



***DEFENSE COUNSEL AT THE INTERNATIONAL CRIMINAL COURT:
RULES, TEST CASES AND FUTURE DEVELOPMENT***

By Karen Corrie

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The International Criminal Court (“ICC” or “Court”) was created to bring to justice those who have committed the worst crimes against humankind. However, such a court can only do justice if it affords all accused persons full due process rights. As Human Rights First stated:

[I]f the work of the ICC will stand for anything, it must be that no objective, not even the most apparently moral or sublime, can justify the resort to unjust means. And if the defendant is condemned without *fairness*, then in a real sense justice will be denied to the victim.¹

So clear was this principle to the Court’s creators that they incorporated provisions for defendants’ due process rights in the Court’s founding document, the Rome Statute of the International Criminal Court (“Rome Statute”).² However, the Rome Statute provided minimal guidance for the role of defense counsel, particularly for counsel provided by the Court at no cost to indigent defendants.

Since the Rome Statute was drafted, the role of defense counsel at the ICC has developed in a number of additional documents governing the work of the ICC. These documents include the Rules of Procedure and Evidence,³ the Regulations of the Registry,⁴ the Regulations of the Court,⁵ and the Agreement on Privileges and Immunities.⁶ Whether these rules adequately define and provide for defense counsel is being and will continue to be determined through their application in the Court’s proceedings.

This paper examines the status of defense counsel before the ICC, with an emphasis on evaluating whether the defense is provided adequate resources and given sufficient access to evidence and processes in order to defend cases brought by the Office of the Prosecutor (“OTP”).

¹ Ken Hurwitz, Deirdre O’Brien and Cushla Thompson, *Ensuring Ethical Representation: Comments on the draft Code of Professional Conduct for counsel before the International Criminal Court Ensuring Ethical Representation: Comments on the draft Code of Professional Conduct for counsel before the International Criminal Court*, Human Rights First, November 2004, at i-ii, at http://www.humanrightsfirst.org/international_justice/pdf/icc-ethics-report-120304.pdf (emphasis in original).

² Rome Statute of the International Criminal Court (hereinafter “Rome Statute”), July 17, 1998, 37 I.L.M. 999.

³ Rules of Procedure and Evidence (hereinafter “RPE”), ICC-ASP/1/3 (part II-A), September 9, 2002.

⁴ Regulations of the Registry (hereinafter “RoR”), ICC-BD/03-01-06 Rev.1, March 6, 2006.

⁵ Regulations of the Court (hereinafter “RoC”), ICC-BD/01-01-04, May 26, 2004.

⁶ Agreement on Privileges and Immunities of the International Criminal Court (hereinafter “APIC”), ICC-ASP/1/3, September 9, 2002.

Section I briefly describes the history of defendants' right to counsel in international criminal law. Section II sets forth in detail the statutes, rules, and regulations establishing counsel for the defense before the Court. Section III addresses potential problems that may follow from these texts. Section IV describes the Court's provisions for free legal assistance to indigent defendants, and analyzes possible concerns about its implementation at the ICC. Section V explains the participation of defense counsel before the Court to date, and Section VI scrutinizes that participation. Finally, Section VII makes recommendations for further strengthening and assisting the defense at the Court.

I. History of Defendants' Right to Counsel in International Criminal Law

Domestic and international law recognize that defendants who have been detained or charged with crimes are entitled to a series of procedural rights referred to as "due process" rights. In the United States, these rights are embodied in the Constitution. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury, to be informed of the charges against him, to be confronted with the witnesses against him, and the right to counsel.

Internationally, defendants were first prosecuted for genocide, war crimes, and crimes against peace at the International Military Tribunals created by the Allies after the Second World War. Even at that early stage, defendants were guaranteed some due process rights, including the right to counsel. Former United States Supreme Court Justice Robert Jackson, who served as chief prosecutor of the Nuremberg tribunal, has described how defendants' due process rights were guaranteed at Nuremberg, stating:

[Each defendant was] allowed . . . counsel of his choice, and if he had none, a German advocate was appointed for him by the tribunal All such counsel were paid, fed and housed by Military Government. They were furnished office space, stenographers and supplies. Copies of documents presented as a part of the prosecution's case were given to them at least twenty-four hours in advance of presentation in court They were allowed, so far as physical conditions permitted, to have the deposition or presence at the trial of any witness they could convince the tribunal had information relevant to their defense A transcript of proceedings, in his own language, was furnished daily to each counsel.⁷

Despite these guarantees, the due process rights afforded defendants at Nuremberg fell short of standards observed in national courts. For example, defendants did not have a right to counsel during interrogation, the right to be presumed innocent until proven guilty, or the right to appeal their cases.⁸ Thus, since the Second World War, international law has built upon and gone beyond the Nuremberg model to develop and enhance the rights of defendants. Indeed, numerous international agreements have been adopted which prescribe rights for accused persons. For example, Article 14(3) of the International Covenant on Civil and Political Rights⁹ (“ICCPR”) accords every person charged with a criminal offense the right to defend herself in person or through legal assistance of her own choosing, and to have legal assistance assigned to her if she cannot afford counsel herself. Article 6(3)(c) of the European Convention on Human Rights,¹⁰ Article 8(2)(d) of the American Convention on Human Rights,¹¹ and Article 7(1)(c) of the African Charter on Human and Peoples’ Rights¹² contain similar provisions.

⁷ Robert H. Jackson, *Nuremberg In Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A.J. 813 (1945), available at <http://www.roberthjackson.org/Man/Nuremberginretrospect/> (last visited August 17, 2007).

⁸ Jonathan A. Bush, *Respondents: Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 St. Louis L.J. 515, 530-531 (2001).

⁹ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 14, 1950, 312 U.N.T.S. 221, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155.

¹¹ American Convention on Human Rights, November 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹² African Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982).

The right to legal assistance is also recognized in Article 21(4)(d) of the Statute of the ICTY¹³ and Article 20(4)(d) of the Statute of the ICTR.¹⁴ Both state that defendants have a number of rights, including: the right to defend themselves in person or through legal assistance of their choosing; the right to be informed, if they do not have legal assistance, of this right; and the right to have legal assistance assigned to them where the interests of justice so require and without payment for this assistance in cases of indigence.

Additionally, defense counsel practicing at the ICTY founded the Association of Defense Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia, which is recognized by the judges of the ICTY as the defense counsel organization that assists the ICTY's President and Registrar in all matters relating to defense counsel pursuant to Rule 44 of the ICTY's Rules of Procedure and Evidence.¹⁵ This organization also provides training to defense counsel practicing at the ICTY, and maintains a list of investigators qualified to work for defense counsel.¹⁶ There is no parallel organization at the ICTR.

Despite these safeguards, the standards in practice of due process at the ICTY and the ICTR fall short of the standards created by Article 14 of the ICCPR. Indeed, in comparison with defense counsel at the ICC, defense counsel at the *ad hoc* tribunals operate virtually on their own.¹⁷ Learning from the lessons of the ICTY and the ICTR, the negotiators of the ICC's Rome Statute more fully provided in Article 67 for some of these rights, including the right to be tried without undue delay, the right of a defense team to disclosure of evidence by the OTP, the ability

¹³ Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827, May 25, 1993.

¹⁴ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955, November 8, 1994.

¹⁵ See <http://www.adcicty.org/>.

¹⁶ *Id.*

¹⁷ Email from Thomas Viles, Director, ICDA-USA, of Berliner, Corcoran & Rowe, LLP, to Daniel Arshack, Director, ICDA-USA, Member of ICB, of Arshack, Hajek & Lehrman, PLLC (December 17, 2007, 13:47 EST) (on file with author).

of defense teams to conduct investigations without governmental or other interference, and the ability of defense teams to have adequate and unrestricted access to the accused.¹⁸

Independent professional associations for defense counsel have also done much to advance the work of defense at the ICC. First, in 1997, the International Criminal Defense Attorneys Association (ICDAA) was created as a non-governmental organization based in Montreal, Canada.¹⁹ Its objective is to “create the foundations for a full, fair and well-organized defence in proceedings before the International Criminal Court (ICC) and other international tribunals.”²⁰ The ICDAA sent a delegation to the Rome Conference in 1998, and contributed to the creation of the Rules of Procedure and Evidence.²¹

In addition, the ICDAA helped to develop the International Criminal Bar (ICB), whose work is focused solely on the ICC. Following the creation of the ICB, the ICDAA turned its attention to other tribunals, leaving the ICB to work on defense issues at the ICC.

The objectives of the ICB are to “ensure that counsel are able to practice in total independence before the ICC,”²² to “assist counsel to speak in a strong and unified voice regarding issues which affect their practice,”²³ and to “guarantee an equitable trial to victims and accused.”²⁴ It held its first general assembly in Berlin on March 21 and 22, 2003, which was attended by four hundred people from more than fifty nations.²⁵ It has established four working groups: the Committee on Ethics, the Committee on Finance, the Committee on Legal Aid, and

¹⁸ For further explanation, see Briony MacPhee, *Filling the Gap in the Rome Statute on Defense*, August 30, 2005, at <http://www.amicc.org/docs/Filling%20the%20Gap%20in%20the%20Rome%20Statute.pdf>.

¹⁹ International Criminal Defense Attorney Association, *About Us*, at http://www.aiad-icdaa.org/about_us/about_us.php (last visited August 17, 2007).

²⁰ International Criminal Defense Attorney Association, *Mission*, at http://www.aiad-icdaa.org/about_us/mission.php (last visited August 17, 2007).

²¹ International Criminal Defense Attorney Association, *History*, at http://www.aiad-icdaa.org/about_us/history.php (last visited August 17, 2007).

²² International Criminal Bar, *Word of Welcome from the Presidents*, at <http://www.bpi-icb.org/> (last visited August 17, 2007).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

the Committee on Professional Training. It has an office in The Hague. In 2003 it adopted its own Code of Conduct and Disciplinary Procedure. It has also held a series training sessions to familiarize attorneys with the workings of the Court.

Although the Registrar has not formally recognized the ICB as a body before the Court, it is the most developed and organized association of defense counsel before the Court, and the Registry does consult the ICB as it drafts further regulations. The ICB seeks to have the Assembly of States Parties (“ASP”) facilitate its recognition as “as the legitimate and representative interlocutor of the Registrar and of the Court on all issues related to the legal profession.”²⁶ Indeed, the ASP has the power to declare its wish to facilitate the establishment of a representative body of counsel or legal associations, one purpose of which could be to advise the Registrar about such defense issues as the assignment of legal assistance and the development of the Code of Professional Conduct.²⁷

II. Rules Governing Defense Counsel at the ICC

The rules governing defense counsel before the ICC are in the Rome Statute, the Rules of Procedure and Evidence (“RPE”), the Regulations of the Registry (“RoR”), the Regulations of the Court (“RoC”), the Agreement on Privileges and Immunities of the Court (“APIC”), and the Code of Professional Conduct for counsel (“the Code”).²⁸ These rules and regulations fall into several categories, including the qualifications for defense counsel, the stage at which defendants become entitled to counsel, the appointment of counsel by the Court, the selection of counsel by

²⁶ International Criminal Bar, *International Criminal Bar* (hereinafter “ICB Paper”), at 3, at legalminds.lp.findlaw.com/list/intpil/doc00061.doc (last visited August 17, 2007).

