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## Highlighting the Importance and Success of Defense Counsels in Guaranteeing Fair Trials at International Criminal Tribunals

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## **Preliminary Statement of the Issue**

Defense counsels at international criminal tribunals have proven to be an effective measure to guaranteeing a fair and impartial trial. This paper will analyze the overall performance of defense counsel, and the measures taken to further solidify the effectiveness of defense counsel representation. Specifically, this is demonstrated through factors such as acquittal rates at international criminal tribunals, evidence from court proceedings, increased qualification mandates, and support from outside organizations. Together, these factors highlight the effectiveness of defense counsel at international criminal tribunals.

## **Description of the Problem**

In evaluating international criminal tribunals, there is debate as to whether the right to counsel is a meaningful measure to ensuring a fair trial. Arguments opposing the effectiveness of defense counsel have been raised, attempting to state that these tribunals warrant nothing more than a public demonstration or a “show trial”<sup>1</sup> of the atrocities conducted by individuals,<sup>2</sup> or that defense counsel is ineffective based on a lack of a permanent office, incompetency, and lack of resources.<sup>3</sup> However, this paper’s analysis sheds light on statistical analysis of acquittal rates amongst international tribunals that favor defendants, combined with the growing requirements and resources being provided to defense counsels. This paper presents an advanced analysis by highlighting individual defense counsel strategies and tactics through anecdotes from trials. These

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<sup>1</sup> Jeremy Peterson, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT. LAW J., 1, 260 (2007).

<sup>2</sup> Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (1946), <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/>.

<sup>3</sup> Matthew Catallo, *Fixing the Problem of Incompetent Defense Counsel Before the International Criminal Court*, 41 MICH. J. INT’L L. 417 (2020). <https://repository.law.umich.edu/mjil/vol41/iss2/5>.

anecdotes show specific tactics that have proven successful as a way to further show the effectiveness of defense counsel.

### **Statement of the Thesis**

Providing defense counsel to defendants being tried before international criminal tribunals has, and continues to be, a successful measure to guaranteeing a fair and impartial trial. The combination of tangible evidence of acquittals reached at past tribunals, stricter qualifications to practice before the tribunals, and increased support being provided to represent international criminal defendants, provide further support for this theory. Opponents to this theory attempt to recognize some of the disadvantages that may have been present in the past. After further analysis, many of the critiques have become outdated or are diminished when juxtaposed with high acquittal rates and examples of defense counsel competency over the last century. International defense counsels have been shown to be effective in the past and have continued to develop to further ensure a fair and impartial trial for defendants at international criminal tribunals.

#### **I. ANALYZING DEFENSE COUNSEL IN INTERNATIONAL CRIMINAL TRIBUNALS DEMONSTRATES THAT COUNSEL HAS BEEN A KEY COMPONENT TO GUARANTEEING A FAIR AND IMPARTIAL TRIAL.**

The performance of defense counsels throughout the history of international criminal tribunals demonstrates that defense counsel has been an effective measure in guaranteeing a fair trial. Analysis of this issue first requires an emphasis on the importance of a defendant's right to counsel, and how this right to counsel was established in the different tribunals. In this analysis, the effectiveness of counsel is prominently represented by way of acquittal rates, anecdotes of skillful tactics used by defense counsel, and measures that have been implemented to improve defense counsels over time. Further, this analysis presents the most common counterarguments opposing counsel's effectiveness, and rebuts those claims with evidence explaining why the

individual criticisms are flawed. In totality, the evidence demonstrates that defense counsels have been effective in guaranteeing a fair and impartial trial for international criminal defendants.

### **A. A Defendant's Right To An Attorney Is A Historically Recognized Right In Court Proceedings.**

A defendant's right to counsel in a criminal trial is one of the cornerstones of a fair and impartial trial. The right to defense counsel is a measure widely recognized internationally as necessary to maintain a fair trial in a criminal tribunal.<sup>4</sup> Without a fair and impartial trial, an international criminal tribunal will not be looked upon with legitimacy within the international community.<sup>5</sup> Courts<sup>6</sup> as well as judicial scholars<sup>7</sup> across the world have explained the importance of defense counsel, and its importance in criminal proceedings. The right to counsel is one that every criminal defendant deserves, and without its presence, a fair and impartial trial where evidence is weighed and argued evenly for both sides is unlikely.

While gaining traction following the Nuremberg Tribunal in 1945, standards on access to counsel have progressed around the world.<sup>8</sup> Following the Nuremberg Tribunal in 1945,

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<sup>4</sup> See, e.g., European Convention of Human Rights ("ECHR"), Article 6(3); International Covenant on Civil and Political Rights, Article 14(3); American Convention of Human Rights, Article 8(2); African Charter on Human and Peoples Rights, Article 7(1)(c).

<sup>5</sup> Brianne McGonigle, *De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia*. Human Rights Brief 13, no. 1 (2005): 10-13, <https://digitalcommons.wcl.american.edu/hrbrief/vol13/iss1/3/>.

<sup>6</sup> See *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

<sup>7</sup> Jardine P.W. Temminck Tuinstra, *Defense Counsel In International Criminal Law*, 153 (2009) ("[N]o party to criminal proceedings, be it defense or prosecution, is put in a procedurally disadvantaged position vis-à-vis the other.").

<sup>8</sup> United States Holocaust Memorial Museum, Washington DC, *International Military Tribunal at Nuremberg*, Holocaust Encyclopedia (Nov. 17, 2020), <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg>.

international human rights have taken steps to recognize the importance of a right to counsel. In the years following Nuremberg, both the African Commission on Human and Peoples' Rights and the European Convention on Human Rights were adopted.<sup>9</sup> Both of these organizations detail a specific right to counsel at trial respectively, specifically in Article 7 of the African Commission on Human and Peoples' Rights and Article 6 of the European Convention on Human Rights.<sup>10</sup> This recognition of the importance of right to counsel solidifies the international understanding of the importance of a fair trial by way of defense counsel.

At its core, the right to counsel seeks to provide a barrier to arbitrary and unreasonable persecution, a concern that is heightened in international criminal tribunals.<sup>11</sup> This concern is heightened in international criminal tribunals because the crimes being tried (genocide, crimes against humanity, etc.)<sup>12</sup> are so grave that they evoke an increased level of outrage, animosity, and controversy from persons outside of the courtroom.<sup>13</sup> This only magnifies the need for a thorough defense counsel at international tribunals, and explains why their ability to perform effectively becomes even more important. Even in cases featuring war crimes and crimes against humanity, defense counsel is monumentally important to making sure that prosecutors present the evidence through fair channels and that defendants are adequately represented. As a result, defense counsel plays a large role in any criminal proceeding, but an even magnified role before international criminal tribunals.

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<sup>9</sup> See, e.g., European Convention of Human Rights ("ECHR"), Article 6(3); African Charter on Human and Peoples Rights, Article 7(1)(c).

<sup>10</sup> *Id.*

<sup>11</sup> Jeremiah Mostellar, *Is Access to Counsel the Most Important Due Process Right?*, Charles Koch Institute (Oct. 28, 2020), <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/is-access-to-counsel-the-most-important-due-process-right/>.

