be Done About One of Them.' **14** Criminal Law Forum. 317-334

GALLANT, K.S. (2010) 'Criminal Defence and the International Legal Personality of the Individual.' Revue québécoise de droit international (Hors-série). 75-90

GOODE, E. & BEN-YEHUDA, N. (1994) 'Moral Panics: The Social Construction of Deviance.' Oxford, Blackwell.

GORDON, G.S. (2006-7) 'Towards an International Criminal Procedure: Due Process Aspirations and Limitations.' **45(3)** Columbia Journal of Transnational Law. 635-710

GROULX, E. (2001) 'The Defense Pillar: Making the Defence a Full Partner in the International Criminal Justice System.' **25** (Oct) Champion. 20-27

GROULX, L. 'A Strong Defence Before the ICC' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

GROULX, E. (2010a) "'Equality of Arms': Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System.' Revue Quebecoise de Droit International. 21-38

GROULX, E. (2010b) 'The New International Justice System and the Challenges Facing the Legal Profession. Revue Quebecoise de Droit International. 39-74

HARRIES, M. & HARRIES, S. (1987) 'Sheathing the Sword. The Demilitarisation of Japan.' London, Heinemann.

HASLAM, E. & EDMUNDS, R. (2012) 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' **12** International Criminal Law Review. 871-903

HASSAN-MORLAI, P.M. (2009) 'Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone.' **3** African Journal of Legal Studies. 96-117

HAYDEN, P. (2009) 'Political Evil in a Global Age: Hannah Arendt and International Theory.' Oxon, Routledge.

DE HEMPTINNE, H. (2007) 'The Creation of Investigating Chambers at the International Criminal Court. An Option worth Pursuing?' **5** Journal of International Criminal Justice. 402-418

HIGGINS, G. (2007) 'Fair and Expeditious Pre-Trial Proceedings.' **5** Journal of International Criminal Justice. 394-401

HUTCHINSON, T. & DUNCAN, N. (2012) 'Defining and Describing What We Do: Doctrinal Legal Research.' **17** Deakin Law Review. 83-119

JACKSON, J. (2009) 'Finding the Best Epistemic Fit for International Criminal Tribunals.' **7** Journal of International Criminal Justice. 17-39

JALLOH, C.C. (2007) 'The Contribution of the Special Court for Sierra Leone to the Development of International Law.' **15** African Journal of International and Comparative Law. 165-207

JALLOH, C.C. (2010-11) 'Special Court for Sierra Leone: Achieving Justice?' **32(3)** Michigan Journal of International Law. 395-460

JALLOH, C.C. (2014) 'The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law.' Cambridge, CUP.

JALLOH, C.C. & DIBELLA, A.E. 'Equality of Arms in International Criminal Law: Continuing Challenges' in SCHABAS, W.A. MCDERMOTT, Y. & HAYES, N. (Eds.) (2013) 'The Ashgate Research Companion to International Criminal Law.' Farnham, Ashgate.

JOHNSON, S.T. (1998) 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia.' **10** International Legal Perspective. 111-192

JOHNSON, S.T. (2010) 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court.' **16** ILSA Journal of International and Comparative Law. 489-496

JOKIĆ, A. (Ed.) (2001) 'War Crimes and Collective Wrongdoing. A Reader.' Massachusetts, Blackwell.

JONES, J.R.W.D. (2004) 'The Gamekeeper-Turned-Poacher's Tale.' **2** Journal of International Criminal Justice. 486-494

JONES, J.R.W.D. CARLTON-HANCILES, C. KAH-JALLOW, H. SCRATCH, S. & YILLAH, I. (2004) 'The Special Court for Sierra Leone: A Defence Perspective.' **2** Journal of International Criminal Justice. 211-230

JORGENSEN, N.H.B.J. (2006) 'The Problem of Self-Representation at International Criminal Tribunals.' **4** Journal of International Criminal Justice. 64-77

JOUET, M. (2007) 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court.' **26** Saint Louis University Public Law Review. 249-308

KARNAVAS, M.G. 'Gathering Evidence in International Criminal Trials - The View of the Defence Lawyer.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

KASTENBERG, J.E. (2003-4) 'The Right to Assistance of Counsel in Military and War Crimes Tribunals: An international and Domestic Law Analysis.' **14** Indiana International & Comparative Law Review. 175-225

KATZMAN, R. (2009) 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial.' **8(1)** Northwestern Journal of International Human Rights. 77-101

KAY, S. & SWART, B. 'The Role of the Defence' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP.

