

***The Office of Public
Counsel for the Defence
&
Challenges for the Defence
before the International
Criminal Court***

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The Office of Public Counsel for the Defence

- OPCD: Internal Defence Office
- Mandate (Regulation 77, Regulations of the Court):
 - To represent the interests of the Defence during the investigation stage;
 - To provide legal support and assistance to Defence teams;
 - To advocate and facilitate Defence rights in relation to policy or structural issues, and ensure that the Defence has an institutional presence.

Outline of Discussion:

■ Structural Issues

- A unified, permanent Office of the Prosecutor vs separated, temporary Defence teams;
- Provisional release issues;
- The role of OPCD

■ Material Issues

- Resources;
- Issues relating to persons granted the procedural status of 'victim';
- Witness relocation

■ Substantive Issues

- Disclosure
- All of the above...

Structural Issues:

OTP vs Defence

■ OTP

- Permanent
- Single Organ
- ‘Institutional Memory’
- Able to negotiate internally and externally
- Able to forge ‘cooperation agreements’

■ Defence

- Temporary
- Separate teams; independent of the Court
- Must constantly ‘reinvent the wheel’
- Representation at internal/external meetings?
- Not able to independently forge ‘cooperation agreements’

Structural Issues:

Provisional Release

- Provisional release should be the rule rather than the exception

BUT:

- Problematic to implement in practice
- Problem of self-referral
- 'Not in my backyard' (Ngudjolo example)
- Difficult for Defence to lobby States

Structural Issues:

The Role of OPCD

- OPCD carries out the following roles:
 - Stores ‘institutional memory’
 - Acquaints Defence counsel with the ICC system
 - Advocates for Defence rights
- However, OPCD can only provide a partial solution...

*“If you are determined
to execute a man in any
case, there is no
occasion for a trial.
The world yields no respect
to courts that are merely
organized to convict.”*

Justice Robert Jackson,
Judge at Nuremberg.

Resources: the gap between OTP and the Defence

- The OTP's greater resource base can be prejudicial to the defence as:
 - The OTP is better equipped to conduct investigations (staff, security)
 - The OTP is better-equipped to respond within a deadline
 - This issue is exacerbated at the Pre-Trial Stage where the Defence has fewer resources
 - No allowance is made for translation of court filings, if required
- The OPCD can reduce the inequality gap by supporting Defence teams regarding legal issues

Persons granted the procedural status of “victim”

- Use of additional resources
- Emergence of a ‘second prosecutor’
 - Katanga/Ngudjolo: “victims” permitted to make submissions on the elements of offences, modes of liability and admissibility of evidence; granted access to the full record of the case
- Solution: limit “victim” participation to issues concerning their personal interests?

Material Issues:

Witness Relocation

- OTP has adopted the practice of *proprio motu* relocating witnesses
- Defence, in terms of resources, unable to adopt similar measures; results in inequality
- Pending resolution

"A fair trial is the only means to do justice."

If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."

Substantive Issues:

Disclosure

- Redactions and Summaries
 - Impede Defence's ability to properly investigate the case;
 - Delay proceedings
- Jurisprudence has tended to favour redactions
 - Factual reasoning behind redactions is often *ex parte*
 - OTP permitted to redact and summarise material itself, even if it is exculpatory in nature
- Article 67(2): Disclosure of exculpatory material
 - The provision was included to ameliorate the difference in resources
 - Practical impediments to its implementation; Trial Chamber decision in *Lubanga*

"This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials."

Judge David Hunt, the Milosevic case, 21 October 2003.

Conclusion

Substantive
Inequality

Fair Trial?

Structural Inequality

- Structure
- Provisional Release

Material Inequality

- Resources
- “Victims”
- Witness Relocation

Substantive
Inequality

- Disclosure