

## Comments

# ACHIEVING JUSTICE BEFORE THE INTERNATIONAL WAR CRIMES TRIBUNAL: CHALLENGES FOR THE DEFENSE COUNSEL

MARK S. ELLIS\*

### I. INTRODUCTION

*The Tribunal has not been established to satisfy the victims only,  
but to bring justice to all, including the accused.*<sup>1</sup>

At 10:00 a.m. on Tuesday, May 7, 1996, the first trial under jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) began. It was the beginning of a remarkable experiment in international humanitarian law, a nascent body of law rooted in international custom and binding on all states. Not since the Nuremberg and Tokyo trials has the international community unambiguously declared that individuals who violate fundamental human rights will be held accountable and brought to justice.

Of course, much has changed since the trials at Nuremberg and Tokyo. Unlike its predecessors, the ICTY is a non-military court. Moreover, it was established in the midst of violent conflict, making it difficult to collect evidence and to execute warrants. In the aftermath of World War II, most defendants at Nuremberg and Tokyo were in custody;<sup>2</sup> the majority of suspects indicted by the ICTY are

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\* Mark S. Ellis is Executive Director of the American Bar Association's Central and East European Law Initiative (CEELI). Based in Washington, D.C., CEELI provides technical legal assistance to countries in Central and Eastern Europe and the former Soviet Union. Mr. Ellis also acts as Special Counsel to the Coalition for International Justice (CIJ), which provides assistance to the International War Crimes Tribunal. The author would like to thank Margaret Zokowski and Laurie MacDonald Brumberg for their editorial assistance and comments.

1. Michail Wladimiroff, Opening Remarks, Prosecutor v. Tadic, No. IT-94-1-T at 35 (May 7, 1996) [hereinafter Opening Remarks] (transcript on file with the *Duke Journal of Comparative & International Law*).

2. See *Bulletin of the International Criminal Tribunal for the Former Yugoslavia*, No. 5/6,

still at large.<sup>3</sup>

These difficulties notwithstanding, the ICTY will not and should not be judged on the basis of indictments or convictions. Though it is true that the ICTY was created to hold war criminals accountable for their actions,<sup>4</sup> expedited convictions will never be a substitute for justice. Ultimately, the ICTY will be judged by the fairness of its proceedings and by the certainty that the accused are given a fair trial and proper defense. During the Nuremberg trials, Justice Robert Jackson conveyed this sentiment when he said, “[i]f 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.”<sup>5</sup>

The first trial before the ICTY was that of Dusko Tadic, a café owner and part-time karate instructor formerly residing in the Prijedor region of Bosnia-Herzegovina. He was charged with individual criminal responsibility for Grave Breaches of the Geneva Conventions of 1949, Violations of the Laws or Customs of War, and Crimes Against Humanity, according to Articles 2, 3, and 5, respectively, of the Statute of the International Criminal Tribunal for Violations of International Humanitarian Law in the former Yugoslavia (Statute).<sup>6</sup>

At the time he was apprehended and extradited to the Hague, Tadic resided and was working in Germany.<sup>7</sup> Tadic was the first indicted suspect to be taken into custody by the ICTY.<sup>8</sup> Standing trial before a court of historic and international significance, and facing charges of enormous gravity, Dusko Tadic needed to secure legal representation. According to the Tribunal’s Statute<sup>9</sup> and the Direc-

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May 24, 1996 at 4; AIREY NEAVE, ON TRIAL AT NUREMBURG 58 n.3 (1979); JOHN PRITCHARD & SONIA ZAIDE, THE TOKYO WAR CRIMES TRIAL 3-4 (1981).

3. Out of 74 indictees, only eight were in custody as of December 18, 1996. See BULL. OF THE INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, No. 13, Dec. 18, 1996.

4. “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . . .” Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 6, U.N. Doc. S/25704 (1993) [hereinafter Statute].

5. ROBERT E. CONOT, JUSTICE AT NUREMBERG 14 (1983).

6. See Indictment of Dusko Tadic, *Prosecutor v. Tadic*, No. IT-94-1-T at 5 (February 13, 1995) [hereinafter Indictment].

7. See Int’l Crim. Tribunal for the former Yugoslavia, *Tadic Fact Sheet*, (press release) (on file with the *Duke Journal of Comparative & International Law*).

8. See *Report of 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*, U.N. SCOR, 15th Sess., U.N. Doc. A/50/365/S/728 (1995).

9. The Statute reads that the accused shall be entitled “to be tried in his presence, and to

tive on Assignment of Defense Counsel (Directive),<sup>10</sup> a defendant who is found to be indigent has the right to court-appointed counsel, free of charge.<sup>11</sup> The criteria for determining indigence have been established by the head of the Registry<sup>12</sup> and approved by the judges.<sup>13</sup> If the accused meets the established criteria, the Registrar assigns counsel.<sup>14</sup>

For an indigent defendant, the assignment of counsel will be the most important decision—other than the Trial Chamber's ultimate decision of guilt or innocence—made in the course of his or her trial. Under provisions of the Directive,<sup>15</sup> Tadic requested counsel and provided evidence to show that he was indigent. On May 1, 1995, the Registrar determined Tadic to be indigent and consequently assigned him counsel.<sup>16</sup>

Much can be learned from the Tadic trial, which is the ICTY's first experience in assigning counsel. It is important to review certain basic elements of the assigned counsel provision of the Statute<sup>17</sup> and to identify areas which need improvement. Such an effort can undoubtedly improve the trial process. Significantly, it can also en-

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defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case . . . if he does not have sufficient means to pay for it . . . ." Statute, *supra* note 4, art. 21(d).

10. See *Directive on Assignment of Defence Counsel, 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*, U.N. Doc. IT/73/Rev.1 (1994), reprinted in 33 I.L.M. 1576 (1994) [hereinafter *Directive*].