KAY, S. & WLADIMIROFF, M. (1999) 'Access to Evidence.' **24(3)** International Legal Practitioner. 76-77

KLIP, A. (2012) 'Confidentiality Restrictions' **10** Journal of International Criminal Justice. 645-660

KNOOPS, G-J.A. (2005) 'The dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective.' **28** Fordham International Law Journal. 1566-1594

KNOWLES, P. (2006) 'The Power to Prosecute: the Special Court for Sierra Leone from a Defence Perspective.' **6** International Criminal Law Review. 387-417

KOSKENNIEMI, M. (2002) 'Between Impunity and Show Trials.' **6** Max Planck Yearbook of United Nations Law. 1-35

KRANZBUHLER, O. (1964-5) 'Nuremberg Eighteen Years Afterwards.' **14** DePaul Law Review. 333-347

KRESS, C. (2003) 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise.' **1** Journal of International Criminal Justice. 603-617

KRESS, C. & HOLTZENDORFF, L. (2010) 'The Kampala Compromise on the Crime of Aggression'. **8(5)** Journal of International Criminal Justice. 1179-1218

KUSCHNIK, B. (2009) 'International Criminal Due Process in the Making New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC.' **9** International Criminal Law Review. 157-185

LANGBEIN, J.H. (1999) 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors.' **58(2)** Cambridge Law Journal. 314-365

LANGER, M. (2005) 'The Rise of Managerial Judging in International Criminal Law.' **53(4)** American Journal of International Law. 835-909

LATERNSE, H. 'Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP.

LEIGH, M. (1996) 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused.' **90** American Journal of International Law. 235-238

LEIGH, M. (1997) 'Witness Anonymity is Inconsistent with Due Process.' **91** American Journal of International Law. 80-83

LIPPMAN, M. (1991) 'Nuremberg: Forty Five Years Later.' **7(1)** Connecticut Journal of International Law. 1-64

MARCOVITCH, H. (Ed.) (2005) 'Black's Medical Dictionary.' London, A & C Black Publishers.

MARKOVIC, M. (2011-12) 'The ICC Prosecutor's Missing Code of Conduct.' **47** Texas International Law Journal. 201-236

MARRUS, M.R. (1997) 'The Nuremberg War Crimes Trial 1945-46. A Documentary History.' USA, Bedford.

MAY, R. & WIERDA, M. (1999) 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha.' **37** Columbia Journal of Transnational Law. 725-765

MAY, R. & WIERDA, M. (2002) 'International Criminal Evidence.' New York, Transnational Publishers.

McASEY, B. (2011) 'Victim Participation at the International Criminal Court and its Impact on Procedural Fairness.' **18** Australian International Law Journal. 105-126

MCGONIGLE, B. (2005) 'De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia.' **13** No. 1 Human Rights Brief. 10-13

MCGONIGLE, B. (2009) 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles.' **22(1)** Leiden Journal of International Law. 127-149

MCINTYRE, G. (2003) 'Equality of Arms - Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia.' **16** Leiden Journal of International Law. 269-320

MÉGRET, F. (2009) 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure.' **14** UCLA Journal of International Law and Foreign Affairs. 37-76

MÉGRET, F. (2014) 'Practices of Stigmatization.' **76** Law and Contemporary Problems. 287-318

MEKJIAN, G.J. & VARUGHESE, M.C. (2005) 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court' **17(1)** Pace International Law Review. 1-46

MERON, T. (1995) 'From Nuremberg to the Hague.' **149** Military Law Review. 107-112

MERON, T. (2006) 'Reflections on the Prosecution of War Crimes by International Tribunals.' **100(3)** American Journal of International Law. 551-579

METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP.

