

IBA Vancouver Conference
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Challenges of defence cases at international criminal courts and tribunals

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1. I entertain the idea of domestic criminal justice systems in civilised jurisdictions to be inspired to prevent justice being merely an instrument of revenge or of executive action. Many checks and balances are incorporated to achieve fairness in the criminal proceedings. Most domestic criminal justice systems have taken generations to evolve. Domestic trials are subject to the scrutiny of the society they serve and those taking part are accountable for their conduct. The courts are situated within the State of their jurisdiction and are responsible for applying standards to all aspects of social behaviour. Those that come before it are part of the same society as the court.
2. Within this domestic system, the defence lawyer as an entity is acknowledged to have a role in the criminal process, not least to ensure that the innocent are acquitted and that a sentence passed is appropriate. No proper criminal justice system puts its faith solely in the prosecutor to get things right, or in the judges to understand perfectly the points for both sides in every case. In other words the principle of the rule of law does not only depend on the way on which investigative, prosecutorial and adjudicatory institutions fulfil their duties, but also on the proper fulfilment by defence counsel of his duties.
3. On a number of issues international cases are basically the same as in domestic cases. In both cases defence counsel have clients, who are charged with crimes and prosecuted before a court of law. In both cases counsel have clients, who are pleading not guilty and who want counsel to do the impossible to get them off the hook. And, yes, on the face of it the tasks counsel performs look the same in both cases. Defence counsels deal with all kinds of factual matters and issues of law to the benefit of the client.
4. But when we look a bit closer we see that in international cases the magnitude, scope and complexity of the facts is completely different. Moreover we deal with different cultures, different languages and *loci delicti* in places far away, usually unknown to us. That difference applies to the law as well, because international crimes have a striking political component and usually have strong ties with local history. In international cases we face new systems of criminal law with different procedures and practises. The bench is different from the usual court at home. In sum, the dynamics of international trials are very different and to most of us a challenge, we have never faced before.
5. Unlike most domestic cases, international prosecutions have not primarily emerged from the need to administer justice, but from the firm belief that perpetrators of international crimes that are believed to be the most heinous ones should be prosecuted at all costs. The eagerness of the

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media, politicians and some NGO's to expect convictions, not merely fair proceedings, puts pressure on international trials. The popular perception is that an acquittal is a failure. This is the reason why international prosecutors may well be inclined to play a creative trial game in order to secure convictions only, rather than assisting the court in finding the truth.

6. Building an effective defence team when running a case before an international court or tribunal does require a specific approach. In this brief presentation I discuss some of the specific requirements, but first a few observations.

Observations

7. It is striking that all statutes of current courts and tribunals hardly pay any attention to the role of defence counsel. They are only mentioned within the context of the court in passing, as an option for an accused where the interests of justice so require. An accused may waive the right to legal assistance if he wishes to represent himself. The few cases where the accused waived - if not resisted - the right to legal assistance because he preferred to represent himself are notorious examples of the corruptive effects of absence of defence counsel. So the **first** observation is: No trial without defence counsel.
8. The **second** one is: No fair trial without defence counsel. The requirement of a fair trial fascinates all of us. Although the public may think the opposite, defence counsel has no difficulty in agreeing that criminals should be prosecuted, but being lawyers, we also say: yes, but only in a fair way.
9. Whereas domestic criminal justice systems are not all the same, the question is: what does fair trial encompass? Fair trial is not an unequivocal concept. Defence counsel working in accusatorial systems may say things about the requirement of a fair trial that may differ from what defence counsel who works in inquisitorial systems say. International defence counsel will tell you that the concept of a fair trial is ambiguous and that it should be understood in the context of the system in which it should operate.
10. The **third** observation is that defence counsel must have rights conferred specifically on him. Here too it depends on the legal system which rights are necessary to safeguard the defendant's interests within the context of that system of law. Defence counsel is obliged to properly and adequately make use of these rights, to punctiliously perform his duties and to fulfil his task in a strictly independent manner.
11. That not only serves the subjective interest of the defendant, but also the public's interest in a fair administration of criminal justice. In this sense the administration of justice, in which the counterbalance afforded by an independent defence counsel is frustrated, runs against the public's interest.