11. An indigent is defined as a person who "does not have sufficient means to engage counsel of his choice and to have himself legally represented or assisted by counsel of his choice." *Id.* art. 5 (emphasis added).

12. The Registry is responsible for the administration of the Tribunal. The Registry is headed by the Registrar, Mrs. Dorothee de Sampayo. The Registry manages Court proceedings, publishes documents, handles all budgetary and personnel matters, oversees the victims and witnesses unit, and assigns defense counsel.

13. See *Rules of Procedure and Evidence, 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*, at Rule 45(B), U.N. Doc. IT/32/Rev. 7 (1996), available in Univ. of Minn. Human Rights Library (visited Mar. 29, 1997) <<http://www.umn.edu/humanrts/icty/ct-rules7.html>> (on file with the *Duke Journal of Comparative & International Law*) [hereinafter *Rules*].

14. A person requesting the assignment of counsel must make a declaration of his means, which in turn must be certified. See *Directive, supra* note 10, arts. 8-9; *Rules, supra* note 13, Rule 45(C).

15. See *Directive, supra* note 10, at arts. 5-11.

16. On April 27, 1995, Mr. Tadic provided the ICTY with a Declaration of Means, which resulted in the Registry's decision that Mr. Tadic was indigent. See Decision by the Registry (May 1, 1995) (on file with the *Duke Journal of Comparative & International Law*).

17. See *Statute, supra* note 4, art. 21(d).

hance the Tribunal's credibility, which rests in part upon the quality of defense afforded each defendant.

## II. SELECTION OF COUNSEL

The ICTY's method of identifying qualified attorneys and assigning counsel is straightforward. An attorney must meet several requirements to the satisfaction of the Registrar, including having been admitted to a state bar or being a professor of law, and having fluency in one of the working languages of the Court (French or English).<sup>18</sup> An attorney wishing to be considered for defense counsel simply notifies the Registrar.<sup>19</sup> When an attorney is deemed qualified, the Registrar adds his or her name to a list of qualified candidates.<sup>20</sup> It is from this list that the Registrar selects and assigns counsel for indigent defendants. When counsel is selected, the Registrar notifies the attorney as well as the professional or governing body

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18. See *Directive*, *supra* note 10, art. 14; *Rules*, *supra* note 13, Rule 44. A recent amendment to the ICTY's Rules of Procedure and Evidence allows for the appointment of counsel who does not speak French or English. Rule 45(A)(ii) now reads: "In particular circumstances, upon the request of an indigent suspect or accused, the Registrar may be authorized, by a Judge or a Trial Chamber, seized of the case, to assign counsel who speaks the language of the suspect or the accused but does not speak either of the two working languages of the Tribunal." *Rules of Procedure and Evidence, Amendments Adopted during the Eleventh Plenary Meeting*, Rule 45. (on file with the *Duke Journal of Comparative & International Law*) [hereinafter *Amended Rules*]. This change is also reflected in the Amended Directive, which reads: "In particular circumstances, a Judge or the Trial Chamber seized of the case may, upon the request of the suspect or the accused, authorize the Registrar to assign counsel who speaks the language of the suspect or the accused but does not speak either of the two working languages of the Tribunal." *Directive on Assignment of Defense Counsel, as Amended 25 June 1996*, art. 14(B), U.N. Doc. IT/73/Rev.2 [hereinafter *Amended Directive*].

19. Mr. Michail Wladimiroff notified the Tribunal on October 17, 1994 of his interest in acting as counsel to indigent suspects. On October 19, 1994, the Acting Registrar for the ICTY, Theo van Boven, responded to Mr. Wladimiroff in a letter, stating the following: "Rule 45(a) of the Rules of Procedure and Evidence requires for the Registrar to keep a list of counsel, who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44 and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused. In light of the information provided in your letter and your curriculum vitae your name will be placed on the list." Letter from Theo van Boven, Acting Registrar for the ICTY, to Mr. Wladimiroff, Attorney at Law (Oct. 19, 1994) (on file with the *Duke Journal of Comparative & International Law*).

20. See *Rules*, *supra* note 13, Rule 45(A). The list includes 66 practicing lawyers and professors from 13 countries, including Australia, Canada, Croatia, The Federal Republic of Yugoslavia (Serbia and Montenegro), France, Italy, The Netherlands, Switzerland, The United Kingdom and the United States. See *Report*, *supra* note 8, at 25; *Report of 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*, U.N. SCOR, 51st Sess. at 29, U.N. Doc. A/51/292/S/665 (1996) [hereinafter *Amended Report*].

with which he or she is associated.<sup>21</sup>

The central problem with the current selection process is that it overlooks the need for extraordinary legal qualifications. Since the ICTY is an international judicial body that uniquely prosecutes violations of international humanitarian law, it is imperative that the defense have expertise and experience in this area. The repertoire of skills used in a "domestic" criminal case, while extremely relevant, does not necessarily include the legal background required in an international war crimes case. The average attorney simply is not schooled in this practice. In effect, the attorney who undertakes to defend an alleged war criminal must be multi-talented. The ICTY must ensure that assigned counsel has practiced actively in the area of criminal law, *and* possesses substantial experience in international humanitarian law.<sup>22</sup> The current requirements fall short in this regard.