<sup>12</sup> See Rome Statute of the International Criminal Court, Article 5-9; see also Statute of the International Criminal Tribunal For The Former Yugoslavia, Article 2.

<sup>13</sup> Jackson, Robert H., *Opening Statement for the United States of America* (1945). INTERNATIONAL MILITARY TRIBUNAL - MAJOR WAR CRIMINALS, <https://digitalcommons.law.uga.edu/imt/11>.

## **B. The Establishment of Defense Counsel Practicing Before International Criminal Tribunals Can Be Traced Back To The Nuremberg Tribunal And Has Progressed Over Time.**

International criminal tribunals are meant to seek justice for extremely heinous crimes and crimes against humanity.<sup>14</sup> The result of these extreme crimes is a public cry for vengeance that could potentially impede a fair trial. Justice Robert Jackson articulated this problem in the Military Tribunal at Nuremberg. In Jackson's Opening Statement, he explained, "The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war."<sup>15</sup> The distinguished goal of a balanced, yet just retribution is found in a fair trial; a trial that can only be conducted with an adequate defense counsel for the accused.

International criminal tribunals have diversity in their origins yet share an understanding of the importance of providing defense counsel to defendants. The structure of post-war tribunals can be traced back to the Nuremberg Tribunal following WWII, where Nazi German authorities were prosecuted.<sup>16</sup> This was followed by the establishment of *ad hoc*<sup>17</sup> tribunals such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY")<sup>18</sup> and the International

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<sup>14</sup> See Constitution of the International Military Tribunal, Article 1; Statute of the International Criminal Tribunal For The Former Yugoslavia, Article 18(3); Statute For The International Tribunal For Rwanda, Article 17(3).

<sup>15</sup> Jackson, Robert H., *Opening Statement for the United States of America* (1945). INTERNATIONAL MILITARY TRIBUNAL - MAJOR WAR CRIMINALS, <https://digitalcommons.law.uga.edu/imt/11>.

<sup>16</sup> See Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement*, 2, (2020).

<sup>17</sup> Legal Dictionary, Law.com Legal Dictionary, (November 9, 2020).

<https://dictionary.law.com/Default.aspx?selected=2326#:~:text=adj.,to%20argue%20a%20key%20point.> ("Ad hoc - Latin shorthand meaning "for this purpose only." Thus, an ad hoc committee is formed for a specific purpose, usually appointed to solve a particular problem.)

<sup>18</sup> War Crimes Tribunal Guide – Legal Research Strategies and Tips, Washington University Law (November 5, 2018, 4:24 PM) <https://libguides.law.wust.edu/c.php?g=209453&p=1398367> ("Formal name: International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.").



Criminal Tribunal for Rwanda (“ICTR”)<sup>19</sup> which were established to prosecute individuals responsible for situations that were specific to the war crimes committed in the former Yugoslavia and Rwanda. The International Criminal Court (“ICC”) was established by the Rome Statute in 2002 with the goal of bringing justice to crimes that threaten peace and security internationally.<sup>20</sup> While there is diversity in their originals, all tribunals shared one common characteristic in that all of the tribunals recognized that in order to establish a fair trial for criminal defendants, a defense counsel was necessary.

A defendant’s right to counsel in an international criminal tribunal can be traced back to the Nuremberg Tribunal following WWII.<sup>21</sup> Speaking specifically regarding a right to counsel, in his opening remarks at Nuremberg, Justice Jackson stated:

But they [defendants] do have a fair opportunity to defend themselves – a favor which these men, when in power, rarely extended to their fellow countrymen. Despite the fact that here they must be given a presumption of innocence, and we accept the burden of providing criminal acts and the responsibility of these defendants for their commission.<sup>22</sup>

The Nuremberg Military Tribunal recognized that if rights were not awarded to the defendants, it would take away from the legitimacy of the Tribunal itself.<sup>23</sup> By guaranteeing that right, the Nuremberg Tribunal set a standard that even defendants being tried for the most heinous crimes would receive adequate representation from defense counsel.

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<sup>19</sup> War Crimes Tribunal Guide- Legal Research Strategies and Tips, Washington University Law (November 5, 2018, 4:24 PM) <https://libguides.law.wustl.edu/c.php?g=209453&p=1398367> (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 and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.”).

<sup>20</sup> See Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement*, 189, (4th ed.2020).

<sup>21</sup> See Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement*, 2, (4th ed. 2020).

<sup>22</sup> Jackson, Robert H., *Opening Statement for the United States of America* (1945). INTERNATIONAL MILITARY TRIBUNAL - MAJOR WAR CRIMINALS, <https://digitalcommons.law.uga.edu/imt/11>.

<sup>23</sup> *Id.* (“[T]o pass these defendants a poisoned chalice is to put it to our own lips as well.”).

The Nuremberg Tribunal was key in establishing defendants' rights, specifically rights that are exercised through counsel. The defendants at Nuremberg were provided an opportunity to challenge the evidence that was brought forth against them.<sup>24</sup> The Tribunal recognized how critical defense attorneys were to a fair trial, and defendants were given the opportunity to select their lawyers from the German bar, or have counsel appointed to them.<sup>25</sup> There was even an American on the defense counsel.<sup>26</sup> Further, defendants were given the opportunity to take the stand, defense counsel received a German copy of all documents introduced into evidence, and defense counsel could have witnesses and documents subpoenaed.<sup>27</sup> All of these rights were exercised through the use of a defense counsel.

Over time, defendants have been awarded more rights at *ad hoc* tribunals and in front of the ICC. While Nuremberg established the right to counsel in international criminal tribunals, subsequent tribunals have demonstrated growth and further protection for defendants by way of defense counsel. One example of this is mandated legal experience. At Nuremberg, there were no requirements placed on counsel to ensure competency. This shortcoming was rectified in later tribunals as the ICTR, ICTY, and the ICC all mandate advanced legal experience, the minimum requirement being seven years.<sup>28</sup> Furthermore, the tribunals that followed Nuremberg state that a defendant does not have to testify against himself or confess to guilt, a measure not specifically

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<sup>24</sup> Bernard D. Beltzer, "War Crimes": *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 Val. U. L. Rev. 895 (1996).

<sup>25</sup> Bernard D. Beltzer, "War Crimes": *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 Val. U. L. Rev. 895 (1996).

<sup>26</sup> Henry T. King Jr., *The Legacy of Nuremberg*, 34 Case W. Res. J. Int'l L. 335 (2002), <https://scholarlycommons.law.case.edu/jil/vol34/iss3/4>.

<sup>27</sup> *Id.*

<sup>28</sup> Rules of Procedure and Evidence 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 – rule 45, [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf). [https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC\\_GuideForApplicants\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC_GuideForApplicants_ENG.pdf)

outlined at Nuremberg.<sup>29</sup> Defense counsel also has the right to examine witnesses “under the same conditions as witnesses against him [defendant],” a right not explicitly granted in the Nuremberg Charter.<sup>30</sup> The rights provided to the defendants at Nuremberg, specifically the right to defense counsel, have welcomed expansion through the international tribunals. Defense counsel at Nuremberg proved effective even with a less detailed enumeration of rights. Statutory implementations and requirements by later tribunals have only bolstered the capabilities of defense counsel.

