The Defence Rights in the Practice of the International Criminal Tribunals

Wolfgang Schomburg and Tobias Wild*

I. Introduction

The UN Security Council, acting under Chapter VII of the Charter of the United Nations, established ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) in 19931 and for Rwanda (ICTR) in 1994.2 Furthermore, in 2002 the United Nations and Sierra Leone created the Special Court for Sierra Leone (SCSL).3 The purpose of the two Tribunals and the Special Court is to bring to justice persons allegedly responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, the territory of Rwanda between 1 January 1994 and 31 December 19944 and the territory of Sierra Leone since 30 November 1996. Further goals are to render justice to the victims, to deter further crimes and to contribute to the restoration of peace by promoting reconciliation.

The two Tribunals and the Special Court are composed of three major sections: Chambers (Trial Chambers and Appeals Chamber), Office of the Prosecutor (OTP) and Registry. Defence counsel external lawyers are organized in the Association of Defence Counsel (ADC). At the ICTY, 107 defence counsel are currently fullyactive, most of them coming from the Federal Republic of Yugoslavia, the United States, Bosnia and Herzegovina, Croatia and the United Kingdom.5 The Tribunals and the Special Court each have their own Detention Centre. Currently, there are about 53 accused persons in custody of the United Nations Detention Centre (UNDU) of the ICTY in The Hague, Netherlands,6 about 55 detainees in the United Nations Detention Facility (UNDF) of the ICTR in Arusha, Republic of Tanzania,7 and 9 in the Special Court’s detention centre in Freetown, Sierra Leone.8 These persons are either in pre-trial, trial or appeal stage, or awaiting transfer to prisons where they will serve their sentence. In all, about 33 accused persons for whom arrest warrants have been issued are still at large.

* Wolfgang Schomburg is currently Judge of the Appeals Chambers of the UN Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Tobias Wild is currently lawyer at Gleiss Lutz, Stuttgart.
4 As well as Rwandan citizens suspected of such acts or violations in the territory of neighbouring states.
5 107 defence counsel are registered as fully active members of the Association of Defence Counsel practicing before the International Criminal Tribunal for the former Yugoslavia, ADC-ICTY (34 from the Federal Republic of Yugoslavia; 23 from the United States of America; 16 from Bosnian and Herzegovina; 16 from Croatia; 8 from the United Kingdom; 2 each from Germany, France and Switzerland; 1 each from Australia, Canada and the Netherlands); source: http://www.adcicty.com/Members.htm.
The two Tribunals and the Special Court have in common that, in principle, they base their work on two basic legal documents: the “Statute” and the “Rules of Procedure and Evidence”. The Statute of the International Criminal Tribunal for the former Yugoslavia (hereafter “ICTY Statute”) was adopted on 25 May 1993 by Resolution 827 of the UN Security Council. Article 15 confers competence on the judges of the ICTY to “adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters”. From the point of view of a separation of powers and legitimacy, this is not an optimal solution, however, it does grant some flexibility that might be acceptable in an ad hoc Tribunal. The permanent Judges of the ICTY first adopted the Rules of Procedure and Evidence (hereafter: “ICTY Rules”), which had been prepared in a common law environment, on 11 February 1994, and have since amended them about 30 times, albeit only after hearing, the OTP and ADC. The procedure at the International Criminal Tribunal for Rwanda is similar to the ICTY Rules Committee and is based on prior written submissions. The ICTR Statute was adopted on 8 November 1994 by Resolution 955 of the UN Security Council. The Judges first adopted the ICTR Rules of Procedure and Evidence on 29 June 1995. The Statute of the Special Court for Sierra Leone was annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

The International Criminal Tribunals and the Special Court for Sierra Leone cannot achieve their goals without guaranteeing elementary rights to the accused person. These rights have evolved during the last centuries, beginning with the Magna Charta of 1215, the Habeas Corpus Act passed by the English Parliament in 1679, the English Bill of Rights of 1689, the Virginia Declaration of Rights of 1776, the Declaration of Independence of 1776, the Constitution of the United States of America of 1787 and its First 10 Amendments ratified in 1791, known as the “Bill of Rights”, and the French Declaration of the Rights of Man and the Citizen of 1789. The modern standard of human rights has been laid down on an international level in the United Nations Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The ICCPR has a total of 152 State parties. The United Nations Human Rights Committee monitors the implementation of the Covenant and the Protocols to the Covenant in the territory of State parties. Although, technically speaking, the ICTY is not a State party, the standards set

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9 These legal documents are accessible via the web sites of the two Tribunals and the Special Court (see footnotes 1, 2 and 3).
14 Adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948.
15 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March 1976, in accordance with Article 49.