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12. The **fourth** and last observation is that only a few lawyers are interested in establishing a fully-fledged practice in international criminal law. Most defence counsel does one or two cases before an international court or tribunal and then returns to their domestic work. Unlike counsel working for the prosecution at the tribunals, most defence counsel does not have accumulated specialist knowledge but are inventing the wheel again in each case. The reality may well be that the working conditions for most defence counsel are disappointing compared to cases at home.

Requirements

13. What is needed is a corps of experienced defence counsel to run cases before the international courts and tribunals. Competent counsel, who either have a team available, or know how to build one. Counsel, who knows what, is needed to run an effective defence team.
14. The usual view is to have lawyers from both common law and civil law jurisdictions in one team to be able to address the challenges of the international systems most effectively. This is generally right to compensate an initial lack of knowledge of the international system, but practice has shown that a very experienced defence team from only one of these jurisdictions may be effective as well. The point is: Legal skills and experience of the law of the court, more specifically of the case law and the day to day practices is needed to match - or even better to top - the experience of the prosecution.
15. I believe it makes sense to distinguish between engineering the law and operating in the courtroom. It is very helpful to be a smooth courtroom operator with smart skills in grilling witnesses; but this alone is not enough. The capriciousness of international legal systems combined with the enforceability of the events, require superior skills to anticipate and address all kinds of issues of procedural law. This requires more than careful preparation and an exhaustive knowledge of the relevant case law; it also requires the ability to deal in a creative way with legal issues where the rules are silent.
16. What a defence team needs is the ability to step back from its domestic legal system and to deal with issues from a different perspective. One has to do more than looking to Statutes and Rules of Procedure and Evidence. Where appropriate, one has to study applicable treaties and principles and rules on international law and of international criminal law, together with established principles of international law of armed conflicts.
17. When necessary one has to endeavour a more comparative approach by looking at general principles of law deriving from national legal systems, especially, as appropriate, national laws of states that would normally exercise jurisdiction over the crime. All this comes with the proviso that findings must not be inconsistent with internationally recognised norms and standards.

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18. Engineering the law focuses especially on issues of substantive law. How do the elements of the charged crimes relate to the facts disclosed to the defence and evidenced in court, or in other words: how to pin the burden of proof onto the prosecution. What is required to prove each of the elements in the instant case? And what kind of arguments is required to show the test of providing convincing evidence fails?
19. The same goes for issues of criminal responsibility and defences to exclude or limit, perhaps mitigate, such responsibility. Such an ongoing analysis of the case is necessary for a thorough understanding and effective preparation of the case. It also encompasses preparation of the strategy and tactics of the case and, where appropriate, keeping in mind what co-defendants may do.

Defence team

20. So what do we need to build such a team of professionals? To start with, it is essential to have a competent and experienced lead counsel who is able to run the show, to structure the strategy, to manage the members of the team, to lead the legal engineering and to take care of the most important witnesses and expert witnesses.
21. It goes without saying that lead counsel must have a good track record and must speak the language of the court. The selection of the right candidates to join the defence team is clearly a crucial requirement in ensuring that all the issues mentioned are professionally dealt with. The rules of the court should support such selection, rather than complicating it, or worse: interfering in it. Ideally, lead counsel has a competent defence team available.
22. Others will be a full time co-counsel, able to assist and when necessary to replace lead counsel. There are no clear threshold levels of experience but it would be reasonable to select lawyers with at least five years' experience in criminal cases in their own jurisdiction (or even better with international experience) and able to lead investigation of the factual issues of the case.
23. Other members of the team would be consultants, researchers and investigators, who would be likely to be needed only on a part time basis. A consultant may be engaged for a particular legal issue or to assist in specific forensic issues. A researcher would be required to deal with complex and large issues, such as analysis of all materials disclosed by the prosecution, specific issues of evidence or matters of comparative law. Investigators will be necessary to do discovery on location, to track down specific witnesses or to dig up documents.
24. In most cases a defence team has to deal with language issues that would require the assistance of a translator, sometimes an interpreter as well. This function can usually be required through the registry of the court of tribunal, but in some cases independent facilities are required

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for a proper functioning of the defence. I e. to protect the confidentiality of the defence work or to protect the interests of witnesses.