The implementation of the right to a defense counsel and the benefits of having a defense counsel have been solidified by at the ICTR, ICTY, and the ICC.<sup>31</sup> Many of the privileges that created a fair trial for defendants at Nuremberg have expanded, as international criminal tribunals have progressed. By establishing the right to counsel in an international tribunal in its charter, the Nuremberg Tribunal guaranteed a right to counsel, thus providing the groundwork and structure for growth in the requirements and capabilities of defense counsel in later tribunals.<sup>32</sup>

## **II. ACQUITTAL RATES ILLUSTRATE THE EFFECTIVENESS OF DEFENSE COUNSEL.**

The strongest argument for demonstrating the effectiveness and importance of defense counsel are the acquittal rates at international criminal tribunals. When defendants are indicted for war crimes or crimes against humanity, the defendant’s case hinges on defense counsel being able to demonstrate that there is doubt he is guilty of the crimes charged. Defense counsels are

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<sup>29</sup> *Rome Statute of the International Criminal Court*, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF. 183/9, Art. 67.

<sup>30</sup> *Id.*

<sup>31</sup> See Constitution of the International Military Tribunal, Article 1; Statute of the International Criminal Tribunal For The Former Yugoslavia, Article 18(3); Statute For The International Tribunal For Rwanda, Article 17(3).

<sup>32</sup> Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 [hereinafter London Charter].

especially key in these tribunals, where there is overwhelming evidence presented against the defendants. When a defense counsel is able to show that prosecutors were not able to demonstrate beyond a reasonable doubt that a defendant was guilty of the crime accused, the defendant is acquitted.<sup>33</sup> Acquittals are a key factor in evaluating the level of fairness present in international criminal courts. An illuminating quotation by Richard Gladstone explained:

I have often cavilled at criticisms of acquittals in international criminal courts. I have said on many occasions that the fairness of any criminal justice system must be judged by its acquittals and not by its conviction. As former chief prosecutor of the ICTY and ICTR, I welcomed acquittals that helped establish the credibility of those courts.<sup>34</sup>

While normal trials may find defendants being acquitted for lack of evidence, that is rarely the case in international tribunals where the evidence is often overwhelming.<sup>35</sup> Two of the more prominent arguments raised by defense counsel, are (1) that a defendant was not guilty of the accused crime, or (2) that even if the crime did occur, the defendant was not in a high-ranking position that would allow him to make decisions worthy of a guilty sentence.

Defense counsel will be the primary motivator for acquittals because even if the evidence for the prosecution is strong, it still takes a defense attorney to expose the shortcomings and false assumptions in the prosecution's argument. Further analysis into prior military and *ad hoc* tribunals demonstrates that acquittal rates in these tribunals are on par, and sometimes even increased in comparison to stable justice systems found in North America and Europe. While

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<sup>33</sup>Acquittal. (n.d.) *Collins Dictionary of Law*. (2006). Retrieved November 2 2020 from <https://legal-dictionary.thefreedictionary.com/acquittal>("when an accused criminal defendant receives if he/she is found not guilty. It is a verdict (or judgment in a criminal case) of not guilty.").

<sup>34</sup> Parisa Zangeneh, *The number of convictions at the ICC- a fair performance indicator?*, INTLAWGRRLS, <https://ilg2.org/2019/04/25/the-number-of-convictions-at-the-icc-a-fair-performance-indicator/>.

<sup>35</sup> "Second Day, Wednesday, 11/21/1945, Part 04", in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102.

acquittal rates in North American and European countries hover around 4-5%,<sup>36</sup> international criminal tribunals and the ICC present acquittal rates of over 10%.<sup>37</sup> These statistics are direct evidence contradicting the argument that defense counsel on the international stage has not adequately protected defendants.

A more nuanced analysis on acquittals from each individual tribunal demonstrates that acquittals are often reached because of skillful work of defense counsel. A court reaching an acquittal based on the skills demonstrated by defense counsels traces its roots back to the Nuremberg Tribunal. By starting the analysis focusing on Nuremberg and then continuing through later tribunals, it demonstrates that while defense counsel has progressed since Nuremberg, it has always been an effective measure to protecting defendants at international criminal tribunals. This narrowed analysis focusing on specific cases provides examples of the skills that defense counsels have used to guarantee a fair and impartial trial. By focusing on specific case examples, it provides perspective of some of the advanced and nuanced arguments used by defense counsels. As a result, it supports the conclusion that defense counsel plays a pivotal role in international criminal tribunals.

### **A. Nuremberg Acquittals**

Nuremberg provided the starting point for international military tribunals, and defense counsel representing defendants who were eventually acquitted is the earliest demonstration that defense counsel for international crimes was effective. The Nuremberg Tribunal brought charges

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<sup>36</sup> See Jennifer Thomas, *Adult Criminal Court Statistics*, 2008/2009, 30(2) *Juristat* (2010); See, Mia Dauvergne, *Adult Criminal Court Statistics in Canada*, 2010/2011 (*Juristat*, Ottawa, 2012); see also Peter H. Solomon, *Understanding Russia's Low Rate of Acquittal: pretrial screening and the Problem of Accusatorial Bias*. file:///Users/erikdettloff/Downloads/acquittalandpretrialscreening.pdf.

<sup>37</sup> See Key Figures of the Cases, *United Nations International Criminal Tribunal for the former Yugoslavia*, IRMCT, (August 2019), <https://www.icty.org/en/cases/key-figures-cases>; see also The ICTR in Brief, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org/en/tribunal>.

against 24 Nazi leaders and reached 22 verdicts.<sup>38</sup> Of the 22 verdicts reached, 3 of the defendants were acquitted, seven received prison terms, and 12 were sentenced to death by hanging.<sup>39</sup> This resulted in an acquittal rate of 13.6%.<sup>40</sup>

Franz Von Papen is an example of a defendant who was aided to an acquittal by the help of defense counsel in the Nuremberg Tribunal. Von Papen was indicted on charges of conspiracy and crimes against the peace.<sup>41</sup> Under the Hitler regime, Von Papen became the Minister of Austria, with the goal of strengthening the Nazi presence in Austria.<sup>42</sup> The defense counsel successfully argued that Von Papen wasn't in a position to initiate the alleged crimes.<sup>43</sup> Von Papen's defense counsel was able to exemplify this in two separate ways. First, in a cross-examination of Major General Lahousen, defense counsel was able to get an admission that Von Papen "was not in sympathy with Hitler's policies and that he remained in Hitler's service in the hope of restraining Hitler and his cohorts to some extent at least."<sup>44</sup> This was a key moment in a cross-examination that furthered Von Papen's defense that he did not support Hitler's actions and did what he possibly could to not participate.<sup>45</sup> Further, on June 19, 1946, Von Papen's defense counsel called a witness, Dr. Hans Kroll to the stand.<sup>46</sup> The witness called by defense counsel testified that Von Papen was an enemy of war and distrusted Hitler's policies.<sup>47</sup> This proved critical to the Tribunal finding that any access Von Papen had was limited, and he did not provide further

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<sup>38</sup> The Editors of Encyclopaedia Britannica, *Nuremberg Trials* (October 11, 2020). <https://www.britannica.com/event/Numberg-trials>. ("Robert Lay committed suicide while in prison and Gustav Krupp von Bohlen und Halbach's mental and physical condition prevented his being tried.")

