

## Chapter 4

### The Needs of Court and Tribunal Users

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There are many similarities between the needs of court and tribunal users but some aspects of international tribunals and courts deserve particular attention. A court or tribunal created within a state will take its character and some of its strength for enforcement from the existing organs and measures within that state. For its part, an international court or tribunal which exercises a coercive jurisdiction has to take a more comprehensive view of the several elements that are necessary to achieve a fair trial.

The particular areas that call for attention and that were given consideration during the Ottawa meeting are listed in the introduction to this *Handbook*. An overarching consideration, which was backed unanimously by those present at the Ottawa meeting, was the need for states to recognise and to be responsible for financing particular matters, as follows: legal aid and defence support, as well as witness protection and support.

#### 4.1 Legal aid and defence support

The areas of legal aid and defence support are crucial from an institutional and financial point of view.

First, let us consider legal aid. It is almost impossible to select the perfect method of reimbursement for defence advocates. Nonetheless, there have been many experiences in this area, both positive and negative. The clear message should be that this area has to be managed as effectively as possible from the outset.

During the Ottawa meeting, it was *not* suggested that legal aid be made available as a right, that is, without proof of 'indigence'. Yet this raises an issue as to how need can be ascertained. A 'case for indigence' can be (and is) readily asserted, but investigation of each claim is essential. In this regard, a meaningful inquiry will be greatly assisted by co-operation through international courts and agencies. In particular, the tracing of assets can only be carried out effectively with assistance from national courts on an international basis. That said, the power to freeze assets, for example (a power possessed by a court such as the International Criminal Court), not only increases the chance of eliminating financial abuse by defendants, but also has the effect of raising the status and the reach of the court.

When considering legal aid, there will be a choice between paying counsel/attorneys an hourly rate or a lump-sum amount for a case or part of a case. The opinion of meeting attendees was strongly weighted in favour of the latter. A lump-sum payment is more likely to keep the claim for costs down, because it necessitates initial calculation and assessment and, once set, is apt to encourage financial discipline. Determining the level of aid is likely to be problematic, but the ultimate test for the level of assistance is that it should be sufficient to enable attorneys to provide

**Box 4.1 Defence support at the UN International Criminal Tribunal for the former Yugoslavia (ICTY)**

In the early days of ICTY, support for defence counsel was rudimentary. The [ICTY] Statute did not foresee defence counsel as institutionally part of the Tribunal, and defence counsel were at times treated with mistrust. They were not allowed to freely access the ICTY building and had to be escorted to and from the courtrooms by security. Fortunately, these early misconceptions about the role and status of the defence have been remedied, and the position of defence counsel has improved significantly over recent years. ...

... Far from weakening the integrity of the proceedings before the ICTY, a zealous and professional defence only augments the Tribunal's credibility as an independent and impartial judicial organ.

(Hocking, 2010)

competent and meaningful assistance. This is a criterion which is as relevant to the staff of the registry when assessing the amount, as it is to the court in determining any question where a dispute arises as to the adequacy of that which is available.

The paramount factor in every case will be to achieve a balance between according a fair trial and meeting a threshold of reasonable provision, which in most cases is likely to be less than the full provision claimed.

Let us now consider defence support. There must be proper premises and accommodation for meetings between defendants and lawyers. Moreover, there should be access to IT and logistical support, on the basis of a level playing field, to assist in the adequate preparation of a defence case.

Some impediments that can significantly affect the quality of the defence capability are: the location and nature of a particular institution; travel issues; climactic considerations; and security issues. Some of these issues might be beyond the control of the institution.

Nonetheless, it is important for an institution to do everything possible to ensure that it attracts defence lawyers of the highest calibre available to operate within its courtrooms.

One new approach in the recruitment of defence lawyers has been undertaken in the Special Tribunal for Lebanon, where that institution's Defence Office advertised for expressions of interest from prospective defence lawyers and then held interviews with a view to creating a 'qualified/ competent' list.

Whatever the approach, it is important that the needs/entitlements of the defence are not overlooked when budgets are being prepared, as it is potentially an extremely expensive area of work. The creation of an effective 'Defence Office' within an

institution can frequently achieve a good working relationship with defence advocates and avoid the standoff so frequently experienced in some tribunals.

## 4.2 Witness and victim protection and support

There are consequences of agreeing to give evidence as a witness or to participate as a victim in international trials, such as trials for mass murder and genocide. It is important to consider not only the immense psychological and emotional strain on witnesses and victims, but also the need for protection to be provided. Frequently such protection may involve a redaction or change of identity, a change of place of residence, extreme limitations on freedom of association and changes to personal and family life.