²⁷ RPE, *supra* note 3, rule 20(3).

²⁸ ICC-ASP/4/Res.1, December 2, 2007.

defendants, support for defense counsel, the logistics of defense counsels' performance of duties, and the privileges and immunities of defense counsel.

A. Qualifications For Defense Counsel

To appear before or represent a defendant before the Court, counsel must meet a set of qualifications required by the RPE and the RoC. Defense counsel must have “established competence in international law or criminal law and procedure, as well as the necessary relevant experience . . . in criminal proceedings,”²⁹ and ten years of relevant experience.³⁰ In addition, defense counsel must be fluent in, or have an excellent knowledge of, at least one of the working languages of the Court, French and English.³¹ This set of qualifications reflects the Court’s goal of providing defendants with highly qualified counsel who have practical, rather than only academic, experience. Defense counsel may be assisted by other persons, including professors of law, who have relevant experience.³²

B. When A Defendant Is Entitled to Counsel

A person who has been arrested or who will appear before the Court pursuant to a summons is entitled to assistance in the preparation of his defense.³³ If a case proceeds to trial, the defendant is guaranteed: adequate time and facilities for the preparation of his defense;³⁴ the choice of his own counsel, even if indigent;³⁵ free communication with counsel in confidence;³⁶ the right to be present at trial and to conduct the defense in person or through legal assistance of his choosing,³⁷ the right to be informed that he has the right to such legal assistance,³⁸ and the

²⁹ RPE, *supra* note 3, rule 22(1).

³⁰ RoC, *supra* note 5, reg. 67(1).

³¹ RPE, *supra* note 3, rule 22(1); RoC, *supra* note 5, reg. 67.

³² RPE, *supra* note 3, rule 22(1).

³³ Rome Statute, *supra* note 2, art. 57(3)(b); RPE, *supra* note 3, rule 117(2); RoR, *supra* note 4, reg. 151(1).

³⁴ Rome Statute, *supra* note 2, art. 67(1)(b).

³⁵ *Id.*; RPE, *supra* note 3, rule 21(2).

³⁶ Rome Statute, *supra* note 2, art. 67(1)(b).

³⁷ *Id.* at art. 67(1)(d).

right to have legal assistance assigned by the Court in any case where the interests of justice so require and without payment if he lacks sufficient means to pay for it.³⁹ Finally, if a defendant enters a guilty plea, the Trial Chamber before which he admits guilt must determine that the admission “is voluntarily made . . . after sufficient consultation with defense counsel.”⁴⁰

C. Appointment of Counsel by the Court

Following consultation with the Registrar, the Court may appoint counsel when a person entitled to legal assistance under the Statute and Rules is to be questioned, or in any case where a person entitled to legal assistance is in need of it and that person has not already secured representation.⁴¹ The Court may also appoint counsel “where the interests of justice so require.”⁴² When a defendant will be without counsel for a brief period but is in urgent need of legal assistance, the Registrar may appoint duty counsel, taking into account the wishes of the accused, and the geographical proximity of, and languages spoke by, the attorney to be appointed.⁴³ Finally, when there is a “unique investigative opportunity,” the Pre-Trial Chamber may authorize counsel for a defendant to participate in proceedings, and may also appoint counsel to represent the interests of unnamed defendants.⁴⁴

It is important to note that these provisions do not prohibit a defendant from representing himself. A defendant wishing to represent himself must inform Registry of this choice “at the first opportunity.”⁴⁵ The importance of this right has been recognized in international law, most prominently in the case of Slobodan Milošević at the ICTY. On November 1, 2004, the Appeals Chamber of the ICTY issued a decision about whether Milošević could represent himself, in

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at art. 65.

⁴¹ RoR, *supra* note 4, reg. 129(2).

⁴² RoC, *supra* note 5, reg. 76(1).

⁴³ *Id.* at reg. 73(2).

⁴⁴ Rome Statute, *supra* note 2, art. 56(2)(d), art. 56(3)(a); RPE, *supra* note 3, rule 47(2).

⁴⁵ RPE *supra* note 3, rule 21(4).

which it stated that “defendants have a presumptive right to represent themselves” in proceedings before the ICTY,⁴⁶ although this right is “not categorically inviolable.”⁴⁷

D. Selection of Counsel By Defendants

The Registry is tasked with helping defendants select counsel. The Registrar must establish criteria and procedures in its Regulations for the selection of defense counsel.⁴⁸ It must also maintain a list of qualified defense counsel from which accused persons can choose their counsel.⁴⁹ This is a general list of counsel who can appear before the Court on behalf of victims and defendants, and it specifies counsels’ preferences to represent victims, defendants, or both.⁵⁰ In addition, the Registry must establish and maintain a roster of counsel who are available at any time to represent any person before the Court or to represent the interests of the defense.⁵¹ The Registry did not provide this list until ordered to do so by the Presidency on June 29, 2007.⁵² The current list, published on the Court’s website, provides only the names, gender, and nationality of each attorney.

When a detained person arrives at the detention center, or as soon afterwards as practicable, a copy of the list of counsel must be made available to him.⁵³ That list must also be

⁴⁶ *Decision on the Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel*, IT-02-54-AR73.7, November 1, 2004, para. 11.

⁴⁷ *Id.* at para. 12. In that case, the Appeals Chamber found that, though Milošević wished to represent himself *pro se*, counsel should be appointed for him because Milošević’s repeated absences for medical reasons could extend the trial for an unreasonably long time or prevent its conclusion entirely. However, the Appeals Chamber also noted that “any restrictions on Milosevic’s right to represent himself must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial,” and that “when he is physically capable of doing so, Milosevic will take the lead in presenting his case.”

⁴⁸ RPE, *supra* note 3, rule 21(1).

⁴⁹ *Id.* at rule 21(2).

⁵⁰ RoR, *supra* note 4, reg. 122.

⁵¹ RoC, *supra* note 5, reg. 73.

⁵² *Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively*, ICC-01/04-01/06-937, June 29, 2007.

⁵³ RoR, *supra* note 4, reg. 151(2), reg. 186(2)(b)(vii).

at the disposal of detained persons at all times in the office of the Chief Custody Officer.⁵⁴ An accused person may select counsel from outside of that list if that counsel satisfies the Registrar’s criteria.⁵⁵ If counsel refuses to represent an accused person, the Presidency shall review that refusal.⁵⁶

E. Support for Defense Counsel

Support for defense counsel comes primarily from the Registry.⁵⁷ The Registry must be organized in a manner that promotes the rights of the defense, consistent with the principle of fair trial as defined in the Statute.⁵⁸ The Registrar is required to: facilitate the protection of confidentiality;⁵⁹ provide support, assistance, and information to all defense counsel appearing before the Court, and, as appropriate, support for professional investigators necessary for the conduct of the defense.⁶⁰ It must also assist arrested persons and accused persons in obtaining legal advice and the assistance of legal counsel, as well as persons who are about to be questioned either by the Prosecutor, or by national authorities pursuant to a request for international cooperation from the Court, where there are grounds to believe that person has committed a crime within the jurisdiction of the Court as set out in Article 55, paragraph 2.⁶¹ Internally, it has the responsibility to advise the OTP and the Chambers on relevant defense-related issues;⁶² provide the defense with the facilities needed for the performance of the duty of the defense;⁶³ and disperse information and case law of the Court to defense counsel. For the development of lawyers practicing at the ICC it must, as appropriate, cooperate with “national

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ RPE, *supra* note 3, rule 21(3).

⁵⁷ *Id.* at rule 14(2).

⁵⁸ *Id.* at rule 20(1).

⁵⁹ *Id.* at rule 20(1)(a).

⁶⁰ *Id.* at rule 20(1)(b).

⁶¹ *Id.* at rule 20(1)(c).

⁶² *Id.* at rule 20(1)(d).

⁶³ *Id.* at rule 20(1)(e).

defense and bar associations or any independent representative body of counsel and legal associations . . . to promote specialization and training of lawyers in the law of the Statute and Rules.”⁶⁴

In addition, the Registrar must assist counsel in traveling to the seat of the Court, to the location of any proceedings, to where his client is in custody, or for on-site investigations.⁶⁵ The Registry must also provide assistance to persons representing themselves.⁶⁶ Furthermore, the Registry must carry out all of its duties, including the Registry’s financial administration, in such a manner “as to ensure the independence of defense counsel.”⁶⁷

The Registrar is also charged with providing training for defense counsel. These duties include ensuring access to a database of the caselaw of the Court, identifying and publishing the names of persons and organizations carrying out relevant training, providing training materials, and offering training that will enable persons to qualify to train other counsel.⁶⁸ The Registry must also establish standard training programs aimed at educating counsel about the Statute and RPE of the Court.⁶⁹ The Registry must take necessary steps to encourage equal geographical and gender distribution of training opportunities, including creating financial support programs for the training of counsel in states where lawyers are of limited financial capacity.⁷⁰

Finally, Rule 20 of the RPE charges the Registry with creating a Code of Professional Conduct for Counsel, the first version of which was approved by the ASP in December 2005. In doing so, the Registrar is required consult with any “independent representative body of counsel

⁶⁴ *Id.* at rule 20(1)(f).

⁶⁵ RoR, *supra* note 4, reg. 119(1)(a).

⁶⁶ *Id.* at reg. 119(2).

⁶⁷ RPE, *supra* note 3, rule 20(2).

⁶⁸ RoR, *supra* note 4, reg. 140.

⁶⁹ *Id.* at reg. 141.

⁷⁰ *Id.* at reg. 142.

or legal associations.”⁷¹ Such independent representative bodies may include “any such body the establishment of which may be facilitated by the Assembly of States Parties.”⁷²

In addition to the Registry itself, support for defense counsel will come primarily from the Office of Public Counsel for the Defense (“OPCD”), an organization based in the Registry for administrative purposes, but otherwise independent from the Registrar.⁷³ The mandate of the OPCD is to ensure that “‘equality of arms’, the rights of the defence and the right to a fair trial are safeguarded.”⁷⁴ During the investigations stage, the OPCD represents and protects the rights of the defense generally, possibly even acting as *ad hoc* counsel when necessary.⁷⁵

After the issuance of arrest warrants or summonses and an initial appearance by the accused, the pre-trial phase begins. The defendant is arraigned and counsel is assigned and given time to prepare. This is followed by the confirmation of charges against specific defendants (equivalent to indictment in the US legal system), which concludes the pre-trial phase and initiates the trial phase. During the pre-trial and trial phases, when named defendants are supposed to have selected counsel to represent them, the OPCD supplements, rather than replaces, counsel for individual defendants. The OPCD focuses its research and assistance on legal issues which are “potentially of common concern to all defendants.”⁷⁶

On January 15, 2007, Mr. Xavier-Jean Keïta of Mali was appointed as Principal Counsel of the OPCD. Mr. Keïta was chairman of the Human Rights and Defence Commission of the International Association of Young Lawyers and was an active member of the International Conference of French-speaking Bar Associations and the International Centre for the Training of

⁷¹ RPE, *supra* note 3, rule 20(3).