In addition to criminal and international humanitarian law, assigned counsel must be conversant with both common law and civil law systems. The reason for this is two-fold. First, the ICTY's trial judges come from common law and from civil law states.<sup>23</sup> Because their decisions will be informed by their own legal backgrounds, counsel must be prepared to argue and respond to issues relevant to both systems and to anticipate matters of unique concern before the

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21. See *Directive, supra* note 10, art. 12(B). On April 25, 1995, Mrs. Dorothee de Sampayo Garrido-Nijgh, Registrar for the ICTY, notified Michail Wladimiroff, in writing, that he had been assigned Defense Counsel for Mr. Dusko Tadic in all proceedings before the Tribunal. The letter was copied to Mr. Tom de Waard, President of the Nederlandse Orde Van Advokaten. Letter from Ms. Dorothee de Sampayo Garrido-Nijgh, Registrar for the ICTY, to Mr. Wladimiroff (April 25, 1995) (on file with the *Duke Journal of Comparative & International Law*). Mr. Wladimiroff was also informed of the final decision to appoint him Defense Counsel to Mr. Tadic after Mr. Tadic was determined indigent by the Registrar. Letter from Ms. Dorothee de Sampayo Garrido-Nijgh, Registrar for the ICTY, to Mr. Wladimiroff (May 1, 1995) (on file with the *Duke Journal of Comparative & International Law*).

22. For instance, in the United States, guidelines have been established setting forth qualifications for assigned counsel in the federal public defender program. In recruiting and selecting candidates for the Office of Federal Public Defender in the Eleventh Circuit, for example, applicants must not only be a member in good standing of a state bar, but must also, among other things, have been engaged in the "active practice" of criminal law for at least five years, and show "outstanding legal ability and competence" as evidenced by "substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and court processes." Regulations of the United States Court of Appeals for the Eleventh Circuit for the Selection and Appointment or the Reappointment of Federal Public Defenders, United States Court of Appeals for the Eleventh Circuit Rules, Add. VII, § 5, codified at 28 U.S.C.A. Rules (West 1997).

23. For instance, in the Tadic trial, the three Trial Chamber judges are: Gabrielle Kirk McDonald (United States), Datuk Lal Vohrah (Malaysia), and Sir Ninian Stephen (Australia).

Tribunal. This may include matters of specific concern to an international court. For example, the Tribunal's Rules allow trial court judges to legislate on procedural matters, such as adopting and amending the Rules at plenary meetings.<sup>24</sup>

A recent decision rendered by the Trial Chamber in the Tadic case illustrates the value of counsel's familiarity with both civil and common law systems. The prosecutor wanted access to the written statements of defense witnesses. In the United States, these statements fall under the "reciprocal discovery rule" and are frequently used for impeachment purposes.<sup>25</sup> The defense attorneys vehemently objected to this request, arguing that such statements are privileged, in the same way that attorney-client communications are privileged. The Trial Chamber ruled 2-1 in favor of protecting the written statements of defense witnesses.<sup>26</sup> The civil law judges (Vohrah and Stephen) voted in favor of the defense while Judge McDonald from the United States voted in favor of the prosecution.

The second reason for defense counsel to be schooled in both systems stems from the procedural requirements for presenting a case before the ICTY. Since the Tribunal's Rules of Evidence and Procedure (Rules) are based largely on an adversarial model and do not follow the inquisitorial approach used in civil law systems, assigned counsel must be adept at arguing cases in an adversarial proceeding.<sup>27</sup> The Nuremberg and Tokyo trials also relied upon this common-law trial practice; judges did not actively participate in the trial proceedings, and made it clear that all responsibility for cross-examining witnesses rested with the defense attorneys.<sup>28</sup> Despite the ICTY's reliance on the adversarial model, however, the current Rules do not specifically require counsel to have common-law trial experience.

The case against Dusko Tadic highlights several problems that can arise when attorneys lack the relevant experience in trial advocacy. Professor Michail Wladimiroff, one of the Netherlands' top criminal lawyers, was assigned as lead counsel for Mr. Tadic. Mr.

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24. See *Rules*, *supra* note 13, Rule 6. This is different from national systems, where procedural codes are adopted by the legislature.

25. See 23 AM. JUR. 2D, *Reciprocal Discovery* § 463.

26. This decision was made in closed session. As this Comment was composed a written notice had not yet been issued. Telephone Interview with Alain Norman, CIJ liaison to the Tribunal (Oct. 25, 1996) [hereinafter Norman Interview].

27. In a civil law system, the judge is an independent, active investigator. The prosecutor and defense attorney play a relatively passive role during the trial.

28. See CONOT, *supra* note 5, 86-87.

Wladimiroff has impeccable credentials.<sup>29</sup> Mr. Wladimiroff asked Alphons Orié, another highly-qualified attorney from his firm, to work part-time on the case.<sup>30</sup> Despite the considerable competence of both attorneys, the Dutch civil law system, under which Wladimiroff and Orié practice, has not provided them with an opportunity to develop skills they will need to aggressively participate in an adversarial trial. Under the Dutch system, the judge plays the primary role in examining witnesses. The judge is an independent, active investigator, while the prosecution and defense remain relatively passive during the trial.<sup>31</sup>

Recognizing their own lack of experience in an adversarial trial, Mr. Wladimiroff and Mr. Orié approached the American Bar Association's Central and East European Law Initiative (CEELI)<sup>32</sup> for assistance in sharpening their trial techniques—particularly examining and cross-examining witnesses.<sup>33</sup> CEELI responded with a week-long training exercise for the defense team. Two U.S. criminal trial lawyers and one English barrister participated in the training program.<sup>34</sup>

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29. Professor Wladimiroff is a Member of the Bar the Supreme Court of the Netherlands. Since 1989, he has been Chairman of the Permanent Advisory Body on Criminal Law and Procedure of the Dutch National Bar Association. Since 1992, he has been Vice-Chairman of the Board of the Dutch Association of Defense Counsel. Professor Wladimiroff is a Member of the Committee of the Dutch Section of the European Association for the Study of Protection of Financial Interest of the European Union. He is also Vice-Chairman of the Board of the (Dutch) Society of Fiscal Criminal Law. Professor Wladimiroff has published dozens of articles on subjects of economic criminal law, fiscal criminal law, environmental criminal law, European Union criminal law and fraud. He has authored and co-authored several specialist books on criminal law and procedure. In 1990, he established the (Dutch) National Course of Advocates for attorneys specializing in criminal defense cases. Mr. Wladimiroff is also Professor of Economic Criminal Law and Procedure the Faculty of Law the University of Utrecht.