CHALLENGES

25. Now what are specific challenges a defence team may have to face? A typical one is working outside one's own jurisdiction. Working abroad in domestic criminal cases is usually in the setting of legal assistance between States. In these situations defence counsel can participate in discovery on location abroad through a Commission Rogatory and court officials usually deal with the logistical issues and liaise with the foreign authorities.
26. In cases before international tribunals the functioning of the defence in this respect is only supported to a limited extent. Sometimes discovery on location is simply not possible because of an ongoing conflict in the area. In many cases defence teams are on their own and have to deal with all kinds of practical issues a lawyer is not used to, such as access to an area or specific places, to officials like police officers or military, or to people in general.
27. In most jurisdictions, defence counsel does not have standing before a local court to enforce specific discovery. If any arrangement between the tribunal and the State in concern is in place, it does not affect the work of the defence. Defence counsel is bound to invoke the powers of the court (perhaps in an *ex parte* procedure) to issue compliance orders, if such time-consuming procedures would be a remedy.
28. Another challenge is access to the case law of the court. In theory, most case law is available on the web sites of the courts and tribunals. In reality however, not all web sites are up to date and some only publish a selection, such as judgements but not procedural decisions. There can be an inequality of arms if the prosecution has unlimited access to all case law, but the defence does not. Such possible lack of balance is not remedied by the usual publications of textbooks, commentaries and specialist articles.
29. The typical challenge is the way defence team has to deal with the bureaucracy, whom one has to admit, seems to be inevitable with large organisations. For the proper functioning of a defence team funding is needed and such funding must - of course - be accounted for. Having said this, a phenomenon not unknown in a domestic setting, occurs: systems of pre-consent, the filing of all kinds of forms, the application of financial or logistical standards that do not fit the situation, the inability of the system to adopt a specific situation and the sluggish handling of requests, forms and payments. A ready defence team may be forced to pre-fund a part of the defence in the interests of an ongoing case. A financial fallback facility is an asset indeed.

Pre-trial preparation

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30. A typical challenge is working outside one's own jurisdiction without the benefit of the infrastructure and facilities available in national trials. Counsel will have to deal with another language and visit troubled areas where it is difficult to travel. Sometimes discovery on location is simply not possible because of an ongoing conflict in the area. In many cases counsel are left on their own to deal with all kinds of practical issues.
31. People who may have relevant information are difficult to locate. When they are officials, civil servants, and police or military forces, the hurdle to approach or to depose them may be their superiors. The same kind of problems may arise with documents, as most documentary evidence will be official documents that are hard to locate, collect, and there might not be local remedies for compulsory release. Comparable issues with witnesses and documents may arise with the prosecution as well, but this office is an organ of the court with legal facilities to make foreign officials comply, such as invoking the possibility of exerting political pressure.
32. Trials before international courts are not trials around the block, but cases with a high profile. These cases are not about ordinary manslaughter, but rather reflect twisted political emotions and aspirations. This factor is an element of the crime and therefore an issue of law that must be addressed in a proper way. The political motivation of the defendant must be presented in such a way that it fits into the strategy on criminal responsibility or to sever political aspirations from alleged criminal actions.
33. In cases before international criminal courts or tribunals, defendants are usually persons with a strong personality—powerful people. These kinds of defendants have strong opinions, and there is often an ethnic or religious issue. Their victims belong to another group, which is believed to be inferior, dangerous, or a threat to the defendant's people. Most defendants deny any loathing for members of the other group or deny any personal involvement in attacking the other group. When such involvement cannot be denied, the mechanism is usually to falsely rationalize why members of the other group caused the problems that prompted the prosecuted actions.
34. Whereas defence counsel's approach to a case, his actions and representations derive from or are based on the defendant's instructions, defence counsel may face problems in finding a proper attitude. Counsel will have to balance between establishing a relation of trust with the defendant and to maintain his professional credibility and independence. Defence counsel and defendant may differ on many issues, yet counsel will have to satisfy the genuine needs of the defendant and to uphold his own position of *dominus litus*.
35. Politics is a factor to consider seriously indeed, because of the profile of the defendant—some of them are heroes at home with substantial political influence. Their support in the homeland and the inherent mass me-

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dia attention may raise specific challenges for defence counsel to protect his professional independence when dealing with media attention.