⁷² *Id.*

⁷³ RoR, *supra* note 4, reg. 43-146; RoC, *supra* note 5, reg. 77.

⁷⁴ *The Office of Public Counsel for the Defence becomes fully operational*, ICC Newsletter, May 2007, at http://www.icc-cpi.int/library/about/newsletter/15/en_03.html (last visited October 28, 2007) (hereinafter “May 2007 ICC Newsletter”).

⁷⁵ *Id.*

⁷⁶ *Id.*

Lawyers in Africa. He was also involved in the establishment of the ICB. Between April 2006 and January 2007, the OPCD operated under Associate Counsel Melinda Taylor. Ms. Taylor was a legal consultant on defense cases before the ICTY, the ICTR and the Special Court for Sierra Leone, and previously worked in the Office of Legal Aid and Detention at the ICTY.

F. Logistics of Defense Counsels' Performance of Duties

A number of rules govern the logistics of defense counsel's performance of his or her duties. First, to enable visits between counsel and client, the Registrar issues a permit for regular visits by counsel to the client as soon as counsel is appointed.⁷⁷ In situations where counsel has not yet been appointed and upon written request from a detained person, the Registrar may issue a permit for an individual acting as counsel to visit the detained person for a specific period of time prior to the hearing on the confirmation of charges.⁷⁸ The issuance of these permits should prevent problems seen at the ICTY and in the case of Charles Taylor at the Special Court for Sierra Leone. In both courts, only lead counsel was permitted to visit with defendants, and any other member of the defense teams could not visit defendants unless lead counsel was present.⁷⁹

All communications between counsel and client are conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention center.⁸⁰ This facilitates the confidentiality of communications between defendants and their counsel. Indeed, communications made in the context of a professional relationship between a person and his or her legal counsel "shall be regarded as privileged, and not subject to disclosure," unless the

⁷⁷ RoR, *supra* note 4, reg. 178(1).

⁷⁸ *Id.*

⁷⁹ Comments on paper from Virginia Lindsay, defense counsel at the ICTY and on board of the ICDA, member of ICB (on file with the author) (hereinafter "Comments from V. Lindsay").

⁸⁰ RoR, *supra* note 4, reg. 183(1); RoC, *supra* note 5, reg. 97(2).

person consents in writing to such disclosure, or the person discloses the content of that communication to a third party.⁸¹

While visiting defendants, counsel may exchange documents with them.⁸² Any document too large to be physically passed to a detained person at the visiting facility shall be passed first to the Chief Custody Officer, who shall pass it “unopened and unread” to the detained person.⁸³

In preparing for trial, defense counsel are also entitled to disclosure of evidence by the OTP. The Prosecutor must provide the defense with the names of any witnesses they intend to call, and all statements of those witnesses.⁸⁴ The Prosecutor must also permit the defense to inspect any books, documents, photographs, or other tangible objects in possession or control of the prosecutor, “which are material to the preparation of the defense or are intended for use by the Prosecutor as evidence for the purposes of confirmation hearing or trial . . . or were obtained from or belonged to the person.”⁸⁵ The defense must provide similar disclosure to the Prosecutor.⁸⁶ Finally, the defense must also disclose its intent to raise the defenses of alibi, mental disease or defect, intoxication, self defense or defense of another.⁸⁷

G. Privileges and Immunities

Generally, defense counsel, as well as experts, witnesses, and “any other person required to be present at the seat of the Court” shall be accorded by the Court and States Parties “such treatment as is necessary for the proper functioning of the Court, in accordance with the

⁸¹ RPE, *supra* note 3, rule 73(1),

⁸² RoR, *supra* note 4, reg. 182(1).

⁸³ *Id.*

⁸⁴ RPE, *supra* note 3, rule 76.

⁸⁵ *Id.* at rule 77.

⁸⁶ *Id.* at rule 78.

⁸⁷ *Id.* at rule 79.

agreement on the privileges and immunities of the Court.”⁸⁸ More specifically, States Parties which have ratified the APIC must accord to defense counsel: immunity from arrest or detention and from seizure of personal baggage; immunity from legal process of every kind in respect of words spoken or written and all acts performed in an official capacity, which immunity shall continue to be accorded even after he or she has ceased to exercise his or her functions; inviolability of papers and documents in whatever form and materials relating to the exercise of his or her functions; and the right to receive and send papers and documents in whatever form for the purposes of communications in the course of his or her functions as counsel.⁸⁹

III. Textual Concerns

The operative texts of the ICC provide enormous detail about the work of defense counsel, and in most respects provide sufficiently for the due process rights of defendants. Nevertheless, the implementation of these texts could also present possible concerns for the work of defense counsel.

A. Equality of Arms

In order for defendants to have fair trials, there must be equality of arms between the prosecution and the defense. In other words, both parties must have equivalent material, financial, and human resources, comparable time frames in which to prepare briefs, motions, and the like, and equal opportunity to travel to the necessary locations in question in good time, and in an effective manner.⁹⁰

Currently, although the OTP and the defense are ostensibly equal parties before the Court, the role of victims has the potential to unbalance this system in favor of the Prosecution.

⁸⁸ Rome Statute, *supra* note 2, art. 48(4).

⁸⁹ APIC, *supra* note 6, art. 18(1).

⁹⁰ May 2007 ICC Newsletter, *supra* note 74.

For example, victims' interests are represented in part by the Office of Public Counsel for Victims ("OPCV") within the Registry, the functions of which mirror those of the OPCD.⁹¹ By creating similar support systems for victims and defendants, the Court could give victims two bites at the apple: first, their participation in the proceedings provided for in Article 68(3), and second, their individual interests are represented by the OPCV.

This problem is partially solved because the Court significantly limits the participation of victims. For example, in September 2006 PTC I set forth the arrangements by which the victims' legal representatives could participate in the confirmation of charges hearing in the case against Thomas Lubanga Dyilo.⁹² For their safety, PTC I restricted victims to anonymous participation.⁹³ Finding that it would be improper for anonymous parties to make accusations against the accused, PTC I then denied victims the ability to add any factual elements to the case.⁹⁴ Thus, PTC I found that the victims may only have access to public documents in the case file, and be present at public hearings.⁹⁵ Such limited participation should not cause an inequality of arms between the prosecution and defense.

More recently, on January 18, 2008, Trial Chamber ("TC") I issued a decision outlining the procedures by which victims may apply to participate in trials heard by the Trial Chambers.⁹⁶ In this decision, TC I held that victims can only participate in cases before it if either (i) there is a "real evidential link" between the victim and the evidence the Trial Chamber will consider, or (ii) the victim is affected by an issue arising during the trial because that victim's personal

⁹¹ RoC, *supra* note 5, reg. 81.

⁹² *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*, ICC-01/04-01/06-462-tEN, September 22, 2006.

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.*

⁹⁶ *Decision on victims' participation*, ICC-01/04-01/06-1119, January 18, 2008.

interests are engaged by it.⁹⁷ In addition, TC I rejected arguments by from victims’ legal representatives that victims should be allowed to participate in all hearings as a general rule⁹⁸ and placed a high burden on victims applying to participate in TC I by requiring them to submit applications in two stages. First, a victim must apply to participate generally in a case before TC I, setting forth how that victim’s interests are affected by that case.⁹⁹ Second, if the Trial Chamber finds that a victim’s interests are affected by the case, the victim must again apply at each stage at which she wishes to participate, and that application must include specifically “the nature and the detail of the proposed intervention (e.g. by providing the questions that he or she seeks to put).”¹⁰⁰ This decision is noteworthy because it limited anonymous participation by victims, noting “that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused.”¹⁰¹ Concerned with undermining “the fundamental guarantee of a fair trial”, the Chamber stated that “The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.”¹⁰²

B. Commencement of Representation of Defendants

It is frequently observed that, because much of the OTP’s investigation into situations and cases takes place before the OTP has named specific defendants, and before defense counsel is involved, the defense is at an inherent disadvantage. While this assessment is technically

⁹⁷ *Id.* at para. 95. In his dissent, Judge Rene Blattmann argues that this decision allows for the participation of too many victims before a Trial Chamber because it does not state that victims’ participation is limited to those whose interests are affected only by the specific case with which a Trial Chamber is seized. However, by requiring that victims’ interests be affected by the evidence presented in a case or the issues arising from trial, the decision appropriately limits the participation of victims to those who have a true interest in the case with which a Trial Chamber is seized. Therefore, this decision is not overly inclusive.

⁹⁸ ICC-01/04-01/06-964, paras. 22-26.

⁹⁹ ICC-01/04-01/06-1119, para. 102.

¹⁰⁰ *Id.* at para. 103.

¹⁰¹ *Id.* at para. 131.

¹⁰² *Id.*

correct, it depends on the actions of the OTP and the Court and is not necessarily a detrimental flaw. Rather, this reflects a practical reality of any criminal prosecution – defendants only become aware of the need for counsel after the investigation or prosecution begins.

However, defense counsel at the ICC are arguably in a less favorable position than most domestic defendants because defense counsel at the ICC must defend their clients against crimes that will nearly always be more complex and have a wider scope than domestic crimes. Indeed, the majority of domestic prosecutions involve crimes that occurred recently and locally, and involve few witnesses. Conversely, most cases heard at the ICC will involve crimes that occur over vast parts of one or more countries, with tens or hundreds of witnesses, and which may have occurred several years before the investigation begins. Because of these unique obstacles, it is essential that defense counsel should have benefits not available to domestic defense counsel.

Thus, in comparison with the procedure used in criminal cases in the United States, defendants at the ICC receive extra advantages. In the United States, criminal investigations often begin before defendants are named, and may be designed to prevent individuals from discovering that law enforcement is investigating them. A domestic prosecutor will rarely make a public announcement about the initiation of an investigation. Indeed, no one outside of the prosecutor's office and police, with the possible exception of an investigative grand jury, is alerted to the existence of an investigation. No defense counsel is appointed to ensure that the rights of a future defendant are protected at that time.

Conversely, at the ICC, the OTP must formally and publicly open investigations into situations, thereby putting any individuals involved in that situation on notice that they may be under investigation. The Pre-Trial Chamber oversees the investigation, and can appoint *ad hoc* counsel for the defense when necessary to protect the rights of future defendants, as discussed

above in section II.C. Under this system, defendants are arguably afforded greater advantage and greater protection than they receive in the United States. Third, defendants at the ICC have greater protection than most defendants, because the OPCD will represent and protect the rights of defendants during the initial stages of investigations.¹⁰³

C. Privileges and Immunities of Defense Counsel

Though defense counsel are guaranteed certain privileges and immunities, they receive far less protection than members of the OTP. Indeed, while the APIC specifically lists the privileges and immunities of defense counsel, the APIC broadly grants members of the OTP the same level of immunity as diplomats or officials.¹⁰⁴ As outlined in the Vienna Convention on Diplomatic Immunities, diplomats and officials enjoy extensive privileges and immunities, including the inviolability of the person of the diplomat,¹⁰⁵ the freedom from any form of arrest or detention,¹⁰⁶ the inviolability of the diplomat's residence, papers, and correspondence,¹⁰⁷ immunity from the criminal jurisdiction of the receiving state (except in limited circumstance),¹⁰⁸ and exemption from nearly all taxes.¹⁰⁹ These same privileges and immunities are extended to a diplomat's family.¹¹⁰ They attach to diplomats and their families from the moment they enter the territory of the receiving state or begin their post.¹¹¹

All of these privileges and immunities are extended to members of the OTP, but many are denied to defense counsel. Most significantly, defense counsel are denied inviolability of their

¹⁰³ *Decision on the Ad hoc Counsel for the Defence's Request for leave to Appeal the Decision of 2 February, 2007*, ICC-02/05-52, February 21, 2007, at 7 (hereinafter "Decision on Ad hoc Counsel's Request"); for more, see section V.A, concerning Mr. Hadi Shalluf.