30. Mr. Orié specializes in international criminal law and Supreme Court cases in criminal law. He is leading counsel in several criminal, extradition, and immigration cases the Supreme Court of the Netherlands. He has 15 years experience in all aspects of international cooperation in criminal matters, mainly in white collar cases. Mr. Orié has also worked as a defense attorney and legal expert in foreign jurisdictions (Germany, Belgium, France, Canada, United Kingdom). Mr. Orié founded the Dutch Section of the Association Internationale de Droit Penal and was Chairman of the Board of this Section (1980-1991). He has published many articles in Dutch and foreign professional journals, as well as several textbooks on international criminal law.

31. See Jan M. Hebly, *THE NETHERLANDS CIVIL EVIDENCE ACT OF 1988* (1992).

32. For a description of CEELI, see *infra* note 1.

33. Their request came through the Coalition for International Justice (CIJ), a tax exempt 501(c)(3) organization created by CEELI to assist the Tribunal. For a definition of 501(c)(3) organizations and their tax treatment under federal law, see *SELECTED FEDERAL TAXATION STATUTES AND REGULATIONS* 445 (Michael D. Rose ed., 1997).

34. The participants were U.S. Attorneys Joseph Jones and Carol Bruce, and British Barrister Steven Kay.

In an intensive effort to address the intricacies of trial advocacy, CEELI used mock trials and videotaped direct and cross-examination exercises to highlight practical techniques that might be useful during the actual trial. Yet, qualified as the defense team was, it was soon apparent that such a short-term exercise, though valuable, could not provide the training necessary to present an effective defense in an adversarial proceeding.

As a remedy, and in consultation with the defense team, CEELI approached the ICTY and requested an immediate allocation of funds to secure the services of an attorney schooled in an adversarial legal system.<sup>35</sup> Despite the ICTY's ongoing budgetary constraints, the Registrar agreed to the request. Subsequent to the Registrar's approval, Steven Kay, the English Barrister who participated in the CEELI training program, arranged a sabbatical from his law practice and joined the Tadic defense team.<sup>36</sup>

The importance of the defense team's new configuration cannot be overstated. Even Justice Richard Goldstone, the Chief Prosecutor for the Tribunal, recognized the effectiveness of this new arrangement.<sup>37</sup> The inclusion of Mr. Kay cemented a highly qualified and competent team that combined experience in both civil and common law systems. Immediately, Mr. Kay played a major role in cross-examining witnesses,<sup>38</sup> while Wladimiroff and Orie continued to direct the overall case and motion arguments.

Numerous measures could be implemented by the Tribunal to improve the process for assigning counsel. First, the Tribunal's Directive should be amended to require attorneys interested in serving as assigned counsel to prove that they have substantial legal back-

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35. The request was made on February 29, 1996, a meeting that included Mark S. Ellis, Executive Director of CEELI, Alain Norman, CEELI's liaison to the Tribunal, and Dorothee de Sampayo, the Tribunal's Registrar [hereinafter Sampayo Meeting].

36. Mr. Kay would be paid U.S. \$90 per hour, a fee substantially reduced from his normal rate.

37. "Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings and without the intervention of [CEELI], I have no doubt that the first trial before the Tribunal would not have measured up to the test." Richard J. Goldstone, Address Before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (October 2, 1996) [hereinafter Goldstone Address].

38. Mr. Kay estimates that he is handling 95% of witness cross-examinations. Telephone Interview with Stephen Kay, Counsel to Mr. Tadic (Sept. 22, 1996) [hereinafter Kay Interview]. For instance, Mr. Kay took the lead in cross-examining several major prosecution witnesses, including: Nasiha Klipic (June 14th), Mr. Seferovic (June 14th), Sud Hrnica (June 21), Seael Halvadizic (June 16th), Edin Mrkalj (July 18th), Emid Beganovic (July 19), Mehmed Alic (July 24th), Armin Mujcic (July 26th), Hase Icic (July 30th), and Dražuni Taskic (July 31st). *See id.*



ground in criminal law and in international humanitarian law. The combined legal backgrounds of the team of Wladimiroff, Orié, and Kay should represent the accepted standard.

Second, the Tadic case should be used as a model for putting together an effective defense team in an international war crimes proceeding, a team that combines common law and civil law experience. This first case amply demonstrates the need for expertise in an adversarial proceeding and the injustice of assigning counsel without considering this need. Thus, individual attorneys should meet rigorous criteria for competence in both civil and common law systems or, alternatively, the Registrar should assign two or more attorneys, where one possesses the requisite common law experience and the team members' skills are complementary.

Third, if there is a shortage of interested attorneys qualified in adversarial proceedings, the Tribunal should require counsel to participate in a training program. The training should provide a solid foundation in those areas of law in which the defense counsel may be deficient. Many jurisdictions provide training programs for new and current public defenders.<sup>39</sup> The ICTY training program might combine trial advocacy skills with an introduction to the Tribunal's rules and procedures.<sup>40</sup> The only legal assistance currently provided by the ICTY to assigned counsel is a publication, entitled *Manual for Practitioners*, designed to assist defense counsel in appearing before the Court.<sup>41</sup> Though helpful, the Manual cannot substitute for trial advocacy experience.

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39. In the United States, the Federal Judicial Center conducts regular seminars for federal public defenders. The seminars last three to five days and focus on issues such as rules of evidence, case management, oral arguments, opening and closing statements, motions and briefs, persuasive argumentation, and appeals. See National Seminar for Federal Defenders, Federal Judicial Center, Apr. 1-3, 1996 (program of events on file with the *Duke Journal of Comparative & International Law*); Appellate Writing Workshop for Federal Defenders, Federal Judicial Center, Washington, D.C., May 22-24, 1996 (schedule on file with the *Duke Journal of Comparative & International Law*).