36. Prosecutors are in a better position in this respect as they have a spokesperson, or even a public relations office, available. Such facilities protect them from direct contact with the media and helps prevent slips of the tongue and other unfortunate utterances defence counsel may well suffer.
37. Language is an issue in different ways and the assistance of interpreters may slow trial preparation during pre-trial or damage the quality of the trial itself. Let me give you a striking example of the examination of Rwandans before an English-speaking Trial Chamber of the ICTR. These witnesses speak only Kinyarwanda, the local language of Rwanda. Two interpreters are needed: Kinyarwanda - French and French - English.
38. I believe language to be one of the means to evaluate the veracity of a witness and things may become complicated when the answer given by a Rwandan takes for example about a minute, but according to the translation it was only a simple "yes." In these kinds of trials, there are permanent risks of losing grip on relevant information.
39. Let me conclude with an obvious observation, yet an issue that may trouble defence counsel acting before international courts and tribunals. This issue is: witness selection. A troublesome issue in all jurisdictions. In most cases because of matters of relevancy or evidential value, sometimes because of conflicting views of what can be considered the truth.
40. Usually it is not that difficult to convince the defendant that counsel will not call witnesses to make clear false statements. But how should one deal with witnesses who are supposed to support the political views of the defendant? On one hand, it may be helpful to produce evidence that explains the motives of the defendant's disputed actions in order to rebut the alleged intent. On the other hand, the trial should not be a forum for dispensing political views. Defendants are inclined to put in every possible political argument, but counsel will consider the objective effect on the case. For this reason, defendant and defence counsel will have to find common ground.

Trial issues

41. An issue common to international and domestic trials is disclosure. In my experience disclosure is a matter of perpetual debate between the defence and the prosecution. From a defence counsel's perspective the key issues are: too late and incomplete and not rally complaints of not disclosing exculpatory evidence. In this respect we must admit that disclosure is more than a matter of compliance, it dominantly is connected to strategic questions and sometime to issues source protection or witness protection.

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42. At trial, international trials do not raise specific issues that are totally unfamiliar to domestic cases, except for confidential information that is made available by third parties on conditions that are difficult or not compatible with requirements of fair trial. The issue has various manifestations that have one thing in common: it cripples the equality of arms, if not a due process. In these cases the prosecution has access to information that is not disclosed to the defence or to the court.
43. A mild form of this issue is for example the policy of some states to allow prosecution access to intelligence for the purpose of investigation provided that such information cannot be used as evidence in court. However, if used in court as evidence the confidential nature of its origin may cause serious problems for an effective cross-examination if the origin of crucial evidence cannot be explored.
44. In rare cases the defence may be aware of exculpatory evidence available to certain state officials but denied because of its confidential or intelligence nature or – in some cases – because the state is not prepared to disclose the information for reasons “in the interest of the state”. This raises the question of the competence of trial chambers to issue compliance orders to states or state officials, and if such time-consuming procedures would be a remedy.
45. Two other issues, familiar to domestic trials, typically pop up in international trials: admittance of documents because of identification problems, and witness protection. After almost fifteen years of case law issued by various courts and tribunals, these issues are no longer serious barriers for a fair trial, yet they still provide tricky problems that require experience and profound preparations, as for example how to cross-examine effectively a protected witness without violating the protection order.
46. I could tough on more and related trial issues but speaking for such distinguished audience I do have the aspiration to be exhaustive. I am sure you can provide much more insights and interesting experiences. So, I trust I cannot tell you no more and for that reason I rest my case.
47. May I may conclude my observations with this. What every defence counsel essentially does is to translate the subjective goals of the defendant into an objectified representation that fits into the legal framework of the court. Some counsel are very able in this translation, some are not.