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> The Avalon Project, *Nuremberg Trial Judgments: Franz von Papen*, JEWISH VIRTUAL LIBRARY A PROJECT OF AICE, <https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-franz-von-papen>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Final Statement, Judgement, Sentence: Franz von Papen*, FRANZ VON PAPEN (last visited Nov. 21, 2020), <http://propagander3.tripod.com/nur16.html>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

support to Hitler's regime.<sup>48</sup> As a result, the tribunal was not able to demonstrate beyond a reasonable doubt that his political morality amounted to planning an aggressive war. Therefore, Franz Von Papen was acquitted.

While this is only one of the many examples of an acquittal, it does demonstrate that even before the defense counsels had been bolstered in further *ad hoc* tribunals, the presence of a defense counsel created fairness within trials that furthered the legitimacy of the Tribunal itself, as well as defense counsel as a measure of preventing unfair persecution.

### **B. ICTY Acquittals**

The ICTY indicted 161 individuals for crimes of humanitarian law committed in the territory of Yugoslavia.<sup>49</sup> As of August of 2019, of the 161 indictments, 90 were sentenced, 18 were acquitted, 13 were referred to national jurisdictions pursuant to rule *11bis*<sup>50</sup> and 37 indictments were withdrawn or the defendant died before coming to trial.<sup>51</sup> This results in an acquittal rate of 14.5%.<sup>52</sup> Most of the acquittals in ICTY cases have come across in one of two ways, both of which are common across tribunals.<sup>53</sup> Acquittals are most often found when “the evidence presented by prosecution was either insufficient to establish that specific crimes occurred, or insufficient to demonstrate that the accused bore criminal responsibility for the commission of the crime.”<sup>54</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See Key Figures of the Cases, United Nations International Criminal Tribunal for the former Yugoslavia, IRMCT, (August 2019), <https://www.icty.org/en/cases/key-figures-cases>.

<sup>50</sup> Susan Somers, *Rule 11 of bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 B.C. Int'l & Comp. L. Rev. 175 (2007) (“An important aspect of this Completion Strategy is the use of Rule 11 bis to transfer certain cases from the Tribunal to national courts.”).

<sup>51</sup> See Key Figures of the Cases, United Nations International Criminal Tribunal for the former Yugoslavia, IRMCT, (August 2019), <https://www.icty.org/en/cases/key-figures-cases>.

<sup>52</sup> *Id.*

<sup>53</sup> See Acquittals, United Nations International Criminal Tribunal for the former Yugoslavia, IRMCT, (August 2019) <https://www.icty.org/en/about/chambers/acquittals>.

<sup>54</sup> *Id.*

In the ICTY, the burden is on the prosecution who must demonstrate that the defendant is guilty beyond a reasonable doubt.<sup>55</sup> In *Prosecutor v. Hadžihasanović et al.*, the court explained that the defendant was not liable when it stated:

“[I]n order to demonstrate that Hadžihasanović had effective control over the members of the El Mujahedin detachment, the Prosecution was required to prove beyond reasonable doubt that Hadžihasanović had the material ability to prevent or punish the criminal conduct of its members. Such material ability is a minimum requirement for the recognition of a superior-subordinate relationship for the purposes of Article 7(3) of the Statute. The Appeals Chamber, taking into account the submissions of the Parties, reviewed all of the relevant findings of the Trial Chamber and examined their significance in terms of effective control, both in isolation and collectively. In light of the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have concluded that it was established beyond reasonable doubt that Hadžihasanović had effective control over the El Mujahedin detachment between 13 August and 1 November 1993”. [Appeal Judgement, para. 231.]<sup>56</sup>

This is an example demonstrating a recurring reason for acquittal in international criminal tribunals. These results are not possible without defense counsel and provides evidence of how effective defense counsel is. In this case, defense counsel raised arguments ranging from the court’s standard of “reason to know,” the trial chambers decision on rule 98bis<sup>57</sup>, and evidentiary issues in a brief that was over 180 pages.<sup>58</sup> This is the type of diligence and competency that demonstrates the effectiveness of defense counsel in international tribunals. Here, the Prosecution could not demonstrate that Hadžihasanović (the group on trial), had the effective control that the

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<sup>55</sup> *Id.*

<sup>56</sup> *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-T, Judgment (March 15, 2006).

<sup>57</sup> Rules and Procedures of Evidence of the International Criminal Tribunal for the Former Yugoslavia, Part VI, Section III,

[https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf).

(“At the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.”).

<sup>58</sup> *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-T, Judgment (March 15, 2006).



prosecution claimed. As a result of not being able to show this beyond a reasonable doubt, the defendant, through assistance of counsel, was acquitted.<sup>59</sup>

One of the ways that defense counsel can protect defendants is by presenting evidence that the defendant was not in a position of power that would allow him to dictate decisions that reached the level of genocide or a crime against humanity.<sup>60</sup> This often occurs when the accused was under orders they could not refuse from a superior, or the accused simply didn't have the power to orchestrate the crimes in his current position. An example of this that resulted in an acquittal in the ICTY occurred in *Prosecutor v. Limaj et al.* where the court stated:

“the Chamber is not able to be satisfied beyond reasonable doubt that the Prosecution has established that in the period from May to 26 July 1998, the Accused Fatmir Limaj held a position of command in the KLA which included command of KLA soldiers in the village of Llapushnik /Lapusnik or, in particular, in the prison camp which existed at that time in the southern part of that village.”<sup>61</sup>

The case turned on the fact that the defense counsel for Fatmir Limaj was able to point out inconsistencies that existed between witness accounts.<sup>62</sup> The defense counsel further raised the point that most of the witness identifications had been done years ago and were partially influenced by media.<sup>63</sup> This was part of the reason that the defense counsel proved so important in this case, in the same way as counsel has presented strong defense in cases across other tribunals. The reason these examples are prevalent, is because they demonstrate that regardless of the severity of the situation or the potential differences in counsel size, defense counsels in these tribunals are making

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<sup>59</sup> *Id.*

<sup>60</sup> See Acquittals, *United Nations International Criminal Tribunal for the former Yugoslavia*, IRMCT, (August 2019) <https://www.icty.org/en/about/chambers/acquittals>.

<sup>61</sup> *Prosecutor v. Limaj et al. (Trial Judgment)*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, <https://www.refworld.org/cases,ICTY,48ac17cc2.html> [accessed 10 November 2020].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

sure that the prosecution does a diligent job. By forcing this level of diligence by adequate defense counsel, it shows that the defense counsel is having a substantial effect on these tribunals.

### **C. ICTR Acquittals**

During its period of activity, the ICTR indicted 93 individuals of whom 62 were sentenced, 14 acquitted and 10 referred to domestic courts.<sup>64</sup> Under the same formula used for the previous tribunals, having 14 acquittals present of the 93 persons who were indicted creates an acquittal rate of 15.05%. This is within the same range (13-15%) that was seen in the ICTY and the Nuremberg Tribunal.