40. Under U.S. federal legislation, funds are allocated to provide newly appointed federal public defenders a three-day training program on the rules and procedures of practicing before federal courts.

41. The *Manual for Practitioners* reviews the Tribunal's procedures and provides information on courtroom protocol. Int'l Crim. Tribunal for the Former Yugoslavia, *Manual for Practitioners, Version 1.1*, (visited Mar. 29, 1997) available in <gopher://gopher.igc.apc.org:7030/00/manual/manual> (on file with the *Duke Journal of Comparative & International Law*). The Manual is intended to educate practitioners on the specific requirements for appearing before an international judicial body. Topics covered include: the facilities the Tribunal, the status of defense counsel and the relationship between defense counsel and the Court, the relationship between a client and defense counsel, and procedures before the Court. See *id.*

Finally, it will become increasingly important for the ICTY to provide training for assigned counsel. In the future, defense counsel will likely include attorneys from the former Yugoslavia, particularly from Serbia, who have neither training from Western universities nor background in public international law. The ICTY's reputation for fairness could be easily eroded if these attorneys are placed in an unfamiliar legal environment and not given the tools they will need to function effectively.

In a similar context, training is already being provided to attorneys who will potentially participate in the International Criminal Tribunal for Rwanda (ICTR).<sup>42</sup> A program initiated in early 1996 by Lawyers Without Borders and the European Law Students Association (ELSA) included Mr. Wladimiroff and Mr. Orie in an intensive trial advocacy program.<sup>43</sup>

### III. LEAD COUNSEL

Under the Directive, the accused is entitled to *one* attorney as assigned counsel.<sup>44</sup> The word "one" is literal. Yet it is incomprehensible to think that one attorney can handle the complexities of an international war crimes trial.<sup>45</sup>

In the Tadic case, Mr. Wladimiroff successfully petitioned the Registrar for an additional defense attorney. In order to support this request, however, the Registrar classified Mr. Orie as a "consultant," rather than co-counsel. The Registrar cleverly reasoned that the Directive, while limiting counsel to one attorney, nevertheless allowed discretionary use of funds to secure the services of a defense counsel consultant.<sup>46</sup> The key issue for the Registrar was thus a financial one—that is, whether or not the budget would allow the hiring of a

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42. *The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda*, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

43. Interview with Mr. Alphons Orie, Co-Counsel for Mr. Tadic (July 16, 1996) [hereinafter Orie Interview].

44. See *Directive*, *supra* note 10, art. 16.

45. During pre-trial hearings, the Registry had calculated that the Tadic case would last only six weeks. See Orie Interview, *supra* note 43. This explains, in part, why the Registry was not concerned about assigning only one counsel. The case is now expected to last ten months. See *id.*

46. "[C]osts and expenses to be met by the Tribunal shall include costs relating to investigative and procedural steps, measures taken for the production of evidence to assist or support the defence, as well as expenses for ascertainment of the facts, *consultancy* and expert opinion . . . ." *Directive*, *supra* note 10, art. 18(B) (emphasis added).

“consulting attorney.”<sup>47</sup> Given the clear and urgent need for additional counsel, the Registrar deferred judgment on the budget, and immediately allocated funds for two additional defense attorneys.<sup>48</sup>

In allocating additional resources to the defense team, the Registrar did not overstep her authority. Considering the support available to the Office of the Prosecutor (OTP), the Registrar might even have been justified in allocating more. For instance, the Tribunal created a Special Legal Services division to provide prosecutors with expertise on criminal and international law. This office is comprised of legal experts who not only research and argue pretrial motions, but also assist each of the trial attorneys in the OTP.<sup>49</sup> Nothing comparable exists for defense counsel.

The Tribunal’s Directive should be amended immediately to permit assignment of co-counsel when necessary. The number of attorneys thus designated should be determined according to, first, the complexities of the case, and second, budgetary considerations. It is difficult to imagine that even the most rudimentary case would not require at least two full-time defense attorneys.<sup>50</sup>

#### IV. COMPENSATION

The magnitude of an international war crimes trial demands a rigorous defense with nothing less than assigned counsel’s full-time commitment of time and resources. Some will argue that defending an alleged war criminal could be accomplished through pro bono representation. This notion, however, is naive. In the Tadic trial, assigned counsel has spent 12 to 14 hours a day, six days a week in pre-trial and trial work.<sup>51</sup> Defense counsel has prepared for more than 85 cross-examinations, and for direct examination of over 35 defense witnesses.<sup>52</sup> This type of commitment is all-consuming. Any-

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47. “Where counsel has been assigned, the costs and expenses of legal representation of the suspect or accused necessarily or reasonably incurred shall be met by the Tribunal *subject to any budgetary constraints.*” *Id.* art. 18(A) (emphasis added).

48. See Sampayo Meeting, *supra* note 35.

49. See Report, *supra* note 8, at 15.

50. As this Comment was being researched, there were rumors that the Tribunal would adopt this recommendation. Based on the latest amendments to the Directive, the Tribunal has, in fact, broadened the definition of counsel. Article 16 of the Amended Directive now reads: “Under exceptional circumstances and at the request of the person assigned as counsel, the Registrar may . . . assign a second counsel to assist the lead counsel. The first assigned shall be called the lead counsel.” *Amended Directive*, *supra* note 18, art. 16(c).

51. See Kay Interview, *supra* note 38.

52. See *id.*

thing short of an equally committed response from the ICTY to support the defense team, including fair compensation, is unjust.

