Trial and Error – How Effective is Legal Representation in International Criminal Proceedings?

CAROLINE BUISMAN, BEN GUMPERT AND MARTINE HALLERS*

Introduction

On 23 October 2001 something extraordinary happened. The Appeals Chamber at the International Criminal Tribunal for Yugoslavia (ICTY), with Judge Wald presiding, found that three of the people who had been convicted in the case of ‘Kupreskic and others’¹ should be acquitted on appeal. In the case of two other appellants their convictions were upheld but their sentences were reduced.² This was the first time at either of the ad hoc tribunals that appeals against conviction have been allowed. The reasons given were, in brief, lack of evidence and defective indictments. By the time of the appeal, some of the accused had replaced their original lawyers with more experienced counsel and one of the Accused, Vlatko Kupreskic, unsuccessfully sought to introduce new evidence on appeal, alleging incompetence of his counsel at trial.³

* Caroline Buisman has a Master in criminal law from Leiden University and is writing a PhD on the rules of evidence at international criminal tribunals at Westminster University, London. From June till December 1999, she did an internship at the Prosecutor’s Office at the ICTY. Since April 2002, she is working as a legal assistant for defence at the ICTR. Since August 2004, she is working as a legal assistant for defence at the ICTY. Ben Gumpert is a barrister with Chambers at 36 Bedford Row in London. He specialises in criminal work. He is currently appearing as defence counsel before the ICTR. In addition to his work as an advocate he sits as a Deputy District Judge in the Magistrates Court and as a Chairman of the Pensions Appeal Tribunal. He is the author of textbooks on Trading Standards and Confiscation. Martine Hallers has a Master in international and criminal law from Leiden University and is currently working as a legal associate at the Dutch Office of the Prosecution at the Court of Appeal, The Hague. The authors wish to acknowledge the contributions of Nathalie Von Wistinghausen, German defence attorney, admitted to the Berlin Bar, and legal assistant for defence at the ICTR; Claire Howell, a pupil with Chambers at 36 Bedford Row in London; Peter Robinson, US defence attorney and defence counsel at the ICTR; Tom Moran, US defence attorney and defence counsel at the ICTR.


² Drago Josipovic filed a Motion for Review on the ground that new evidence demonstrated that he was not involved in the crimes alleged. The Motion was, however, rejected in: Drago Josipovic v. The Prosecutor, IT-95-16-R2, Decision on Motion for Review, 7 March 2003.

It is far from unusual, in any jurisdiction, to hear a defendant blame his conviction at first instance on the incompetence of the lawyers at the time, but the circumstances of the Kupreskic case do raise questions as to whether the defects in the prosecution case, which the Appeals Chamber found effectively rendered it invalid, should have been spotted and acted upon before the appeal stage.

The Appeals Chamber used strong terms in allowing the appeals of Vlatko, Mirjam and Zoran Kupreskic. They referred to a ‘miscarriage of justice’. The link between ineffective representation and such a miscarriage is a delicate issue, and it would be simplistic to imagine that different counsel at trial would necessarily have prevented convictions. There are, however, other cases which give rise to concern. Those familiar with the Akeyesu and Kambanda cases at the International Criminal Tribunal for Rwanda (ICTR) have raised doubts about the effectiveness of counsel representing each at the time of the convictions. The noted Belgian jurist, Alain De Brouwer, has written a powerful open letter to the former Prosecutor at both tribunals, Carla del Ponte, touching on the difficulties which arose from the nature of Kambanda’s representation.4

Whether these individual complaints in respect of counsel’s competence are meritorious or not, effective legal assistance is of fundamental importance in the international criminal justice system. The cases are factually complex, the likely penalties severe, the procedure adversarial in nature so that there is a heavy reliance on trial counsel, and the crimes under the jurisdiction of the two ad hoc tribunals (ICTY and ICTR) are so grave and notorious that some have argued that there is a de facto undermining of the presumption of innocence.

The creation of an international criminal justice system, as represented initially by the ad hoc tribunals and latterly by the ICC, is a significant attempt by the world community to prevent those who are accused of having committed genocide, war crimes and crimes against humanity from sheltering behind the protection of national sovereignty. It is, however, becoming evident that, to function satisfactorily, such a system needs to do more than achieve respectable statistics in respect of arrest and conviction. The bringing of those who commit such crimes to justice must be balanced by a procedure by which objective observers can be satisfied that fair trials are taking place.5

Prominent among the fair trial guarantees incorporated into many international instruments, notably the Universal Declaration of Human Rights