One of the exemplary examples of defense counsel's work in the ICTR is displayed in the acquittal of the Chief of Military Operations within the Hugh Command of the Rwandan Army, Gratién Kabiligi.<sup>65</sup> The prosecution's case was built on the idea that Kabiligi's high-ranking position alone, as well as his presence at planning meetings made him guilty.<sup>66</sup> However, defense counsel for Kabiligi called a military expert as well as witnesses to explain that his position did not entail "command authority."<sup>67</sup> When opposing counsel sought to limit defense counsel's cross-examination of their sole witness discrediting Kabiligi's alibi that he wasn't at major planning meetings, counsel for Kabiligi argued successfully that the subject matter of cross-examination of witnesses could not be limited.<sup>68</sup> As a result, the defense was able to cross-examine the sole witness

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<sup>64</sup> The ICTR in Brief, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org/en/tribunal>.

<sup>65</sup> The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Judgement and Sentence, delivered in public and signed 18 December 2008, filed 9 February 2009 ("Trial Judgement").

<sup>66</sup> The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Oral Summary – Bagosora et al., [http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTR/Bagosora\\_Judgement\\_Summary\\_EN.pdf](http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTR/Bagosora_Judgement_Summary_EN.pdf)

<sup>67</sup> *Id.*

<sup>68</sup> The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on Kabiligi Application For Certification Concerning Defense Cross-Examination After Prosecution Cross-Examination, (Int'l Crim. Trib. for Rwanda Dec. 2, 2005). [http://www.worldcourts.com/ictf/eng/decisions/2005.12.02\\_Prosecutor\\_v\\_Bagosora\\_2.pdf](http://www.worldcourts.com/ictf/eng/decisions/2005.12.02_Prosecutor_v_Bagosora_2.pdf).

discrediting Kabiligi's alibi.<sup>69</sup> Kabiligi's counsel was able to prove that he was not present at some of the key planning meetings. This technical and nuanced argument made by the defense led to the acquittal of Gratien Kabiligi, and further demonstrated the impressive skills and overall competency of the defense counsel.

#### **D. ICC Acquittals**

In the landscape of international criminal law, it is necessary to look towards the International Criminal Court as it is an active judiciary body. Unlike the previous tribunals analyzed, the ICC brings cases against individuals who commit crimes as part of situations<sup>70</sup> that are referred to the ICC, or when a case is initiated under the Prosecutor's *proprio motu* powers.<sup>71</sup>

The ICC has been a vastly criticized body of international criminal justice. This is largely due to the fact that while the ICC has noble intentions, the conviction rate has been low in comparison to the cases taken.<sup>72</sup> According to the ICC website, there are 28 active cases.<sup>73</sup> Of those 28 active cases, there have been 2 acquittals, 11 defendants still at large, 4 convictions, 8 defendants in ICC custody, and 2 members not currently in ICC custody.<sup>74</sup> The ICC does not present the large number of defendants that some of the earlier tribunals offered in terms of sample size. However, when comparing the amount of acquittals and times that charges have been vacated

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<sup>69</sup> *Id.*

<sup>70</sup> See Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement*, 2, (4th ed. 2020) (*Situation* refers to a group of crimes (or "crime base") within the Court's jurisdiction committed within a particular geographic and temporal context.).

<sup>71</sup> *Id.*

<sup>72</sup> James Goldston, *Don't Give Up on the ICC*, <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/>. ("Something is wrong when a court created to "put an end to impunity" for "the most serious crimes," that deals with a handful of cases at a cost well in excess of \$150 million per year, produces more acquittals and dismissals of charges than convictions.")

<sup>73</sup> International Criminal Court, *Cases*, <https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D>.

<sup>74</sup> *Id.*

compared to the amount of convictions, it provides evidence that the ICC is allowing for defense counsel to adequately advocate for defendants, thus creating a fair trial.

The previously addressed international criminal tribunals present acquittal rates of over 10%, demonstrating that defense counsel has created a procedural safeguard ensuring a fair trial. The argument that acquittal rates demonstrate the skill of defense counsels becomes further strengthened when compared to stable justice systems across the world. In comparison, acquittal rates are higher at international criminal tribunals, showing that the defense counsels are not only competent, but provide defendants with exemplary representation.

### **E. International Acquittal Statistics**

The acquittal rates of international tribunals seem abstract until they are placed in the landscape of criminal justice systems across the world. It is a generally accepted practice that acquittals provide evidence that a justice system is fair, meaning defense counsel is doing a thorough job and is given a fair opportunity to represent their clients. When compared to justice systems across North America and Europe, it becomes evident that the acquittal rates of international tribunals are not only on par with stable justice systems around the world, but in most circumstances are actually higher. This provides direct evidence that the defense counsels in international criminal tribunals have been able to be effective, despite alleged shortcomings or disadvantages.

The United States is a country with a rich history of fair and impartial trials, as the right to an attorney was established by the 6<sup>th</sup> Amendment of the United States Constitution in 1789.<sup>75</sup>

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<sup>75</sup> Constitution of United States of America 1789 (rev. 1992). (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

Juxtaposed to what is considered a stable judicial system like the United States, the acquittal rates from international tribunals demonstrate that defense counsel is providing a competent defense for defendants. To draw a comparison to international tribunals, during a 12-month span ending in September of 2018, the United States District Courts tried 8,154 people who did not enter a guilty plea.<sup>76</sup> Of those 8,154 people who were tried but did not plead guilty, 320 of them were acquitted on the merits of their case, coming out to an acquittal rate of 3.9%, a percentage lower than the international criminal tribunals analyzed.<sup>77</sup> A key difference between United States District Courts and international criminal tribunals, is that in U.S. courts, most cases are resolved in a guilty plea. In international criminal tribunals, this is not an option. A guilty plea by definition requires an admission of guilt, which is the antithesis of being acquitted of charges. This would suggest that when all cases are taken into consideration, the acquittal rate of international criminal tribunals becomes even more favorable to defendants in comparison to U.S. courts. This theory is supported by the fact that when factoring in defendants in U.S. District Courts who pled guilty, the acquittal rate is less than 1%.<sup>78</sup>

To provide further evidence, Canada's acquittal rates are on par with those of the United States and are much lower than what has been present in the international tribunals analyzed. A 2008/2009 study showed that in Canada as a whole, the acquittal rate was 3.2%.<sup>79</sup> While this rate varied within the provinces, even Quebec who had the highest acquittal rate (13.1%), was still in the same statistical area as the tribunals analyzed.<sup>80</sup> Analyzing acquittal rates across Europe provide

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<sup>76</sup> Criminal Defendants Disposed of, by Type of Disposition and Offense, Period Ending September 30, 2018, Table D-4, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d4\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* – The amount of total defendants (including those who entered guilty pleas) was 79,704. Considering the 320 acquittals is a static number in this analysis, with that factored in, the acquittal rate is less than 1%.

<sup>79</sup> Jennifer Thomas, *Adult Criminal Court Statistics*, 2008/2009, 30(2) *Juristat* (2010); *See, also*, Mia Dauvergne, *Adult Criminal Court Statistics in Canada*, 2010/2011 (*Juristat*, Ottawa, 2012).