¹⁰⁴ APIC, *supra* note 6, art. 15.

¹⁰⁵ Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 29.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at art. 30(1)-(2).

¹⁰⁸ *Id.* at art. 31.

¹⁰⁹ *Id.* at art. 34.

¹¹⁰ *Id.* at art. 37.

¹¹¹ *Id.* at art. 39.

person, freedom from any form of arrest or detention for matters unrelated to their work as defense counsel, and immunity from the criminal jurisdiction of the states to which they travel. In addition, the privileges and immunities defense counsel do enjoy are not extended to family members traveling with them.

The reduced privileges and immunities place defense counsel at a disadvantage. This is first evident at the investigations stage. While the OTP may have spent months investigating situations, thereby building relationships with the governments and the people involved, defense counsel must attempt to perform their investigations without this relationship, and with only limited protection. This may restrict their ability to travel to and inside of the states where crimes are alleged to have occurred. What is more, there is a potential for defense counsel to be subjected to politically motivated arrests in unwelcome host countries which may not have an interest in the provision of an adequate defense for the counsel's client. Because of that risk, defense counsel need the greater immunities afforded to the OTP.

Additionally, denying defense counsel the same privileges and immunities as the OTP makes little sense in light of the work defense counsel must perform. In fulfilling their duties before the Court, defense counsel "may have to make statements and do acts, not because they personally believe in the cause of the client or accused, but because his case has to be advanced in accordance with instructions for his defense."¹¹² Because of this role, defense counsel may be at far greater risk of facing legal criminal charges and other non-disciplinary liability for performing their professional duties.¹¹³

A possible reason for the disparate privileges and immunities of prosecutors and defense counsel may be due to a perception that prosecutors are akin to state actors because of their law

¹¹² Steven Kay, QC and Bert Swart, *The Role of the Defense*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOL. II 1421, 1427 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002).

¹¹³ *Id.*

enforcement function, and therefore deserve the same privileges and immunities as other state actors. Meanwhile, defense counsel may be “regarded as being on the side of an enemy,”¹¹⁴ and therefore not so entitled. Unfortunately, granting lesser privileges and immunities to defense counsel bolsters this stereotype.

D. Conflicts of Interest Within the Registry

As noted above, the Registry is responsible for giving support to both defense counsel and victims involved in situations and cases before the Court.¹¹⁵ This could cause conflicts of interest for defense counsel. First, counsel may have significant conflicts of interest because the Registry’s list of counsel permitted to practice before the Court is the same for defendants and victims. The ICB has recognized this problem, suggesting that the Court remedy it by simply requiring that counsel for the defense do not appear as counsel for victims in the same situation or case, and vice-versa.¹¹⁶

Conflicts of interest may also arise because defense counsel share resources with victims in the Registry. Although both the OPCD and OPCV are based out of the Registry, separating representation of defendants from representation of victims into two separate entities will hopefully avoid potential conflict. However, the work of defense counsel could have been separated further from that of victims. For example, as the Court’s Statute was negotiated at the Rome Conference, the issue of establishing a separate “Office of the Defense” was discussed informally, but because no formal proposal to that effect was put forward, the debate focused on

¹¹⁴ *Id.* at 1424.

¹¹⁵ For more on the Registry’s responsibility to victims, see Karen Corrie, *Victims’ Participation and Defendants’ Due Process Rights: Compatible Regimes at the International Criminal Court*, January 10, 2007, at <http://www.amicc.org/docs/Corrie%20Victims.pdf>.

¹¹⁶ International Criminal Bar, *International Criminal Bar – Position Paper*, September 12, 2006, at 9, at <http://85.17.104.100/bpi-icb/files/icb%20position%20paper%20120906.pdf>.

creating such an office within the Registry.¹¹⁷ Later, during the negotiation of the RPE, the French delegation proposed the establishment of an Office of the Defense to the ICC, independent of any of the other branches of the Court.¹¹⁸ Though the OPCD is not completely independent, it is, for the first time in any international criminal tribunal, a self-contained unit, separate and distinct from any other.¹¹⁹

E. Lack of Input in the Creation of Further Rules and Regulations

A final potential problem is that defense counsel have no input into the creation of further rules and regulations for the Court. Article 51 of the Rome Statute sets forth the process of making amendments to the RPE, and states that amendments may be proposed by a State Party, the judges acting in an absolute majority, or the Prosecutor. Neither defense counsel nor any body representing defense counsel, such as the ICB, have an opportunity to propose amendments to the RPE. Unless a state party speaks on behalf of defense counsel by sponsoring or proposing an amendment on their behalf, the concerns of defense counsel may never be voiced.

Fortunately, defense counsel had input into the creation of the Code of Professional Conduct for counsel. Rule 8 of the RPE, which concerns the creation of the Code, provides that “[t]he Presidency, on the basis of a proposal made by the Registrar, shall draw up a draft code of professional conduct for counsel, after having consulted the Prosecutor.” However, the Code was based in large measure on a draft prepared by the ICB.¹²⁰ The ICB had proposed its own Code of Conduct to the Registrar. The Registrar also drafted a proposal and submitted it for comment, and the ICB and many organizations of lawyers made comments. The Registrar then

¹¹⁷ Gérard Dive, *Counsel for the Defence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 276, 277-278 (R.S. Lee, ed., 2001).

¹¹⁸ Kay and Swart, *supra* note 113, at 1429.

¹¹⁹ Other international tribunals have already built upon the progress made at the ICC. Indeed, in apparent recognition of the unavoidable conflicts which have arisen and will arise within the OPCD in the ICC, the recently enacted Special Tribunal for Lebanon has established a completely independent office of Defense Services.

¹²⁰ Interestingly, although the Code was prepared with the input of the ICB, it does not provide for zealous representation of clients.

proposed a second draft, and again critical comments were made. Eventually, the ASP did not approve the Registrar's proposal to it. The ASP prepared its own Code of Conduct and the contents of the ASP Code are in many respects similar to or inspired by the ICB's proposal.¹²¹

Unlike the RPE, the Code gives counsel and independent organizations, as well as States Parties, judges, and the Registrar, the power to propose changes to the Code.¹²² Proposals are to be communicated to the Registrar, who will then transmit the proposal to the Presidency.¹²³ The Registrar is required to provide a report on the proposals, prepared "after consultation with the Prosecutor and, as appropriate, with any independent organization representing lawyers' associations and counsel."¹²⁴

IV. Free Legal Assistance

Indigent defendants may apply for legal assistance paid for by the Court. As soon as the Registry contacts a person entitled to free legal assistance under the Rome Statute and the RPE, the Registry shall provide that person with all relevant forms to submit an application for legal assistance paid by the Court.¹²⁵ The Registry must immediately acknowledge receipt of an application for free legal assistance, and must then determine whether that applicant has provided adequate proof of indigency to justify free counsel.¹²⁶ As soon as possible, the Registry must inform the applicant of any missing or incomplete material in that application.¹²⁷ The Registry should decide whether the Court should pay for legal assistance in whole or in part within thirty

¹²¹ Comments on paper by Giuseppe Battista, Vice President of the ICDA, Member of ICB Committee on Ethics (on file with author).

¹²² Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, December 2, 2005, art. 3(1).

¹²³ *Id.* art 3(2).

¹²⁴ *Id.*

¹²⁵ RoR, *supra* note 4, reg. 131(1).

¹²⁶ *Id.* at reg. 131(2).

¹²⁷ *Id.*

days after the accused person has submitted all required paperwork.¹²⁸ During those thirty days, the Court will pay for legal assistance.¹²⁹ A defendant receiving legal aid from the Court must inform the Court of changes in his financial situation, and the Registrar may randomly check a defendant's financial status to verify eligibility for legal assistance.¹³⁰

The Registrar manages legal assistance paid for by the Court, with “due respect to confidentiality and the professional independence of counsel.”¹³¹ Any division of the Registry involved in the payment of legal assistance must maintain the confidentiality of any information learned while arranging such payment.¹³² In addition, the Registry also maintains a list of professional investigators available to defense counsel to be paid by the Court if so provided in the legal aid assessment.¹³³

The rights of indigent defendants have surpassed those even of defendants accused of crimes domestically in common law systems. Specifically, indigent defendants at the ICC are entitled to choose their own counsel from a list of eligible defense counsel.¹³⁴ While the ability of defendants to choose their defense counsel has certain obvious benefits, including preventing language barriers and personality conflicts, it has the potential to create problems. For example, a defendant may select counsel on the basis of counsel's political biases, but such selection could result in the manipulation of the defendant's case for political purposes rather than for the best interests of the case of that defendant.¹³⁵

The method for providing an adequate defense team to an indigent defendant is not fully defined. To aid the Registry, the Committee of Budget and Finance (“CBF”) of the ASP has

¹²⁸ *Id.* at reg. 132(3).

¹²⁹ *Id.*

¹³⁰ *Id.* at reg. 132(4).

¹³¹ *Id.* at reg. 130(1).

¹³² *Id.* at reg. 130.

¹³³ *Id.* at regs. 137 and 139.

¹³⁴ RPE, *supra* note 3, rule 21(2).

¹³⁵ Comments from V. Lindsay, *supra* note 79.

attempted to develop a formula to determine the size of the defense team to which an indigent defendant is entitled. That formula was published in a working paper titled “Proposed Adjustment to the Legal Aid System”¹³⁶ (“Legal Aid Proposal”). The Legal Aid Proposal envisages a core team that works throughout the proceedings, consisting of one attorney, one assistant, and one case manager.¹³⁷ The core team will be supported by additional resources during the trial phase, including the automatic assignment of a second attorney.¹³⁸ The Legal Aid Proposal further sets forth the method by which defense teams will be paid.¹³⁹

The Legal Aid Proposal has several problems. First, no budgetary provisions are made for defense investigation during the pre-trial phase, which is now estimated to last as long as a year.¹⁴⁰ The Legal Aid Proposal acknowledges the need for the defense to do investigative work before a defendant’s hearing on the confirmation of charges.¹⁴¹ The budget includes different proposals for the remuneration of pre-confirmation hearing investigators, and acknowledges criticisms that travel expenses currently provided for during the trial phase would be insufficient for team’s needs. However, it also notes that an increase in such expenses is not planned for.