METTRAUX, G. & CENGIC, A. 'The Role of a Defence Office - Some Lessons from Recent and not so Recent War Crimes Precedents.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

MILGRAM, S. (2009) 'Obedience to Authority: An Experimental View.' New York, Harper Collins.

NEGRI, S. (2005) 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure.' **5** International Criminal Law Review. 513-571

NEGRI, S. 'Equality of Arms - Guiding Light or Empty Shell?' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

NEWTON, M.A. (2011) 'Evolving Equality: The Development of the International Defence Bar.' **47(2)** Stanford Journal of International Law. 379-440

NGANE, S. N. (2009) 'Witnesses Before the International Criminal Court'. **8** The Law and Practice of International Courts and Tribunals. 431-457

NIELSEN, C. (2008) 'From Nuremberg to the Hague: The Civilizing Mission of International Criminal Law.' **14** Auckland University Law Review. 81-114

NIETZSCHE, F. (2008) 'Human, All Too Human. & Beyond Good and Evil.' England, Wordsworth Classics.

NINA, H.B.J. (2006) 'The Problem of Self-Representation at International Criminal Tribunals.' **4** Journal of International Criminal Justice. 64-77

ORIE, A. 'Accusatorial vs. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings of the ICC.' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP.

OVERY, R. 'The Nuremberg Trials: International Law in the Making.' in SANDS, P. (2003) 'From Nuremberg to The Hague: The Future of International Criminal Justice.' Cambridge, CUP.

PLACHTA, M. (2000) 'Concerns about the Independence of Defense Counsel before the (Permanent) International Criminal Court.' **16(1)** International Enforcement Law Reporter. 576 *et seq.*

POZEN, J. (2005-6) 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials.' **38(1)** New York University Journal of International Law and Politics. 281-322

RAPP, S.J. (2008) 'The Compact Model in International Criminal Justice: The Special Court for Sierra Leone.' **57** Drake Law Review. 11-48

RAUB, L. (2009) 'Positioning Hybrid Tribunals in International Criminal Justice.' **41** New York University Journal of International Law and Politics. 1013-1053

RAWLS, J. (1999) 'A Theory of Justice.' USA, Harvard University Press.

ROBERTSON, G. (2002) 'Crimes Against Humanity: The Struggle for Global Justice', New York, New press.

ROBINSON, D. (2013) 'A Cosmopolitan Liberal Account of International Criminal Law. **26** Leiden Journal of International Law. 127-153

ROBINSON, P. (2009) 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY.' **3** Berkeley Journal of International Law Publicist. 1-11

ROCK, P. (1973) 'Deviant Behaviour.' London, Hutchinson & Co.

ROCK, P. & McINTOSH, M. (Eds.) (1974) 'Deviance and Social Control.' London, Tavistock Publications.

SAFFERLING, C.J.M. (2001) 'Towards an International Criminal Procedure.' Oxford, OUP.

SAFFERLING, C. (2011) 'The Rights and Interests of the Defence in the Pre-Trial Phase.' **9** Journal of International Criminal Justice. 651-667

SAFFERLING, C. (2012) 'International Criminal Procedure.' Oxford, OUP.

SANDS, P. (2003) 'From Nuremberg to The Hague: The Future of International Criminal Justice.' Cambridge, CUP.

SARVARIAN, A. (2012) 'Ethical Standards for Prosecution and Defence Counsel before International Courts. The Legacy of Nuremberg.' **10** Journal of International Criminal Justice. 423-446

SCHABAS, W. (2003a) 'National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes' **1** Journal of International Criminal Justice. 39-63

SCHABAS, W. (2003b) 'The International Criminal Court.' Cambridge, CUP.

SCHABAS, W. (2012) 'Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals'. Oxford, OUP.