<sup>80</sup> *Id.*

further illuminating examples that international tribunals have been not only fair, but maybe even advantageous to defendants. European countries with adversarial systems similar to those found in international tribunals featured acquittal rates that were consistent with information from the United States and Canada, ranging roughly around 3-5%. (3% in Germany; an estimated 3.2% in The Netherlands; 5% in France.<sup>81</sup>)

Arguments are presented to delegitimize the impacts that defense counsels have for defendants in international criminal tribunals, but these arguments falter following analysis of acquittal rates. Although there are other factors in play and acquittal rates are not a perfect science, one of the most prevalent factors to measuring defense counsel performance is the acquittal rates of defendants. When compared to justice systems across the world, ranging from North America to Europe, the acquittal rates of international tribunals either compare similarly, or far outweigh those of domestic justice systems. This is the strongest evidence demonstrating that defense counsels in international tribunals have been a successful measure to guaranteeing a fair and impartial trial.

### **III. IMPLEMENTATION OF MANDATED QUALIFICATIONS AND SUPPORT FROM OUTSIDE ORGANIZATIONS HELP ENSURE STABILITY OF DEFENSE COUNSEL AT INTERNATIONAL CRIMINAL TRIBUNALS.**

While acquittal rates serve as evidence of the court proceedings that demonstrate the usefulness of defense counsel, these skills are heightened by the qualifications needed to practice in these courts. Further, outside organizations provide assistance to defense counsel that allow counsel to excel in court. These together, create further stability for defense counsel practicing international criminal law.

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<sup>81</sup> Peter H. Solomon, *Understanding Russia's Low Rate of Acquittal: Pretrial Screening and the Problem of Accusatorial Bias*, *Review of Central and East European Law* 40(1):1-30 May 2015  
file:///Users/erikdettloff/Downloads/acquittalandpretrialscreening.pdf

### **A. Mandated Requirements Guarantee A Level of Competency for Defense Counsel.**

One of the measures implemented to ensure defense counsel's competency is a mandate that defense counsel meet certain requirements before practicing in front of the criminal tribunals and international courts. The requirements mandated on defense counsels have made great progress, and currently create a safeguard that helps guarantee a fair and impartial trial. While each tribunal or court have created different procedural requirements, the ICC, as a current functioning court addressed in this paper, was able to adopt some of the procedural safeguards that were enacted in the ICTY and ICTR and have further strengthened them. While there are variations between each tribunal, the four general categories of requirements are competency, experience, language skills necessary to represent a defendant in a tribunal, and maintaining a high standing within the profession.<sup>82</sup>

The experience requirement is a specific mandate that is a tool used to guarantee a level of expertise amongst counsel and is used as a tool to combat some of the major criticisms of the tribunals. By mandating a level of experience, it guarantees that defendants are receiving representation from attorneys with prior experience. The ICTR and the ICTY both established these safeguards to ensure that attorneys being hired for the defense counsel met certain standards. In both tribunals, defense counsel must have at least seven years of experience as “a judge, prosecutor, attorney or in some other capacity, in criminal proceedings.”<sup>83</sup> These requirements only expanded under the ICC. Both tribunals also feature the language skills requirement present

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<sup>82</sup> Guide for applicants to the ICC List of Counsel and Assistants to Counsel, International Criminal Court – Admission Criteria, *International Criminal Court*, [https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC\\_GuideForApplicants\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC_GuideForApplicants_ENG.pdf).

<sup>83</sup> Rules of Procedure and Evidence 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 – rule 45, [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf).

in the ICC.<sup>84</sup> This is an example of the procedural safeguards that are an effort to maintain a level of expertise and experience for counsel representing defendants.

The requirements to practice have steadily increased over time, demonstrating an effort to protect international criminal defendants. This is seen most clearly in the ICC's requirements to practice. The ICC guarantees competency amongst its defense counsel through an application process. In the Guide for applicants, the application states:

The International Criminal Court (ICC) has a mandate to prosecute and punish persons responsible for the most serious crimes of concern to the international community. In so doing, its proceedings follow highest standards of due process and procedural fairness. The Rome Statute guarantees victims, accused persons and under certain conditions suspects the right to be assisted by counsel. As part of this aim, the Court endeavors to offer these individuals a pool of highly qualified counsel.<sup>85</sup>

In order to create the pool of highly qualified counsel, certain requirements must be met. The application process for the ICC breaks its admission criteria into 4 categories: Competence, Experience, Language Skills, and Record of High Standing Required for the Profession.<sup>86</sup> The first, and the most important of the requirements is that defense counsel must have “a minimum of ten years of relevant experience in criminal proceedings as a judge, prosecutor, advocate or in other similar capacity.”<sup>87</sup> This increase in experience from the *ad hoc* tribunals demonstrates growth for defense counsels. In terms of competence the criteria for admission is that an attorney must have “proven competence and expertise in international or criminal law and procedure.”<sup>88</sup> Further, in terms of language skills, the applicants must be fluent in one of the languages of the

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<sup>84</sup> Rules of Procedure and Evidence 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 – rule 44, [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf).

<sup>85</sup> Guide for applicants to the ICC List of Counsel and Assistants to Counsel, International Criminal Court – Admission Criteria, *International Criminal Court*, [https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC\\_GuideForApplicants\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/PIDS/docs/ICC_GuideForApplicants_ENG.pdf).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



court, either English or French.<sup>89</sup> Lastly, the applicants must be in good standing and not convicted of any serious criminal or disciplinary offense.<sup>90</sup> These procedural safeguards guarantee that when a defendant is awarded counsel, it is counsel that will provide them ample opportunities to receive a fair trial with component counsel.

While *ad hoc* tribunals and the ICC have faced criticism, the steps that have been made to guaranteeing a fair trial through mandating experience and competence of defense counsel have been successfully implemented. International criminal defendants now have a better opportunity to a fair trial as a result of the measures implemented historically by *ad hoc* tribunals, that have been strengthened in the ICC.

#### **B. The Establishment of International Organizations Provide Further Support for Defense Counsel.**

Outside organizations that support defense counsel have been present in prior tribunals and provide further support for the ICC defense counsel today. Prior to its name change to the ADC-ICT, the ADC-ICTY provided support for defense counsels specifically in the ICTY. The ADC-ICTY and its counterpart in the ICTR (Association des Avocats de la Defense) sought to provide assistance to defense counsel, thus helping to ensure a more experienced and competent defense counsel.

The ADC-ICTY and the Association des Avocats de la Defense were originally established to provide aid to defense counsels. The ADC-ICTY was able to bring improvements to the ICTY, improving defense counsel through measures and goals such as:

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<sup>89</sup>*Id.*

<sup>90</sup> *Id.* (“Record of High Standing Required of the Profession: Candidates must not have been convicted of any serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court. In cases where candidates have been the object of such a conviction, the Registrar will assess whether the imposed sanction is of a nature that impedes the candidate’s ability to act before the Court in accordance with the relevant provisions of the legal texts of the Court. Candidates in this situation are invited, at the time of submitting their applications, to provide the Court with a copy of each relevant decision, as well as any observations they wish to provide.”).