Rules covering remuneration of assigned counsel are provided for in the Tribunal's Directive.<sup>53</sup> Assigned counsel is paid according to three separate schedules. First, attorneys are paid on a fixed rate basis.<sup>54</sup> The fixed fee is U.S. \$400, payable at specific stages of the trial.<sup>55</sup> In the Tadic case, it is envisaged that the fixed rate fee will pertain to two stages for a total of U.S. \$800.<sup>56</sup> The second and last payment will be made after a final detailed statement is submitted by assigned counsel.<sup>57</sup> Since this payment is negligible, it is of little importance to assigned counsel.<sup>58</sup>

The second type of payment is a daily allowance for living outside The Hague.<sup>59</sup> This payment is based on the United Nations Schedule of Daily Subsistence Allowance Rates,<sup>60</sup> and is paid on a progressive rate reduction schedule.<sup>61</sup> Since the assigned counsel for Tadic is a local attorney, he does not receive the daily allowance.

The third type of payment, and the most important, is the daily fee.<sup>62</sup> The daily fee is fixed to the number of days worked and, for assigned counsel, is limited to U.S. \$200 a day.<sup>63</sup> When calculated on the basis of a 7 ½ hour workday, Mr. Wladimiroff is paid U.S. \$26 per hour. Besides covering assigned counsel's salary, this amount is also meant to cover general administrative costs for the counsel's office.

This absurdly low fee compelled Mr. Wladimiroff to petition the Registry for an increase in his daily fee.<sup>64</sup> In what would be an extremely important decision by the Registrar to assist the defense counsel, an informal agreement was negotiated, increasing Mr. Wladimiroff's daily fee from U.S. \$200 to \$825 a day (U.S. \$110 per hour).<sup>65</sup> The two "lawyer consultants" were to be paid U.S. \$80 and

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53. See *Directive*, *supra* note 10, art. 23.

54. See *id.* art. 23 (A)(I).

55. See *id.* art. 24.

56. See *Orie Interview*, *supra* note 43.

57. See *Directive*, *supra* note 10, art. 28(B).

58. See *Orie Interview*, *supra* note 43.

59. See *Directive*, *supra* note 10, art. 23 (A)(iii).

60. See *id.*

61. See *id.* art. 26.

62. See *id.* art. 23 (A)(ii).

63. See *id.* art. 25.

64. See *Orie Interview*, *supra* note 43.

65. See *id.*

\$90 per hour respectively.<sup>66</sup> This new rate is a significant improvement and, for the lead counsel, is actually equal to the fee paid to the lead prosecutor.<sup>67</sup>

However, the current fee structure for assigned counsel—even with the increase—is still inadequate to cover administrative costs.<sup>68</sup> Nor does the current fee level for lead counsel equal Mr. Wladimiroff's opportunity cost for agreeing to forego his regular clientele in order to represent Dusko Tadic.<sup>69</sup> Even in the Nuremberg and Tokyo trials, the Court provided defense counsel with a fee roughly equivalent to their regular salaries.<sup>70</sup> The defense attorneys in these trials also received certain perquisites necessary to undertake their cases.<sup>71</sup> In contrast, the Registrar of the ICTY has informed the defense team that they will not be remunerated for preparatory work done in Bosnia-Herzegovina.<sup>72</sup> In addition to trying to control overhead costs incurred by the defense, the ICTY is contemplating a limit on the total number of hours worked by each defense attorney to 175 hours per month.<sup>73</sup>

Further attempts to limit compensation for defense counsel could have a devastating impact on their livelihoods. As it now stands, assigned counsel is prohibited from receiving remuneration from any other source.<sup>74</sup> Consequently, Mr. Wladimiroff depends solely on remuneration from the ICTY so long as he represents Tadic. The ICTY should not encourage further erosion of counsel's fees; on the contrary, it should actively promote an equitable fee schedule that provides fair compensation for assigned defense counsel.

The long-term impact of low compensation could have a demoralizing effect on future candidates for defense counsel.<sup>75</sup> Mr. Wladi-

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66. Mr. Orie, a partner in Mr. Wladimiroff's firm, would be paid U.S. \$80 per hour, and Mr. Steven Kay, the British Barrister added to the defense team, would receive U.S. \$90 per hour. *See id.*

67. The fee paid to the lead prosecutor is U.S. \$110. *See* Norman Interview, *supra* note 26.

68. *See* Orie Interview, *supra* note 43.

69. Mr. Wladimiroff's normal fees are U.S. \$300 per hour. *See id.*

70. A successful German lawyer earned at that time between U.S. \$7500 and \$10,000 a year (\$625 to \$833 per month). The Court provided assigned defense counsel with a one-time payment of \$1,000, and a monthly payment of \$625. *See* CONOT, *supra* note 2, at 83.

71. *See id.* at 94.

72. *See* Kay Interview, *supra* note 38.

73. *See id.*

74. *See Directive, supra* note 10, art. 23(B).

75. *See* Orie Interview, *supra* note 43.

miroff and Mr. Orié already have cautioned other attorneys from undertaking an assignment unless there is some improvement in the fee schedule.<sup>76</sup> Furthermore, both attorneys have indicated that the low pay may prevent them from representing Mr. Tadic on appeal, if an appeal is necessary.<sup>77</sup>

To correct inequities in the remuneration of assigned counsel and the OTP, the Directive should be amended to at least provide the lead defense counsel with the equivalent of what a lead prosecutor is paid, based on the U.N. pay scale.<sup>78</sup> In addition, the daily fee schedule for assigned counsel should include a formula to cover general office and administrative costs.<sup>79</sup> In changing its compensation policy, the ICTY would simply reflect an accepted practice in Western countries that salaries for assigned defense counsel should be at least comparable to prosecutors' salaries. For instance, in the United States an important factor in setting the rate of compensation paid to public defenders is the rate paid to U.S. state attorneys.<sup>80</sup> In an effort to prevent inequities, some jurisdictions legislate a minimum salary range for public defenders that is proportionate to prosecutors' salaries.<sup>81</sup> In other jurisdictions, the salaries of public defenders and prosecutors are roughly equivalent.<sup>82</sup>