Defense counsel cannot be expected to allow his preparation for a defense to languish while the Prosecution mounts its case. To that end, Mr. Jean Flamme, former counsel for Thomas Lubanga Dyilo before PTC I,¹⁴² has stressed the importance of providing more resources to defense counsel during the pre-trial investigative stage – specifically, from the inception of counsel’s representation of a defendant, counsel should have one full-time investigator working

¹³⁶ February 20, 2007, *at* http://www.vrwg.org/Publications/05/Legal%20Aid%20Reform%20ICC%20Registry%20Proposals_EN.pdf (hereinafter “Legal Aid Proposal”).

¹³⁷ *Id.* at 5.

¹³⁸ *Id.*

¹³⁹ *Id.* at 10-11.

¹⁴⁰ Comments from V. Lindsay, *supra* note 79.

¹⁴¹ Legal Aid Proposal, *supra* note 134, at 7.

¹⁴² For more, *see* Section V.B.

in coordination with a person at the site of the alleged crimes.¹⁴³ Mr. Flamme has also noted that provisions should be made for that investigator to travel between The Hague and the site of alleged crimes before and during the trial.¹⁴⁴ Finally, the Court should provide independent facilities for defense counsel in the state where the crimes allegedly occurred, to enable the defense to perform investigations.¹⁴⁵

A second potential shortcoming in the Legal Aid Proposal is that it sets out phases of the case when one counsel shall typically act alone. According to the Legal Aid Proposal, only one defense counsel will normally represent a defendant in certain stages of the proceedings, namely: during the period before that defendant is transferred to the Court's authority, and during the period between the end of closing arguments and the issuance of a judgment. Additionally, in most cases, only one counsel may act as *ad hoc* counsel.

The ICB has criticized these provisions, arguing that one counsel acting alone is not adequate to represent a defendant at any stage.¹⁴⁶ Instead, the ICB suggests that resources should be available "from the beginning of the pre-trial phase to allow Counsel to recruit experienced Associate Counsel . . . as part of the core team, and there should be two Counsel throughout pre-trial, trial and appeal phases."¹⁴⁷ The ICB rightly points out that leaving one defense counsel to do all of the work for any period of the proceedings "will result in lengthy legal aid appeals, will

¹⁴³ Email from Jean Flamme, former counsel for Thomas Lubanga Dyilo, to Daniel Arshack, Director, ICDA-USA, Member of ICB, of Arshack, Hajek & Lehrman, PLLC (December 19, 2007, 09:41:54 EST) (on file with author).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ International Criminal Bar, *Consultation Paper on the ICC Registrar's 'Proposed Adjustments to the Legal Aid System*, March 7, 2007, at 4, at http://www.iccnw.org/documents/ICB_position_paper_on_proposed_legal_aid_adjustments_FINAL_VERSION.pdf (hereinafter "Consultation Paper").

¹⁴⁷ *Id.*

negatively impact on defense work product, and will result in burn-out of Counsel, with the delays inherent in allowing new counsel time to prepare.”¹⁴⁸

A third concern is that, under the formula, the Registry would appoint a core team that will be active throughout the proceedings, to be supported by additional resources during only the trial phase.¹⁴⁹ The limitation of additional resources to the trial phase potentially handicaps the defense from the beginning, in part because additional resources may be needed throughout the proceedings. For example, during pre-trial and discovery phases of the case, the participation of additional counsel may be indispensable in examining the hundreds, if not thousands, of documents, statements, and pieces of physical evidence that the OTP will use in its case-in-chief. Indeed, during the pre-trial phase of the case of Mr. Lubanga, Mr. Flamme was asked to respond to over 350 hundred motions without the assistant counsel he requested, and many of those motions were novel and complex.¹⁵⁰

The Legal Aid Proposal, if adopted, may create further problems in its attempt to establish a specific formula for adding additional resources at the trial stage. The formula would allow “modular arrangement of additional resources . . . in accordance with the sometimes considerable fluctuations which may occur in a case.”¹⁵¹ First, for every 40 charges that the Prosecutor sets out, the defense gets the equivalent of one additional full-time team member (“FTE”).¹⁵² Second, for every two-hundred victims who apply for participation, the defense gets one FTE.¹⁵³ Third, for every fifty victims whose applications to participate in the case are

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5.

¹⁵⁰ Comments on paper from Daniel Arshack, Director, ICDA-USA, Member of ICB, of Arshack, Hajek & Lehrman, PLLC (on file with author); Comments from V. Lindsay, *supra* note 79.

¹⁵¹ Legal Aid Proposal, *supra* note 137, at 6.

¹⁵² *Id.*

¹⁵³ *Id.*

accepted by the Chamber, the defense gets one FTE.¹⁵⁴ Fourth, for every 30,000 pages submitted into the record by other participants, the defense gets one FTE.¹⁵⁵ Finally, for every 30,000 pages disclosed by the Prosecutor alone, the defense gets one FTE.¹⁵⁶ In addition, with every FTE, the defense will receive one assistant, and for every three FTE the team will receive one associate counsel.¹⁵⁷

This rigid formula is unrealistic and unworkable because the amount of work required in a particular case is not definitively related to the number of charges, victims, pages of motions, or pages of disclosed documents. Rather, the amount of work required is a function of the quality and quantity of the evidence, the logistics of the case, the creativity and responsiveness of the defense and the behavior of the prosecution, the victims' counsel and the positions taken by the court. The Legal Aid Proposal takes none of these elements into account.

The ICB has voiced its concerns about the Legal Aid Proposal. It has stated that the nature of the charges, entirely left out of the CBF's Legal Aid Proposal, is the most significant factor that must be taken into account when determining the size for a defense team, because:

War crimes are not the same as crimes against humanity, and different crimes against humanity have more or less difficult elements of proof. Persecution, torture and murder have varying degrees of complexity. Where knowledge is an issue, as in aiding and abetting and in command responsibility cases, or where there is requirement of discriminatory intent, the amount of resources for analysis of circumstantial evidence will be more important than in some other cases.¹⁵⁸

The ICB has suggested additional factors that a formula for counsel will need to take into account. These include: the position of the accused; the geographical scope of the indictment; the nature of the counts, including mode of responsibility and elements of the crimes alleged;

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Consultation Paper, *supra* note 147, at 5.

whether there are novel issues that must be addressed; the complexity of the issues; the volume of pleadings filed by States Parties and those seeking leave for *amicus* status; the number of motions filed by victims; any mode of participation granted to victims; and the number of pages of disclosure given in connection with each prosecution witness.¹⁵⁹

In addition to overlooking factors that affect the size of a defense team, the modular provisions are problematic because they could allow for the OTP to manipulate the size of the defense team. For example, the OTP could bring 39 charges instead of 40, or disclose only 29,000 pages instead of 30,000, thereby denying the defense team extra members while still presenting the defense team with an overwhelming amount of work.

Another potential problem with the Legal Aid Proposal is that it anticipates that there will be a limit on the additional resources that a defense team may receive, but it does not set a limit. The Registry would benefit from consulting such associations as the ICB to determine where to impose such a cap, lest it set the limit so low that it inhibits defense counsel from adequately representing defendants.

Finally, the Legal Aid Proposal suggests different methods for determining the amount that the Registry will pay defense counsel. Article 49 of the Rome Statute provides for salaries, allowances, and expenses, but does not mention compensation for defense counsel. Thus, the Legal Aid Proposal sets forth several different methods by which the Court may compensate defense counsel. A promising option is one in which each team member's pay is determined on the basis of his or her actual relevant experience.¹⁶⁰ The Legal Aid Proposal also lists methods of giving that remuneration to defense counsel, ranging from paying all to only a percentage of

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 10.

defense counsel's salary upon receipt of hours worked.¹⁶¹ Before selecting one plan over another, the CBF should consult the ICB, OPCD, or other defense-oriented bodies to determine which method will best enable defense counsel to perform their duties.

V. Current Work of Defense Counsel at the ICC

These rules and regulations pertaining to defense counsel are being tested in the situation in Darfur, Sudan, and in the cases against Mr. Thomas Lubanga Dyilo and Mr. Germain Katanga of the Democratic Republic of Congo ("DRC").

A. *Ad Hoc* Counsel for the Situation in Darfur, Sudan

On July 24, 2006, Pre-Trial Chamber I ("PTC I") issued a Decision Inviting Observations in Application of Rule 103 of the RPE ("July 24 Decision").¹⁶² Rule 103 of the RPE permits briefs of *amicus curiae* and other forms of submissions, and gives the OTP and defense counsel an opportunity to respond to such submissions. In the July 24 Decision, PTC I ordered the Registrar "to appoint an *ad hoc* counsel to represent and protect the general interests of the Defense in the Situation in Darfur, Sudan, during the proceedings pursuant to rule 103 of the Rules."¹⁶³ On August 28, 2006, the Registrar appointed Mr. Hadi Shalluf as *ad hoc* counsel for that purpose.¹⁶⁴

On December 18, 2006, Mr. Shalluf asked PTC I for permission to do more than merely respond to submissions from *amicus curiae*. He sought permission to represent the general interests of potential defendants in the situation in Darfur outside of the proceedings pursuant to

¹⁶¹ *Id.*

¹⁶² *Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence*, ICC-02/05-10, July 24, 2006, at 6.

¹⁶³ *Id.*

¹⁶⁴ *Decision of the Registrar Appointing Mr. Hadi Shalluf as ad hoc Counsel for the Defense*, ICC-02/05-12, August 25, 2006, at 3.

rule 103.¹⁶⁵ Mr. Shalluf noted that the Prosecutor indicated that fourteen individuals had been arrested in the Sudan for violations of international humanitarian law and human rights abuses.¹⁶⁶ He also noted that the Prosecutor reported to the UN Security Council that he would request the cooperation of the government of the Sudan to meet the individuals in custody.¹⁶⁷

Based on these factors, Mr. Shalluf then argued that “any meeting between the Office of the Prosecutor and the individuals in custody in the Situation in Darfur must be conducted in the presence of the Defense.”¹⁶⁸ He therefore asked that PTC I grant him leave to attend all criminal proceedings in the Situation in Darfur, including questioning, interviewing witnesses and victims, and witness confrontations.¹⁶⁹ He also asked PTC I to order the OTP to inform him of any proceedings “so that the rights of the Defense are guaranteed and safeguarded.”¹⁷⁰ He further asked that PTC I order the Prosecutor to invite him to attend and participate in all proceedings in order to safeguard the rights of the Defense.¹⁷¹ Finally, he asked PTC I to order the appropriate Court services to facilitate and organize all defense missions either within the Court, outside, or abroad, pursuant to Rule 20.¹⁷²

PTC I denied these requests, responding that Mr. Shalluf’s mandate, as appointed so far, was limited to responding to the observations of *amicus curiae* pursuant to Rule 103.¹⁷³ Mr.

¹⁶⁵ *Application requesting the presence and participation of the Ad Hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan*, ICC-02/05-41, December 18, 2006.