“(1) It has given a face to the function of the defense and has allowed it to enjoy the status of a recognized party to the proceedings before the jurisdiction  
(2) Has allowed defense counsel to build a credible organization able to express their concerns with one voice before the judges and the Registrar  
(3) has made it possible to ensure a better standard of advocacy for members practicing before the jurisdiction  
(4) has made it possible to achieve positive results in some areas for the benefit of all defense counsels; and  
(5) has made it possible to assist defense counsels in their endeavor to represent their clients with the utmost effectiveness through the provision of services not available to individual defense teams.”<sup>91</sup>

During the time period of the ICTY and ICTR, both of the associations were able to bring equality towards defense counsel. Measures were taken to work on the skills of defense counsel in order to ensure more skilled representation. Both organizations created disciplinary councils, as a form of self-policing in search for attorneys not operating on ethical grounds, a measure that was found to be successful.<sup>92</sup> Both organizations “share the common goal of promoting the efforts of the defense by buttressing members’ advocacy skills, knowledge of international criminal law, and the ability to take advantage of available resources and jurisprudential collections.”<sup>93</sup> The groups also met with Tribunal officials to help when problems arose for defense counsel.<sup>94</sup> Often, these problems can be remedied by educating the defense counsel on the affected reasons and methods of representation.<sup>95</sup>

While originally established to solve problems in the ICTY, in December of 2016, the ADC-ICTY amended its constitution, renaming itself to the ‘Association of Defence Counsel practising before the International Courts and Tribunals’ or ‘ADC-ICT.’<sup>96</sup> Currently, the group

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<sup>91</sup> Michael Bohlander & Roman Boed & Richard J Wilson, *Defense in international criminal proceedings: cases, materials and commentary*, 488 (2006).

<sup>92</sup> See Michael A. Newton, *Evolving Equality: The Development of the International Defense Bar*, 47 STAN. J. INT’L L. 379, 387 (2011)

<sup>93</sup> *Id.* at 410.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> About Us, *Association of Defense Counsel*, <https://www.adc-ict.org/about-us>.

seeks to offer the same services provided to past tribunals and has added courses in Criminal Enterprises, advocacy skills, special defenses, and mock trial training.<sup>97</sup> These workshops seek to provide assistance and knowledge to defense counsel so they can better represent defendants. Further, the group holds a yearly Annual Conference for members of the group.<sup>98</sup> All of these measures taken further ensure the competency of defense counsel in international criminal tribunals.

While outside organizations such as the ADC-ICT, as well as competency requirements provide support to defense counsels, there are counterarguments presented that the acquittals and supporting measures are not enough to prove defense counsels' effectiveness. However, major criticisms such as the lack of a defense counsel office are countered by the evidence that has been presented in this paper. When criticisms are compared to the overwhelming evidence of acquittals, skills in court proceedings, and enhanced requirements to practice, the criticisms lack serious merit in establishing the ineffectiveness of defense counsel.

#### **IV. COUNTERARGUMENTS PRESENTED IN OPPOSITION OF DEFENSE COUNSELS' SUCCESS ARE INHERENTLY FLAWED AND OUTDATED.**

While the evidence presented does strongly support that defense counsel has been an effective measure to ensuring a fair trial at international criminal tribunals, there have been criticisms of *ad hoc* tribunals as well as the ICC. While substantive opposing arguments exist, when weighed against the prior evidence, defense counsels are still shown to be competent and an effective measure to ensuring a fair trial.

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

### A. Lack of Permanent Defense Counsel Office

One of the criticisms of the *ad hoc* tribunals was that the absence of a unified defense organ left defense counsel at a disadvantage preventing a fair trial for defendants.<sup>99</sup> Admittedly, the defense counsel lacked the centralized office that the prosecution had access to.<sup>100</sup> However, the *ad hoc* tribunals took measures in an effort to counteract this. For instance, *ad hoc* tribunals mandated attorneys have certain qualifications, one of which was an experience requirement of seven years.<sup>101</sup> The defense counsel had matters handled by a Registry that was in charge of assigning defense counsel to defendants. The Registry was not able to lobby interests in the same way as the Office of the Prosecutor, however, requirements of competency combined with an office intended to facilitate defense counsel to defendants provided a laudable attempt to create a more level playing field. Today, the ICC features an Office of Public Counsel for the defense (“OCPD”) as a group within its own Registry, which handles similar duties to the Office of the Prosecutor. This demonstrates the growth in resources for defense counsels and an attempt to rectify this problem.<sup>102</sup> Even with this criticism, despite having a less robust office, acquittal rates from the tribunals show that this was not something that prevented defense counsel from providing adequate representation.

In terms of resources, some of the prior tribunals have drawn criticism for lack of manpower. While in an ideal world, the defense staff has the exact same amount of resources as

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<sup>99</sup> Matthew Catalo, *Fixing the Problem of Incompetent Defense Counsel Before the International Criminal Court*, 41 MICH.J. INT'L L. 417 (2020).

<sup>100</sup> *Id.*

<sup>101</sup> Rules of Procedure and Evidence 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 – rule 45, [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev43\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf).

<sup>102</sup> Jardine P.W. Temminck Tuinstra, *Defense Counsel In International Criminal Law* 153 (2009) (“The Registry administers the assignment of legal aid to the accused and issued the Directive on the Assignment of Defence Counsel; establishes whether or not lawyers or other defence team members fulfil the necessary qualification requirements; provides resources to the defence; drafted a Code of Professional Conduct for Defence Counsel; and, monitors defence counsel’s professional behaviour.”).

the prosecution, this is not always an attainable reality. However, the idea that a defendant doesn't have a competent and adequate staff working on his case is not accurate. Critics claiming a disparity in resources rarely point out that defendants often have five or more people on their support staff.<sup>103</sup> For example, the first defendant in the ICTY, Duško Tadić, was represented by a team of two Dutch lawyers, two UK lawyers, an interpreter in The Hague, and two Serbian investigators.<sup>104</sup> Furthermore, it is rare that members of the defense counsel handle a multitude of cases like defense attorneys in the United States or other countries. Some international counsel will spend years with the help of legal assistants and co-counsel on the same client.<sup>105</sup> Additionally, international tribunals, a prime example being the ICTY, often spend millions of dollars per defendant.<sup>106</sup> While it is understandable that there may be small criticisms on the staffing of prosecution in comparison to the defense counsel, defense counsels still have adequate manpower and funding to create a fair and impartial trial for defendants. This can be illuminated through the growth in funding over time,<sup>107</sup> measures taken by the ICC to rectify these problems,<sup>108</sup> and the acquittals resulting from trials as a result of competent defense counsel.

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<sup>103</sup> *Id.* at 153. ("At the ad hoc Tribunals, a maximum of two defense counsel can be assigned to an accused under the legal aid scheme: one lead counsel and one co-counsel. In addition, a maximum of three support staff members . . . may be assigned at the ICTR and a maximum of five under the lump sum system of the ICTY.")

<sup>104</sup> *Sylvia de Bertodano*, What Price Defence? Resourcing the Defence at the ICTY, 2 J. INT'L CRIM. JUST. 503, 504 (2004).