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76. *See id.*

77. *See id.*

78. In discussions with the Registrar, the author was informed that the U.N. pay scale for a prosecutor stipulates a base salary of U.S. \$57,000, plus an adjustment of \$34,000, totaling \$91,500. The Tribunal also pays, for each prosecutorial position, taxes and administrative costs in the amount of \$55,000. Thus, if the Tribunal were to compensate assigned counsel at an equivalent level, the total cost for defense counsel would be \$146,500. *See Sampayo Meeting, supra* note 35. Discussions about amending the Directive took place shortly after this Comment was written; by the time it went to press, the Directive had, in fact, been officially amended. "The fixed daily rate for fees . . . shall be assessed by the Registrar on the basis of the seniority and experience of counsel . . ." *Amended Directive, supra* note 18, art. 25. The hourly fees are based on the following scale: lead counsel, \$110 for 20 years or more experience; \$100 for 15-19 years of experience; \$90 for 10-14 years of experience; and \$80 for 5-9 years of experience. Co-counsel is paid an hourly fee of \$80. *See id.* at Annex VI.

79. Under the Amended Directive, the new fee structure includes "general office costs." *See Amended Directive, supra* note 18, art. 25.

80. *See Guidelines for the Administration of the Criminal Justice Act*, 7 GUIDE TO JUDICIARY POLICIES AND PROCEDURES § 4.02(A)(3).

81. In the State of Illinois, state law sets a salary range for public defenders that is based on the salary of the elected state's attorney in each jurisdiction. For instance, in one category, the public defender cannot make less than 40% of the state's attorney's salary. *See Trends and Issues 90: Criminal and Juvenile Justice in Illinois, Illinois Crim. Justice Information Auth.* (visited March 27, 1997) available at [http://www\\_loc.eecs.ulc.edu:80/~suvavna/CRJ/INTRO/TI](http://www_loc.eecs.ulc.edu:80/~suvavna/CRJ/INTRO/TI) (on file with the *Duke Journal of Comparative & International Law*).

82. In a recent study conducted by the U.S. National Legal Aid and Defender Association, it was noted that 47% of state public defenders responding to a survey indicated that their sala-

## V. EQUALITY OF ARMS

*The pretrial proceedings have shown a serious inequality of arms in that all the Prosecution's witnesses are outside the Srpske Republic, and that all authorities except those of the Srpske Republic have fully co-operated with the Prosecution in this case.*<sup>83</sup>

Since his opening statement in the Tadic trial, Mr. Wladimiroff has argued vehemently that basic tenets of a fair trial remain absent.<sup>84</sup> Attorneys for Mr. Tadic have consistently held that an inequality of arms<sup>85</sup> in this case has "seriously handicapped" preparation of the defense.<sup>86</sup> At issue has been the continued lack of access to key sites in the Prijedor region of Bosnia-Herzegovina. Local Serb authorities, in a bid to challenge the Tribunal's legitimacy, have persistently tried to stymie and derail the defense case.<sup>87</sup> This situation is unacceptable. If not resolved, attorneys in future cases will face the same obstacles, and the ICTY ultimately might suffer from a perceived inability to guarantee a proper defense to persons accused of war crimes. Since the majority of current indictments are against individuals alleged to have committed war crimes in the region now controlled by Republika Srpska,<sup>88</sup> mounting an adequate defense in each case will hinge upon counsel's ability to secure evidence and witness testimony from within this hostile and uncooperative environment.

It was not until January 1996 (only four months before the trial began) that fighting subsided enough for the Tadic defense team to even enter relevant locations in Bosnia-Herzegovina.<sup>89</sup> Even then, they were severely constrained in their ability to move throughout the area. The OTP indeed faced the same limitations; yet, because their witnesses had moved outside of affected areas, it did not ham-

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ries were equivalent to the salaries of state prosecutors. Of those respondents who indicated a disparity in salary, the difference was approximately \$1502 for entry level positions. See Alvita S. Eason & Billie Bitely, *Just Compensation? A Preliminary Report of the NLADA Salary Survey of Defender Systems*, at 6 (Dec. 4, 1994).

83. Opening Remarks, *supra* note 1, at 42.

84. *See id.* at 36.

85. *See* Orié Interview, *supra* note 43.

86. *See* Opening Remarks, *supra* note 1, at 36.

87. *See id.* at 36-48.

88. Of the 74 ICTY indictees, 44 are alleged to have committed crimes in Republika Srpska, primarily at various detention camps. These include the Omarska Camp (19); Suska Camp (1); Keraterm Camp (13); Bosanski Samac (6); Srebrenica (2); Stupni Do (1) and Brcko (2). *See* BULL. OF THE INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, No. 8, July 19, 1996, at 3.