¹⁶⁶ *Id.* at 1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Prosecutor’s response to “Requête sollicitant la présence et la participation du conseil ad hoc pour la défense dans la procédure qui sera entamée par le Bureau du Procureur sur le territoire soudanais,”* ICC-02/05-42, December 21, 2006.

Shalluf requested an opportunity to respond to the OTP’s response,¹⁷⁴ but on February 2, 2007, PTC I denied both Mr. Shalluf’s request to respond, and his overall request.¹⁷⁵ PTC I stated that Mr. Shalluf’s mandate was solely to uphold the rights of future defendants insofar as he could reply to submissions from *amicus curiae* and others: “the mandate of the *ad hoc* Counsel for the Defence is strictly restricted to those proceedings and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules.”¹⁷⁶ Thus, PTC I found that Mr. Shalluf’s request “falls outside the parameters of his legally assigned responsibilities”¹⁷⁷ and denied his request.¹⁷⁸

Mr. Shalluf sought leave to appeal this decision on February 4, 2007.¹⁷⁹ On February 21, 2007, PTC I denied leave to appeal, largely on procedural grounds.¹⁸⁰ In this denial, PTC I also stated that:

[A]t this stage of the investigations, the Office for the Public Counsel for Defence (the OPCD) – and not the *Ad Hoc* Counsel appointed for the purpose of specific proceedings under rule 103 – is, as per Regulation 77(4) of the Regulations of the Court, the body of the Court which has been assigned the task of representing and protecting the rights of the Defence during the initial stages of an investigation.¹⁸¹

Further, PTC I reprimanded Mr. Shalluf in its decision, calling his argument as “misconceived as it is in flagrant disregard of the provisions of the Statute, the Rules of

¹⁷⁴ *Application to reply to the Prosecutor’s Response to the Application requesting the presence and participation of the Ad Hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan*, ICC-02/05-44-tEN, December 22, 2006.

¹⁷⁵ *Decision on the Ad hoc Counsel for Defence Request of 18 December 2006*, ICC-02/05-47, February 2, 2007.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 6.

¹⁷⁹ *Application requesting leave to appeal from the decision rendered on 02/02/2007 on the application filed by the Defence requesting “the presence and participation of the Ad Hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan*, ICC-02/05-48-tEN, February 4, 2007.

¹⁸⁰ *Decision on Ad hoc Counsel’s Request*, *supra* note 104, at 7.

¹⁸¹ *Id.* at 7.

Procedure and Evidence and the Regulations of the Court, and suggests that the *Ad Hoc* Counsel attempts to extrapolate the specificity, the limits and the scope of his mandate.”¹⁸²

Additional admonishment of Mr. Shalluf came prior to PTC I’s decision when, on February 13, 2007, the Head of the Division of Victims and Counsel of the Registry informed Mr. Shalluf that no payments would be made for the periods of December 1-31, 2006 and January 1-31 2007, on the ground that he had been acting beyond the scope of his mandate.¹⁸³

On February 27, 2007, Mr. Shalluf filed a “Request for Review of the Registry’s decision of February 27, 2007, ” asking PTC I to either (i) declare the decision of the Head of the Division of Victims and Counsel unlawful, flawed, void and unfair, or (ii) declare that the work that he had performed fell within the scope of his mandate.¹⁸⁴ He also asked PTC I to order the Registrar to pay his fees for all the work done in December 2006, January and February 2007.¹⁸⁵

On March 15, 2007, PTC I denied this request. In a harshly worded decision, PTC I held that “the continuous filings of the *ad hoc* Counsel are frivolous and vexatious,” and that “in the view of the Chamber, such filings extrapolate the limits and scope of the *ad hoc* Counsel’s specific mandate . . . and, as such, can be considered an abuse of procedure.”¹⁸⁶ In upholding the Registrar’s denial of payment to Mr. Shalluf, PTC I stated “given the fact that the *ad hoc* Counsel has been acting beyond the scope of his mandate, the Chamber is of the view that he is in no position to demand payment of fees for the vexatious and frivolous claims instituted before this Chamber for the said period.”¹⁸⁷ Finally, PTC I effectively fired Mr. Shalluf, ordering the

¹⁸² *Id.*

¹⁸³ *Réponse du Greffier au “Recours à l’encontre de la décision du Greffe du 13 février” déposé le 27 février par Me. Hadi Shalluf*, ICC-02/05-60-Anx 3, February 6, 2007.

¹⁸⁴ *Recours à l’encontre de la Décision du Greffe du 13 février 2007*, ICC-02/05-57, February 27, 2007.

¹⁸⁵ *Id.*

¹⁸⁶ *Decision on the Request for Review of the Registry's decision of 13 February 2007*, ICC-02/05-66, March 15, 2007, at 8.

¹⁸⁷ *Id.*

Registry “to complete all administrative arrangements in order to release Mr. Hadi Shalluf from his responsibilities as *ad hoc* Counsel for the Defence in the Situation in Darfur, Sudan.”¹⁸⁸

Mr. Shalluf sought leave to appeal this decision, but that request was also denied,¹⁸⁹ and Mr. Shalluf was therefore removed as *ad hoc* counsel pursuant to the March 15, 2007 decision.

On July 27, 2007 Mr. Shalluf requested PTC I to review the decision made by the Registrar on June 26, 2007, refusing to pay his fees for November 2006, and to order its payment.¹⁹⁰ Mr. Shalluf alleged a violation of regulation 135 (1) of the RoR, which requires the Registrar to take a decision at the earliest possible juncture, notifying the counsel accordingly.¹⁹¹ This matter has not yet been decided.

PTC I later issued a decision to allow the OPCD to fulfill the role it suggested – to represent and protect the rights of the defense during the initial stages of an investigation. For example, when several victims applied to participate in the proceedings, PTC I gave the OTP and the OPCD an opportunity to make observations on those applications.¹⁹² In this decision, PTC I effectively treated the OTP and the OPCD as equal and parallel bodies.

B. Case Against Thomas Lubanga Dyilo

The first named defendant before the ICC is Thomas Lubanga Dyilo, whose case arises out of the situation in the DRC. Mr. Lubanga is accused of committing the war crimes of enlisting and conscripting children under the age of fifteen, and of using children under the age

¹⁸⁸ *Id.*

¹⁸⁹ *Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007*, ICC-02/05-70, March 27, 2007.

¹⁹⁰ *Recours conformément à la norme 135, paragraphe 2, du Règlement du Greffe et en application de la norme 83 du Règlement de la Cour, à l'encontre de la décision du Greffier du 26/06/2007, refusant le paiement des honoraires du mois*, ICC-02/05-86, July 27, 2007.

¹⁹¹ *Id.*

¹⁹² *Decision authorizing the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings*, ICC-02/05-85, July 23, 2007.

of fifteen to participate actively in hostilities.¹⁹³ Mr. Lubanga was originally taken into custody in the northeastern Ituri region of the DRC by Congolese militia on March 19, 2005.¹⁹⁴ On February 10, 2006, PTC I issued a warrant for the arrest of Thomas Lubanga Dyilo.¹⁹⁵ On March 17, 2006, Mr. Lubanga was arrested in Kinshasa, and he was transferred to the International Criminal Court.¹⁹⁶

Because his was the first case brought against a specific defendant at the Court, the OTP was no doubt aware that, in this prosecution, the Court would hash out the details of its practices, often encountering obstacles and difficulties not seen by its founders. Moreover, the case will likely set procedural, if not also legal, precedents at the Court. As such, it appears that the OTP made its case against Mr. Lubanga intentionally simple.¹⁹⁷ Though Mr. Lubanga was wanted for numerous atrocities in the Ituri region,¹⁹⁸ he was charged only with a limited number of war crimes relating to the use of child soldiers. The factual simplicity of his case will allow any precedent-making decisions from all of the Chambers to be clear and uncomplicated by the facts of the case.

As soon as Mr. Lubanga was transferred to the ICC detention center, the Registry provided him with a list of duty counsel who had confirmed their availability to assist him at his

¹⁹³ *Warrant of Arrest*, ICC-01/04-01/06, February 10, 2006 (hereinafter “Warrant of Arrest”).

¹⁹⁴ BBC News, *DR Congo Militia Chief Arrested*, March 22, 2005, at <http://news.bbc.co.uk/2/hi/africa/4370843.stm> (hereinafter “BBC News Article”).

¹⁹⁵ Warrant of Arrest, *supra* note 194.

¹⁹⁶ *First arrest for the International Criminal Court*, March 17, 2006, at http://www.icc-cpi.int/pressrelease_details&id=132.html.

¹⁹⁷ *But see* Katy Glassborow, *Lubanga Defence Hits Out at ICC: Militia leader’s lawyer says defence team treated unfairly on eve of historic case hearing*, Institute for War and Peace Reporting, at http://iwpr.net/?p=acr&s=f&o=325193&apc_state=henpacr (November 8, 2006) (OTP states that, when Mr. Lubanga was transferred to the ICC’s cells, the OTP felt it only had the evidence to prove Mr. Lubanga guilty beyond a reasonable doubt of enlisting and conscripting children under the age of fifteen, and of using children under the age of fifteen to participate actively in hostilities).

¹⁹⁸ BBC News Article, *supra* note 195; Amy K. Rolfvondenbaumen, *Profile of Thomas Lubanga Dyilo*, April 18, 2006, at <http://www.amicc.org/docs/Lubanga%20Profile.pdf>.

first appearance before the Chamber.¹⁹⁹ On March 20, 2006, he appeared before PTC I, represented by then-duty counsel Mr. Jean Flamme of Belgium. The Chamber satisfied itself that Mr. Lubanga had been informed of the crimes of which he was accused, and his rights under the Statute, including the right to apply for interim release. After his first appearance, and after examining the list of counsel admitted to appear before the Court, Mr. Lubanga appointed Mr. Flamme as his counsel of choice on April 12, 2006.²⁰⁰

Mr. Flamme appointed several additional members to his defense team, including a Legal Assistant, a case manager, and a resource person for investigative activities.²⁰¹ A second legal assistant was later appointed within the defense team.²⁰² In addition, Mr. Flamme received substantial assistance from the OPCD, as well as from several interns working *pro bono* or as part of the Court's internship program.²⁰³ Despite this aid, Mr. Flamme stated that he had to “fight for every penny” to hire an investigator for Mr. Lubanga's case.²⁰⁴ What is more, as the ICC had not yet made available a list of qualified investigators for the defense, Mr. Flamme found a local lawyer in the Congo who could take that position.²⁰⁵

On May 23, 2006 the defense filed an application for the release of Mr. Lubanga, arguing that the Court did not have jurisdiction over him.²⁰⁶ On October 3, 2006, after several additional related submissions from the defense and from the OTP, PTC I dismissed the jurisdictional

¹⁹⁹ *Decision on Defence Request pursuant to Regulation 83(4)*, ICC-01/04-01/06-460, September 22, 2006 (hereinafter “Decision on Defense Request”), at 2.

²⁰⁰ *Id.*; *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, December 14, 2006, n.6.

²⁰¹ Decision on Defense Request, *supra* note 200, at 2.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Glassborow, *supra* note 198.