SCHABAS, W.A. MCDERMOTT, Y. & HAYES, N. (Eds.) (2013) 'The Ashgate Research Companion to International Criminal Law.' Surrey, Ashgate.

SCHOMBERG, W. (2009) 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights.' **8(1)** Northwestern University Journal of International Human Rights. 1-29

SCHWARTZ, R.L. (1992) 'Internal and External Method in the Study of Law.' **11(3)** Law and Philosophy. 179-199

SCHWARZENBERGER, G. 'The Judgement of Nuremberg.' in METTRAUX, G. (Ed.) (2008) 'Perspectives on the Nuremberg Trial.' Oxford, OUP.

SILVER, S.J. (1990) 'Equality of Arms and the Adversarial Process: A New Constitutional Right.' Wisconsin Law Review. 1007-1041

SKILBECK, R. (2004) 'Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone.' **1(1)** Essex Human Rights Review. 66-86

SKILBECK, R. (2008a) 'Defending the Khmer Rouge.' **8** International Criminal Law Review. 423-445

SKILBECK, R. (2008b) 'Funding Justice: The Price of War Crimes Trials.' **15(3)** Human Rights Brief. 6-10

SKILBECK, R. (2010a) 'Frankenstein's Monsters: Creating a New International Procedure' **8** Journal of International Criminal Justice. 451-462

SKILBECK, R. (2010b) 'Ensuring Effective Defence in Hybrid Trials.' Revue Quebecoise de Droit International. 91-108

SLUITER, G. (2005) 'Fairness and the Interests of Justice. Illusive Concepts in the *Milošević* Case.' **3** Journal of International Criminal Justice. 9-19

SOLUM, L.B. (2004) 'Procedural Justice' **78** Southern California Law Review. 181-322

STARR, S.B. (2009) 'Ensuring Defense Counsel Competence at International Criminal Tribunals.' **14** UCLA Journal of International Law and Foreign Affairs. 169-206

STRIJARDS, G. 'The Need for an Independent Defence Unit.' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

SVENDSEN, L. (2001) 'A Philosophy of Evil.' Champaign, IL., Dalkey Archive.

SWOBODA, S. (2008) 'The ICC Disclosure Regime - A Defence Perspective.' **19** Criminal Law Forum. 449-472

SYMPOSIUM (1995) 'Telford Taylor Panel: Critical Perspectives on the Nuremberg Trial.' **12** (3) New York Law School Journal of Human Rights. 453-544

TAYLOR, T. (1955) 'The Nuremberg Trials.' **55** Columbia Law Review. 488-525

TAYLOR, T. (1993) 'The Anatomy of the Nuremberg Trials.' USA, Bloomsbury.

TOCHILOVSKY, V. (1999a) 'Second Session of the Preparatory Commission for the International Criminal Court.' **1(4)** International Law Forum Du Droit International. 189-190

TOCHILOVSKY, V. (1999b) 'Rules of Procedure for the International Criminal Court: Problems to Address in the Light of the Experience of the Ad Hoc Tribunals.' **46(3)** Netherlands International Law Review. 343-360

- TOLBERT, D. (2002) 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings.' **26** Fletcher Forum of World Affairs. 7-19
- TOLBERT, D. (2003) 'The ICTY and Defence Counsel: A Troubled Relationship.' **37** New England Law Review. 975-986
- TOLBERT, D. (2004) 'Reflections on the ICTY Registry.' **2(2)** Journal of International Criminal Justice. 480-485
- TOLBERT, D. (2008-9) 'International Criminal Law: Past and Future.' **30(4)** University of Pennsylvania Journal of International Law. 1281-1294
- TUINSTRA, J.T. (2006) 'Assisting an Accused to Represent Himself: Appointment of *Amici Curiae* as the Most Appropriate Option.' **4** Journal of International Criminal Justice. 47-63
- TUINSTRA, J.T. (2009) 'Defence Counsel in International Criminal Law.' The Hague, TMC Asser Press.
- TUINSTRA, J.T. (2010) 'Defending the Defenders. The Role of Defence in International Criminal Trials.' **8** Journal of International Criminal Justice. 463-486
- TURNER, J.I. (2008) 'Defence Perspectives on Law and Politics in International Criminal Trials.' **48** Virginia Journal of International Law. 529-594
- VAN SLIEDREGT, E. (2012) 'Individual Criminal Responsibility in International Law.' Oxford, OUP.
- VAN WIJK, J. (2013) 'When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released.' **26** Leiden Journal of International Law. 173-191
- VERRIJN STUART, H. (2008) 'The ICC in Trouble.' **6** Journal of International Criminal Justice. 409-417