<sup>105</sup> See Starr, Sonja B. "Ensuring Defense Counsel Competence at International Criminal Tribunals." *UCLA J. Int'l L. Foreign Aff.* 14, no. 1, 175 (2009); See also Julian A. Cook, III, Plea Bargaining at the Hague, 30 *YALE J. INT'L L.* 473, 496-97 (2005) (noting that defense counsel are well compensated and are "all too willing to spend countless hours with their clients"); UN Fee-Splitting Report, *supra* note 13, 7 (describing composition of defense teams); ICTY Office of Legal Aid, <http://www.icty.org/sid/163>

<sup>106</sup> See Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 *Nw. U. L. REV.* 1257, 1276 n.97 (2007) (estimating that trials at the ICTY have cost between \$10.9 million and \$15.3 million per defendant).

<sup>107</sup> *The ICTY at a glance – General Information – Budget*, <http://www.un.org/icty/glance/index.htm> (accessed Oct. 29, 2005) (Budget of the ICTY rose from \$10,800,000 in 1994 to \$271,854,600 in 2004).

<sup>108</sup> Matthew Catallo, *Fixing the Problem of Incompetent Defense Counsel Before the International Criminal Court*, 41 *MICH. J. INT'L L.* 417 (2020).

## B. Payment of Fees

One of the counterarguments against the notion that defense counsel is effective on the international scale is that there are difficulties funding defense investigations.<sup>109</sup> While this may have been a problem that was evident at the initiation of some tribunals, that is easily explained, and the problem was alleviated over time in the *ad hoc* tribunals. This example is most clearly illuminated by the ICTY. Critics are correct that at its establishment, there were payment issues to work out, but this was largely because the ICTY was enacted during an active conflict.<sup>110</sup> To demonstrate the changes that were made over time, as of 2004, defense teams at the ICTY were being compensated at a rate that equates to \$360,000 per year.<sup>111</sup>

Following the growth demonstrated in the later stages of the ICTY, the ICC determined that it wanted to continue the growth in defense counsel compensation that was criticized in some of the *ad hoc* tribunals. The ICC sought to compensate defense counsel through two theories: (1) Providing defense counsel with what amounts to a salary<sup>112</sup> and (2) creating a payment scheme that “maintains equilibrium between the resources and means of the accused and those of the prosecution.”<sup>113</sup>

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<sup>109</sup> Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L L. 21 (2000); (“The need to address funding defense investigations is demonstrated by the experience of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) and the International Criminal Tribunal for Rwanda (ICTR), which have not been immune from the problems that all criminal courts face.”).

<sup>110</sup> Bernard D. Beltzer, “War Crimes”: *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 Val. U. L. Rev. 895, 909 (1996). Available at: <https://scholar.valpo.edu/vulr/vol30/iss3/3>

<sup>111</sup> Sylvia de Bertodano, *What Price Defence? Resourcing the Defence at the ICTY*, 2 J. INT'L CRIM. JUST. 503, 504 (2004)

<sup>112</sup> Interim Report on Different Legal Aid Mechanisms Before International Criminal Jurisdictions, ICC-ASP/7/12, ¶¶ 21–22 (Aug. 19, 2008), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-7-12\\_English.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-7-12_English.pdf).

<sup>113</sup> ICC Assembly of State Parties, 3rd Sess., Report to the Assembly of States Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons, ICC-ASP/3/16, ¶ 16 (Aug. 17, 2004) [hereinafter Report on Adequate Defense], [https://asp.iccpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-3-16-\\_defence\\_counsel\\_English.pdf](https://asp.iccpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf).

The ICC's payment scheme demonstrated the growth that has occurred and continues to grow in defense counsel compensation in international criminal law.<sup>114</sup> While at a certain point in history these criticisms may have had validity, currently these criticisms are outdated and no longer apply to defense counsel in international criminal law. Moving forward, it is unlikely that criticisms of defense counsel being underpaid will carry any validity.

### C. Show Trials

Under a theory of a "show trial" it is said that defendants are not given a fair opportunity to bring forward their case.<sup>115</sup> Critics have advanced the argument that international criminal tribunals are often used to paint a picture of the military atrocities being tried to the public, thus making it a "show trial."<sup>116</sup> Military tribunals, *ad hoc* tribunals, and the ICC proceedings all share the common characteristic in that part of their goal is to display the atrocities committed by the defendants on a public scale. As a result, the label of a "show trial" has been placed on both military tribunals and *ad hoc* tribunals.<sup>117</sup> The idea of a "show trial" is that the trials have an increased chance of defendant conviction, and the trial is being conducted with a focus on the outside audience in an effort to educate outside observers about the crimes committed.<sup>118</sup> However, this argument is inherently flawed for two reasons. First, framing of issues and facts is something that

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<sup>114</sup> Matthew Catalo, *Fixing the Problem of Incompetent Defense Counsel Before the International Criminal Court*, 41 MICH. J. INT'L L. 417 (2020). <https://repository.law.umich.edu/mjil/vol41/iss2/5>

<sup>115</sup> Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (1946), <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/>

<sup>116</sup> Jeremy Peterson, "Unpacking Show Trials: Situating the Trial of Saddam Hussein", in *Harvard International Law Journal*, 2007, vol. 48, no. 1, pp. 260.

<sup>117</sup> Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (1946), <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/>. See also Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENGL. L. REV. 915, 915 (2003) (asking whether "history [will] remember Milosevic as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court").

<sup>118</sup> *Id.*

exists in every case.<sup>119</sup> While the details may be extreme in front of international criminal tribunals, that only heightens the importance and effectiveness of defense counsel. The fact that the public is educated about the crimes does not shape the decision making of judges. Second, the statistics on acquittals in almost all tribunals do not support the argument that conviction is more likely than a standard criminal trial.<sup>120</sup> Acquittal rates in international criminal tribunals are often higher than those in stable justice systems across the North America and Europe.<sup>121</sup> The idea of a “show trial” is built on the conclusion that a defendant would be less likely to succeed on the merits of the case, and the evidence of acquittals takes away the support of that argument.

## V. CONCLUSION

A strong defense counsel is one of the pillars of a fair and impartial trial domestically or internationally. However, the need for defense counsel becomes increasingly important in international crimes when military leaders are on trial due to the social unrest and the overwhelming evidence presented against them. While this seems like a daunting task, evidence of acquittals spanning across different types of tribunals, requirements mandated of counsel before appearing before international tribunals, and the evidence of constant improvement of defense counsel conditions demonstrate that defense counsels have been successful and will continue to ensure fair and impartial trials.

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<sup>119</sup> Lloyd N. Bell, Leading the Jury Down the Right Path: Framing Your Case During Voir Dire, Verdict – The Journal Of The Georgia Trial Lawyers Association, <https://verdict.gtla.org/2018/05/31/leading-the-jury-down-the-right-path-framing-your-case-during-voir-dire/>

<sup>120</sup> See Key Figures of the Cases, United Nations International Criminal Tribunal for the former Yugoslavia, IRMCT, (August 2019), <https://www.icty.org/en/cases/key-figures-cases>; see also The Editors of Encyclopedia Britannica, Nuremberg Trials, (October 11, 2020) <https://www.britannica.com/event/Nurnberg-trials>.

<sup>121</sup> *Id.*