²⁰⁵ *Id.*

²⁰⁶ *Application for release*, ICC-01/04-01/06-121, May 23, 2006.

challenge and the application for Mr. Lubanga's release.²⁰⁷ The defense also sought the interim release of Mr. Lubanga,²⁰⁸ which PTC I denied.²⁰⁹ The defense sought a reversal of that decision from the Appeals Chamber,²¹⁰ which dismissed this appeal on December 14, 2006.²¹¹

On January 29, 2007 PTC I confirmed the charges against Mr. Lubanga, finding that there is sufficient evidence to establish substantial grounds to believe that he committed crimes within the Court's jurisdiction.²¹² Mr. Flamme continued to represent Mr. Lubanga at this stage. On January 30, 2007, Mr. Flamme filed an appeal of the decision confirming the charges.²¹³

On February 20, 2007, Mr. Flamme sought leave of the Trial Chamber and the Appeals Chamber to withdraw from Mr. Lubanga's case, asking that the Court stay all proceedings that could be prejudicial to the defendant in order for new counsel to be appointed.²¹⁴ On February 27, PTC I granted Mr. Flamme's application for leave to withdraw.²¹⁵

On March 20, 2007, Mr. Lubanga selected Ms. Catherine Mabilille as his new defense counsel.²¹⁶ However, Ms. Mabilille would not begin to represent Mr. Lubanga because the Registry would not assure a minimum level of financial support that Ms. Mabilille felt was

²⁰⁷ *Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute*, ICC-01/04-01/06-512, October 3, 2006.

²⁰⁸ *Request for further information regarding the confirmation hearing and for appropriate relief to safeguard the rights of the Defence and Thomas Lubanga Dyilo*, ICC-01/04-01/06-452, September 20, 2006.

²⁰⁹ *Decision on the Application for the interim release of Thomas Lubanga Dyilo*, ICC-01/04-01/06-586-tEN, October 18, 2006.

²¹⁰ *Appeal by Counsel for the Defence from the "Decision on the Defence challenge to the jurisdiction of the Court pursuant to article 19(2)(a) of the statute" of 3 October 2006*, ICC-01/04-01/06-532-tEN, October 9, 2006.

²¹¹ *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, December 14, 2006.

²¹² *Decision on the confirmation of charges*, ICC-01/04-01/06-803, January 29, 2007.

²¹³ *Defence Appeal against the Pre-Trial Chamber's Décision sur la confirmation des charges of 29 January 2007*, ICC-01/04-01/06-797, January 30, 2007.

²¹⁴ *See Observations of the Defence confirming the document titled "Defence submissions on the scope of the right to appeal within the meaning of article 82-1-b of the Statute" of 7 February 2007*, ICC-01/04-01/06-900-eTN, May 11, 2007, at 2.

²¹⁵ ICC-01/04-01/06-833-Conf, February 27, 2007.

²¹⁶ *Désignation de Maître Catherine Mabilille comme conseil de la défense de M. Thomas Lubanga Dyilo*, ICC-01/04-01/06-845, ICC-01/04-01/06-845-Anx, March 20, 2007; ICC-01/04-01/06-846, ICC-01/04-01/06-846-Anx, March 20, 2007; ICC-01/04-01/06-847, ICC-01/04-01/06-847-Anx, March 20, 2007..

necessary to represent Mr. Lubanga. Though she attempted to negotiate for the resources she found necessary, the Presidency stated that designated Counsel may not negotiate minimum legal aid resources prior to accepting an appointment.²¹⁷ Without the assurance that she would have the resources she needed, Ms. Mabilie would not accept the appointment as counsel for Mr. Lubanga. Thus, Mr. Lubanga remained without primary counsel. Indeed, even the OPCD was not equipped or mandated to begin preparing Mr. Lubanga's defense, since it is intended to merely supplement, rather than replace, counsel for individual defendants.

By April 19, 2007, no new counsel had been appointed as principal counsel to Mr. Lubanga. Accordingly, on April 19, 2007, PTC I ordered the Registry to appoint a duty counsel to represent Mr. Lubanga for the purpose of responding on his behalf to an application from the Prosecution for leave to appeal PTC I's decision on the confirmation of charges filed with PTC I on February 5, 2007.²¹⁸ On May 4, 2007, the Registry formally appointed Ms. Annick Mongo as duty counsel for Lubanga,²¹⁹ and she was sworn in on May 8, 2007.²²⁰ She was appointed for the sole purposes of submitting the response regarding the appeal of the confirmation of charges and regarding the applications of several victims to participate in the proceedings.²²¹

Upon her arrival, Ms. Mongo asked for an extension of the time limit to file defense responses to the confirmation of charges and to the application of several victims to participate, both pending in the Appeals Chamber, as she had just arrived in The Hague and had not yet met

²¹⁷ *Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007*, ICC-01/04-01/06-874, May 2, 2007, para. 17.

²¹⁸ *Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "D cision sur la confirmation des charges"*, ICC-01/04-01/06-806, February 5, 2007.

²¹⁹ *Appointment of Ms Annick Mongo as Duty Counsel pursuant to the Appeals Chamber's Decision of 3 April 2007*, ICC-01/04-01/06-882, May 4, 2007 (hereinafter "Appointment of Ms. Mongo").

²²⁰ *Prestation de serment de Me Annick Mongo*, ICC-01/04-01/06-889, May 8, 2007.

²²¹ Appointment of Ms. Mongo, *supra* note 220.

with Mr. Lubanga.²²² The Appeals Chamber granted both requests.²²³ On May 21²²⁴ and 22,²²⁵ she filed both responses.

In addition, on May 4, 2007, PTC I appointed Mr. Emmanuel Altit as a second duty counsel for Mr. Lubanga. His sole purpose was to respond to the Prosecution's Application for Leave to Appeal Pre-Trial Chamber 1's January 28, 2007 Decision on the Confirmation of Charges.

While Mr. Lubanga was without principal counsel to represent his general interests, Mr. Lubanga also filed a hand-written *pro se* motion with the Court on May 25, 2007, in which he sought additional resources from the Court.²²⁶ The ICB sought leave to file an *amicus* brief in relation to Mr. Lubanga's *pro se* motion, on the grounds that it could assist the Court's determination of the issues raised by Mr. Lubanga's motion. The ICB further stated that:

Because the accused is having to act *pro se* and without the assistance of his chosen counsel in relation to legal issues that would benefit from treatment by trained professional Counsel . . . it is respectfully submitted that the proposed *amicus* brief will assist the Court in the proper determination of the case.

The ICB annexed its proposed *amicus* brief to its request to file such a brief. In that *amicus* brief, the ICB stated that the Registrar had adopted a policy whereby it would not consider granting additional resources for the trial until the decision on the confirmation of

²²² *Application for extension of time*, ICC-01/04-01/06-892-tEN, May 9, 2007.

²²³ *Decision of the Appeals Chamber on the Defence application for an extension of time of 9 May 2007*, ICC-01/04-01/06-903, May 11, 2007.

²²⁴ *Arguments supplémentaires de la Défense au document intitulé 'Defence submissions on the scope of the right to appeal within the meaning of article 82-1- b of the Statute' du 7 février 2007*, ICC-01/04-01/06-908, May 21, 2007.

²²⁵ *Réponse à la Requête du Procureur du 5 février 2007 en autorisation d'interjeter appel de la Décision de la chambre préliminaire I du 29 janvier 2007*, ICC-01/04-01/06-913, May 22, 2007.

²²⁶ *Demande d'intervention sur « Demande de ressources additionnelles en vertu de la norme 83.3 du Règlement de la Cour » déposée devant le Greffe en date du 3 Mai 2007*, ICC-01/04-01/06-916, May 25, 2007.

charges is definitive.²²⁷ It further stated that this policy “infringes the fair trial rights of the accused,”²²⁸ especially in cases, like the case in question, where “proceedings are suspended pending appointment of a replacement Defence Counsel, and where the granting of additional resources may well have the effect of allowing an already designated counsel to be able to in good conscience accept appointment.”²²⁹

Without ruling specifically on Mr. Lubanga’s motion, and without specifically addressing the issues presented in the ICB’s filings, PTC I held that when it confirmed the charges against Mr. Lubanga and committed Mr. Lubanga to trial in Trial Chamber I, PTC I no longer had jurisdiction over the case.²³⁰ As such, all new motions must be referred to Trial Chamber I, for PTC I could no longer rule on new motions related to the case.

Finally, on June 22, 2007, after successfully negotiating an increase in the amount of resources made available to her, Ms. Mabile publicly accepted the appointment of defense counsel for Mr. Lubanga.²³¹ With her official acceptance, Mr. Lubanga annexed a letter to the Registrar, stating in part that, “because this sole issue of additional means has been the root of a blockage in the system lasting several months, with detrimental consequences which affect me as well as the Court . . . I have decided to appoint a new Principal Counsel, namely Ms. Cathérine

²²⁷ *Motion and proposed Amicus Brief in relation to the pro se request for review of the Registry decision of 14 May 2007 by Thomas Lubanga Dyilo on behalf of the International Criminal Bar pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/04-01/06-918-Anx, June 5, 2007, para. 30.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Decision on the application for additional means under regulation 83(3) of the Regulations of the Court and on the applications to intervene as amici curiae under rule 103 of the Rules of Procedure and Evidence*, ICC-01/04-01/06-919, June 5, 2007.

²³¹ *Registration of the appointment and the declaration of acceptance of Ms Catherine Mabile as Counsel for Mr Thomas Lubanga Dyilo*, ICC-01/04-01/06-928, June 22, 2007.

Mabille.²³² After Ms. Mabille officially began her representation of Mr. Lubanga, the ICB withdrew its *amicus* brief.²³³

On July 18, 2007, PTC I requested that the OTP and the defense team make submissions on a variety of issues for early determination. These issues included the date on which both parties would be ready for trial, the languages to be used in the proceedings, the timing and manner of disclosure of evidence, the role of victims in the proceedings in the period leading up to trial, the procedures to be adopted in instructing expert witnesses, and the best approach to familiarizing witnesses with ICC procedure.²³⁴ PTC I established timelines for submissions on each topic, and also scheduled a hearing for September 4, 2007, to discuss these issues.

On August 7, 2007, Ms. Mabille, assisted by Ms. Véronique Pandanzyla and Mr. Marc Desalliers, requested that Trial Chamber I grant them a two-month extension to become familiar with the file.²³⁵ In addition, the defense team expressed its intention to propose a new calendar for the submission of the issues discussed in the July 17, 2007 request, at the September 4 hearing.²³⁶ On November 9, 2007 Trial Chamber I decided that the trial in the case of Mr. Lubanga would begin on March 31, 2008.²³⁷

VI. Practical Problems Concerning Defense Counsel at the ICC

Practical problems have arisen as defense counsel have begun to work at the Court. This is not surprising, as practical difficulties inevitably arise during the initial operation stages of any

²³² *Id.*

²³³ *Motion to withdraw request for leave and proposed Amicus Brief on behalf of the International Criminal Bar*, ICC-01/04-01/06-938, July 25, 2007.

²³⁴ *Request for submissions on the subjects that require early determination*, ICC-01/04-01/06-936, July 18, 2007.