VOGLER, R. (2005a) 'A World View of Criminal Justice.' England, Ashgate.

VOGLER, R. (2005b) 'Reform Trends in Criminal Justice: Spain, France and England & Wales.' **4** Washington University Global Studies Law Review. 631-637

WALKER, A.J. (2003-4) 'When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees.' **106** West Virginia Law Review. 245-304

WALLACH, E.J. (1998-9) 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?' **37** Columbia Journal of Transnational Law. 851-883

WARBRICK, C. (1998) 'International Criminal Courts and Fair Trial.' **3(1)** Journal of Armed Conflict Law. 45-64

WATKINS, D. & BURTON M. (2013) 'Research Methods in Law'. Oxon, Routledge.

WHITING, A. (2009) 'Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case.' **14** UCLA Journal of International Law and Foreign Affairs. 207-223

WILKINS, L.T. (1964) 'Social Deviance.' London, Tavistock.

WILLIAMS, S. 'The Completion Strategy of the ICTY and the ICTR.' in BOHLANDER, M. (Ed.) (2007) 'International Criminal Justice: A Critical Analysis of Institutions and Procedures.' London, Cameron May.

WILSON, R.J. (2002) 'Assigned Defence Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach.' **2** International Criminal Law Review. 145-194

WILSON, R.J. 'A History of the Role of Defence Counsel in International Criminal and War Crimes Tribunals.' in BOHLANDER, M. BOED, R. & WILSON, R.J. (Eds.) (2006) 'Defense in International Criminal Proceedings: Cases Material and Commentary.' New York, USA.

WILSON, R.J. (2008) 'Emaciated' Defence or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?' **15(2)** Human Rights Brief. 6-9

WIPPMAN, D. (2006) 'The Costs of International Justice.' **100(4)** American Journal of International Law. 861-881

WLADIMIROFF, M. (1999) 'The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda.' **12** Leiden Journal of International Law. 957-968

WLADIMIROFF, M. 'Position of the Defence: The Role of Defence Counsel before the ICTY and ICTR.' in BEVERS, H. & JOUBERT, C. (Eds.) (2000) 'An Independent Defence Before the International Criminal Court: Proceedings of the Conference Held in the Hague, 1-2 November 1999.' Amsterdam, Thela Thesis.

WLADIMIROFF, M. (May 2002) 'Challenges for Defence Lawyers Taking Cases for an International Tribunal.' **53** Deutscher Anwaltstag.

WLADIMIROFF, M. (2007-9) 'Defending Individuals Accused of Genocide.' **40(1)** Case Western Reserve Journal of International Law. 271-280

ZAHAR, A. & SLUITER, G. (2008) 'International Criminal Law.' Oxford, OUP.

ZAPPALÀ, S. 'The Rights of the Accused.' in CASSESE, A. GAETA, P. & JONES, J.R.W.D. (Eds.) (2002) 'The Rome Statute of the International Criminal Court: A Commentary.' VOLUME II. Oxford, OUP.

ZAPPALÀ, S. (2003) 'Human Rights in International Criminal Proceedings.' Oxford, OUP.

ZAPPALÀ, S. (2010) 'The Rights of Victims v. The Rights of the Accused.' **8** Journal of International Criminal Justice. 137-164

ZIMBARDO, P.G. (2008) 'The Lucifer Effect: Understanding How Good People Turn Evil.' New York, Random House.