In the case of child witnesses, there are other special considerations for their protection and support. It is undoubtedly the case that best practice requires the administration and the court to address the particular sensitivities, vulnerabilities and requirements of protection for children. In every case, the availability of a general support system for witnesses should be regarded as integral to the system. Private and secure accommodation, while waiting to give and in giving evidence, will be necessary. The presence of an experienced counsellor, who can provide advice on how to give evidence or what evidence to give, can also be made available to calm and ease the exigencies of a demanding process.

A related issue is that victims will not always be witnesses, but the question arises as to whether they should be afforded some protection simply as victims. In genocide and war crime trials, a large section of the population – hundreds or thousands – may be involved and may be deeply concerned about the progress and outcome of the proceedings. Schemes for the legal assistance of victims need to be addressed. Where the numbers are large, common representation of groups can then be made available. The extent and nature of their participation will always give rise to jurisprudential issues, but experience has shown that the participation of victims can serve a distinct and useful fact-finding role, guide the component of reparation that will arise from proceedings and support the outreach campaign, which is critical to the wider

### **Box 4.2 The child in court: physical layout**

The architecture and the interior design of the Family Court [should be] tailored to ensure that the child who uses the Court is at ease. Certain jurisdictions, such as Trinidad and Tobago, have ensured that there are spaces specifically designated for the child in various age groups. Designated spaces for the child include youth rooms, nurseries and children's interviewing rooms. ... Further, of significance in supporting the child through the infrastructure of the Family Court is the use of technology to allow remote viewing of the child's statements on secure electronic transmission by the use of video, video-conferencing facilities, satellite or closed-circuit television (CCTV).

(Robertson, 2010)

advantages to which the proceedings can give rise. One of the most notable, which has enhanced public awareness, is the role of the public meeting in connection with trials.

Recognition of these consequences and provision for them can often be a pre-requisite to the participation of witnesses or victims at such trials.

These protective measures can be more readily set up and furthered by the court, and the legislation or regulation governing the court should provide a framework for this jurisdiction to be exercised.<sup>4</sup>

A clear best practice recommendation that emerged was that a special unit dedicated to witness and victim protection and support should be established, whose staff members have multi-disciplinary skills.<sup>5</sup> This is because judges, without assistance, are not always best qualified to determine the range or character of the measures which may be best suited to a particular witness or victim in a particular case. Indeed, the International Criminal Court (ICC) presents a good model in many respects (although its experience is in some respects untested by a large number of trials). Such a unit is critical to providing adequate care before, during and after the trial. Most pertinently, it can use its expertise to make recommendations to the judges as to the level and nature of protection. The nature of the protection and its purpose has been well described by Trial Chamber 1 of the ICC:

‘... Protective and special measures for victims are often the legal means by which the court can secure the participation of victims in the proceedings, because they are a necessary stage in order to safeguard their safety, physical and psychological well-being, dignity and private life ...’

Also worth exploring is the experience in Sierra Leone. The Special Court for Sierra Leone was the first court to operate in a country where the actual conflict took place.<sup>6</sup> In this case, it was especially important for the Victim and Witness Protection Unit to work effectively.

During the Ottawa meeting, a number of other specific measures warranted particular attention: the need to educate witnesses in the consequences of their exposure and the need to provide reassurance in preparation for the trial. In some instances, 24-hour contact is likely to be necessary. In this regard, appropriate measures which can be addressed by the court include: redacting material to protect witnesses and victims, providing screening at the hearing and granting confidentiality where appropriate. Outside the court, the needs for escort by way of protection, general security protection and, as has already been indicated, the relocation of witnesses may need to be considered.

### 4.3 Areas of state responsibility

International trials engender a wide range of public expectations which are essential to manage. Part of managing the expectations that flow from the establishment of an international court or tribunal and its proceedings include state co-operation, playing a critical role through headquarters' agreements and new agreements.

One of the state's responsibilities is to provide for the protection of judges and lawyers, and the ongoing care, both psychological and physical, of witnesses and victims. At the meetings, delegates identified two specific examples of protection and support that are the responsibility of a state at the international level: the need for visas to be provided to enable witnesses to travel to a court, and the grant of immunity from prosecution at a meaningful international level.

Some other areas of state responsibility include: the establishment of a proper system of legal aid governed by consistent criteria; the encouragement of pro bono participation; the establishment of trust funds to be administered by the court or tribunal (there was strong support at the meetings for this); and methods whereby assets can be identified and hidden assets can be revealed and the enforcement of this through state co-operation.