89. *See* Opening Remarks, *supra* note 1, at 36.

per their investigation to the same extent.<sup>90</sup> The prosecution also could rely on its official status as an arm of the ICTY to gain cooperation from national authorities; the same was not true for the defense.<sup>91</sup> While the Tribunal's Statute provides the legal instruments with which to force cooperation in the OTP's pretrial investigation,<sup>92</sup> "[t]he defense," as Mr. Wladimiroff noted, "has no power whatsoever to enlist anyone's cooperation in providing relevant facts. The defense's activities preceding the trial depends solely upon the voluntary cooperation of others . . . . Everything, therefore, that the Defense has been able to achieve so far is the result of [the Defense's] own negotiations with authorities and individuals and not of any provision of the Tribunal."<sup>93</sup>

Even where access is granted, however, formidable challenges remain. People living in the area are still afraid to speak and are often threatened if they do.<sup>94</sup> Furthermore, "[w]itnesses in the area who held any police or military authority have been barred from talking to the Defence."<sup>95</sup> In a recent incident, the defense counsel interviewed a potential witness in a small town in Republika Srpska at approximately 6:00 p.m. The next morning, by the time counsel arrived for an unrelated visit to the police station, the witness had been contacted by the Chief of Police and was sitting in police headquarters.<sup>96</sup> During a recent interview for Court TV, defense attorneys expressed frustration over the fact that Prijedor's local police chief refused an exit visa to a defense witness wanting to testify in the Hague.<sup>97</sup> Two other witnesses who had agreed to testify for the defense backed out at the last minute because of threats to their lives.<sup>98</sup>

The rigid "don't cooperate, don't speak" policy carried out by local police demonstrates just who wields power in the municipalities of Republika Srpska. One local police officer commented, "No one can order me to allow witnesses for the Defence to be investigated in

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90. *See id.*

91. *See id.* at 37.

92. "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Statute, *supra* note 4, art. 29(1).

93. *See* Opening Remarks, *supra* note 1, at 42.

94. *See* Orić Interview, *supra* note 43.

95. Opening Remarks, *supra* note 1, at 45.

96. *See* Kay Interview, *supra* note 38.

97. *Court TV* (television broadcast, Sept. 17, 1996).

98. *See id.*



my area.”<sup>99</sup> Mr. Wladimiroff, in his opening statement before the Tribunal, framed the problem thus:

In preparing the defence, we have struggled with the hostility and suspicion with which the Tribunal is viewed in the Serb Republic and, in particular, in the Prijedor area. Those in power in this area have blocked avenues of investigation . . . . It might be thought that they would be eager to help Dusko Tadic in his defense at this trial and treat him as one of their own. This, your Honours, has not been the case. The Defence of Dusko Tadic has been prepared with little or no help from the Prijedor authorities, and there have been active attempts to prevent us from obtaining evidence on behalf of our client to prove his innocence.<sup>100</sup>

The Tribunal should take action to ensure the defense’s ability to secure witnesses for trial. Given the difficulties involved in securing cooperation from potential witnesses in Republika Srpska, and because the ICTY does not have a police force to compel witnesses to testify, available defense witnesses should be provided safe conduct. Orders for safe conduct should grant witnesses limited immunity from prosecution when appearing in the Hague to give testimony.<sup>101</sup> Although orders for safe conduct are not specifically provided for in the Statute or the Rules, the Trial Chamber could find authority in Rule 54, which reads “At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or the preparation or conduct of the trial.”<sup>102</sup>

If safe conduct is not feasible, the Trial Chamber should liberally permit defense witnesses to give testimony by means of video link. Just recently, the Trial Chamber ruled that defense witnesses can offer testimony via video conferencing if they cannot or will not travel to the Hague.<sup>103</sup> The video link could be a live television link between the Trial Chamber and a safe harbor, such as an embassy, in Bosnia-Herzegovina. To mitigate the very real threat of reprisals against

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99. Opening Remarks, *supra* note 1, at 45.

100. *Id.*

101. See *European Convention and Council of Europe Recommendation No. R (83)12 of the Committee of Ministers Concerning Safe Conduct for Witnesses in Application of Article 12 of the European Convention* (Sept. 23, 1983).

102. *Rules, supra* note 13, Rule 54.

103. Decision on the Defense Motion to Summon and Protect Defense Witnesses and on the Giving of Evidence By Video-Link, *Prosecutor v. Tadic*, No. IT-94-1-T (June 25, 1996).

witnesses who testify, the Trial Chamber should refrain from disclosing witnesses' identity to the public. This elementary form of witness protection is supported by the Statute<sup>104</sup> and the Rules,<sup>105</sup> each of which contains a provision to guarantee confidentiality.

## VI. CONCLUSION

*There is no question that history will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.*<sup>106</sup>

The historic importance of this first trial before the ICTY should not be underestimated. Not since Nuremberg and Tokyo has the international community attempted to bring to justice individuals charged with war crimes. If this painstaking experiment in international humanitarian law succeeds, the Tribunal will ensure that individuals responsible for atrocities, having been fairly tried and convicted, are held accountable for their actions. The Tribunal cannot reverse the tragedy that took place in Bosnia. It can, however, be a voice for those who no longer speak, and it can help to restore faith in the lawful pursuit of justice.

The Tribunal might also be the precursor to a permanent international criminal court. Movement in this direction, however, depends upon the integrity of the institution and its general acceptance by participating states. Success in the pending trials will thus rest upon the fairness of the Tribunal's proceedings. If the proceedings are considered biased against defendants, the loss will be to the Tribunal's legitimacy.

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104. See Statute, *supra* note 4, art. 20(4) ("The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."); see also *id.* art. 22 ("The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.").

105. See Rules, *supra* note 13, Rule 69(A) ("In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal."); see also *id.* Rule 79 ("The Trial Chamber may order that the press and public be excluded from all or part of the proceedings for reasons of: . . . (ii) safety, security or non-disclosure of the identity of a victim or witness . . .").

106. Goldstone Address, *supra* note 37.

The Tadic case is a window into procedural challenges uniquely presented by a war crimes trial. Because it is the first proceeding held before the Tribunal, it also offers a rare opportunity to assess and shape standard practice in a relatively new area of law. This Comment, by focusing on low attorney compensation, inequality of arms, and the unrealistic expectations now placed upon a single attorney, highlights some of the problems incumbent on the defense in a war crimes trial. Amendments to the Tribunal's internal regulations to remedy these deficiencies can ease the undue burden on assigned counsel. More importantly, they will enhance the Tribunal's credibility and set the yardstick by which future trials are measured.