²³⁵ *Réponse de la Défense à l'invitation de la Chambre de Première Instance à présenter des conclusions sur des questions devant être tranchées à un stade précoce de la procédure*, ICC-01/04-01/06-940, August 7, 2007.

²³⁶ *Id.*

²³⁷ *Decision Regarding the Timing and Manner of Disclosure and the Date of Trial*, ICC-01/04-01/06-1019, November 9, 2007.

new institution. Nevertheless, these experiences provide guidance for adopting and implementing improvements to the system and must be heeded.

A. Absence of Principal Defense Counsel to Oversee Preparation of a Defense

One problem for the work of defense counsel has been the Chamber's practice of appointing duty counsel to handle only specific issues during the period between a defendant's arrest and the appointment of permanent counsel. This practice left Mr. Lubanga without a principal counsel overseeing and planning the preparation of a defense for trial for several months. Indeed, after Mr. Flamme withdrew from Mr. Lubanga's case in February 2007, Mr. Lubanga was without principal counsel for four months, until July 2007. Although the Court appointed two duty counsel to deal with specific issues regarding Mr. Lubanga's case, Mr. Lubanga's right to defense counsel was temporarily compromised because there was no principal counsel preparing Mr. Lubanga's defense for trial. The more time-consuming work of performing defense investigations, gathering evidence and witnesses, and preparing a defense case was thus stalled.

The appointment and removal of Mr. Shalluf from the situation on Darfur further illustrates that duty counsel do not, and indeed cannot, represent the general interests of the defense. When Mr. Shalluf attempted to act beyond what the Court viewed as the scope of his mandate, the Court zealously restrained, and eventually relieved, Mr. Shalluf. The Court did so regardless of the fact that Mr. Shalluf's stated purpose was to protect the rights of potential accused persons when members of the OTP traveled to Darfur to interview such persons. It is unclear whether such counsel was necessary, and, if so, whether counsel was appointed to perform this work. If the OTP interviewed potential defendants already in custody without

counsel present, it is possible that the due process rights of these defendants were not upheld, contrary to the requirements of Article 33(2) of the Rome Statute.

B. The Electronic Disclosure System

Another practical problem faced by defense counsel working at the ICC is the use of the electronic system for filing all documents and disclosing evidence among participants (“E-Court system”). Use of the E-Court system requires team members to undergo specific training in data management programs and software.²³⁸ It also requires that there be trained staff within the teams who can download and manage all the documents disclosed between the parties in the proceedings.²³⁹ In addition, the work cannot be done by those outside of the defense teams, because whoever does the uploading necessarily has access to confidential evidence and work product.²⁴⁰ Thus, the operation of the system takes valuable team members away from an already limited defense team, and may slow, rather than expedite, the work of defense teams.

Much of the delay caused by this system will likely be worked out through use, as with any new computerized system.²⁴¹ Indeed, the ICTY has a similar E-Court system which experienced problems, but which has improved with time and with training for defense counsel.

However, the ICB has argued that these problems will not all diminish as fluency with its use increases, because some problems require improvements in the technology.²⁴² The ICB has suggested measures to fix these problems. For example, the ICB urges that, upon submission of any applications for arrest warrants or summonses to a PTC, the OTP and Registry immediately work together to create fully loaded and searchable databases for each person named in the arrest warrants or summonses, including all documents relied upon in connection with the applications

²³⁸ Decision on Defense Request, *supra* note 200, at 4.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Decision on Defence Request pursuant to Regulation 83 (4)*, ICC-01/04-01/06-460, September 22, 2006, at 4.

²⁴² Consultation Paper, *supra* note 147, at 3.

for arrest warrants or summonses.²⁴³ Further, upon assignment to a case, each defense counsel should have immediate access to such a database.²⁴⁴ The Court should respond actively to these suggestions to improve the technology of the electronic database system, rather than rely on its users to resolve them in the course of the proceedings.

VII. Recommendations for the Future

A. Appoint Principal Counsel Early

The case of Mr. Lubanga demonstrates the potential for delay in naming principal counsel for a defendant. This delay is detrimental to the Court. It hurts the integrity and reputation of the Court as a whole because defendants are detained without their cases proceeding to trial in a timely fashion. It also hurts the OTP. Such delays can weaken cases as witness' memories lapse over time, and OTP staff cannot move their attention to new cases. Finally, and most obviously, it is damaging to the defense, because significant time for preparing the defense case is lost. Indeed, even when principal counsel is finally appointed and has assembled a defense team, that team will need time to become familiar with a case file that has accumulated since the investigation first began, thereby again delaying the preparation of a defense and the start of trial.

There are several possible solutions to this problem. First, when appointing duty counsel to represent defendants on specific issues, the Court could also appoint a duty counsel to act as principal counsel until the defendant has selected one. Alternatively, the potential for delay in naming principal counsel could be solved by giving the OPCD the responsibility for assigning a staff member to each defendant until that defendant has chosen counsel, even for brief periods.

²⁴³ *Id.* at 4.

²⁴⁴ *Id.*

Such practices occur in the United States, where a defendant who has been arrested and is about to be arraigned but has not yet hired private counsel will be represented by a public defender at arraignments and until private counsel is retained.

It appears that the Court followed such a course in the case of Mr. Katanga. When the Court arraigned Mr. Katanga on October 25, 2007, the Registrar appointed Mr. Keïta from the OPCD as duty counsel for that one appearance.²⁴⁵ Subsequently, PTC I ordered the Registrar to appoint, in consultation with Mr. Katanga, a new duty counsel to represent him until he exercised his right to choose counsel.²⁴⁶ On November 13, 2007, the Registrar decided to appoint Mr. Jean Pierre Fofé as duty counsel to represent Mr. Katanga until the appointment of his counsel was finalized.²⁴⁷ Ten days later, Mr. Katanga's permanent counsel, Mr. David Hooper, was officially appointed.²⁴⁸

However, relying on representation by duty counsel, either from the OPCD or from the list of available counsel, presents its own concerns. If duty counsel is temporarily assigned, she will be privy to information which could conflict with representation of any other defendant accused of crimes arising from the same situation. Thus, any counsel who serves as duty counsel for a defendant, even for a brief period of time or a limited purpose, should be ineligible to represent any other defendant accused of crimes arising out of that situation. Because the pool of available duty counsel is finite, this could significantly reduce the number of attorneys available to permanently represent named defendants.

²⁴⁵ *Enregistrement de la désignation et de la déclaration d'acceptation de Maître Xavier-Jean Keïta en sa qualité de Conseil principal du Bureau du conseil public pour la défense comme conseil de permanence pour M. Germain Katanga*, ICC-01/04-01/07-39, October 19, 2007.

²⁴⁶ *Decision on the appointment of a duty counsel*, ICC-01/04-01/07-52, November 2, 2007.

²⁴⁷ *Decision Appointing Mr Jean Pierre Fofé as Duty Counsel for Mr Germain Katanga*, ICC-01/04-01/07-75, November 13, 2007.

²⁴⁸ *Enregistrement de la désignation de Maître David Hooper par M. Germain Katanga comme son conseil et des déclarations relatives à cette désignation*, ICC-01/04-01/07-80, November 23, 2007.

A third, perhaps better, option, is to make the OPCD responsible for recommending counsel for defendants, based on language ability, knowledge of the region, or experience representing defendants accused of particular categories of crimes. This work could expedite the process of defendants' selection of counsel.

B. Enhance the List of Defense Counsel

While indigent defendants are currently provided with a list from which to choose defense counsel, that list does not provide enough detail to make such selection meaningful.²⁴⁹ The lists of counsel provide only the name, gender, and nationality of each attorney. The Court has refused to provide more detailed information sought by defendants who wish to make an educated selection from that list. For example, after Mr. Flamme resigned as principal counsel for Mr. Lubanga, the Registry gave Mr. Lubanga a list of approximately 200 names from which to select a duty counsel to represent him.²⁵⁰ Mr. Lubanga requested additional information about those on the list because it included no information as to qualifications or experience, language skills, and the like.²⁵¹ His request was denied. Eventually, the Registry selected two duty counsel to represent Mr. Lubanga because he could not make a selection himself.²⁵²

The Presidency has since ordered the Registry to change this practice, though the Presidency's order is unclear as to exactly what information the Registry must provide to defendants. In a decision on June 29, 2007, the Presidency ordered the Registry to "make the roster of duty counsel and the list of counsel available in both working languages of the Court" and to ensure that the both clearly distinguish between persons only willing to represent the

²⁴⁹ Comments from V. Lindsay, *supra* note 79.

²⁵⁰ International Criminal Bar, *International Criminal Bar Newsletter October/November 2007*, at <http://85.17.104.100/bpi-icb/files/october%20newsletter%20eng.pdf> (last visited December 30, 2007).

²⁵¹ *Id.*

²⁵² *Id.*

defense, victims, or both.²⁵³ Although the decision also noted that, in preparing the roster, the Registry should “consider the languages spoken, availability and geographical proximity of counsel,”²⁵⁴ it did not order the Registry to include these, or any other, details on the roster itself.

Without knowing more about counsel on that list, including their qualifications, experience, or language fluency, defendants cannot make an educated decision when selecting counsel. If the lists remain as sparse as that currently available, many defendants will be unable to select counsel, just as Mr. Lubanga could not. Thus, defendants’ right to counsel of their choosing becomes illusory. The Registry must provide enough detail on the roster and list of available counsel for defendants to select counsel who can best represent them.

C. Ensure Adequate Funds for the Defense

Indigent defendants cannot receive adequate representation unless public defenders have the financial means to prepare a case. However, the failure to guarantee that financial security has presented another problem – it has made defense counsel hesitant to agree to represent defendants. For example, Ms. Mabilille’s delay in becoming Mr. Lubanga’s counsel was primarily caused by her refusal to act as counsel when she was not certain she would have the financial means necessary to represent Mr. Lubanga properly.

The Court and ASP should avoid this conflict in the future by ensuring adequate financial resources to all defendants. If the Court develops a reputation of providing adequately for defense budgets, potential defense counsel will be more confident that they too will receive the resources they need for their cases.

²⁵³ *Decision on the “Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuves” and on the “Urgent Request for the Appointment of a Duty Counsel” filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively*, ICC-01/04-01/06-937, June 29, 2007, para. 55(iii).

²⁵⁴ *Id.* para. 50.

Key to that representation is the implementation of an adequate system by which the Court allocates defense resources. The modular system in the Legal Aid Proposal is too limited. It must be improved upon, taking into account the suggestions of the ICB as outlined above. Once potential defense counsel are comfortable that they will get the resources they need, delays such as that with Ms. Mabilie will be easier to avoid.

It is important to note that defense counsel are not the only component of the ICC that has had difficulty securing finances. Indeed, the OTP has had similar trouble. For example, when the OTP began investigating the situation in Darfur, there were concerns that it would not have a full budget for that investigation. The OTP had to find additional funding to proceed with that investigation, and relied in part on the donations of states parties. For example, Canada made a \$500,000 (Canadian) contribution to assist the investigation, supplementing resources available through the court's existing budget.²⁵⁵ Perhaps, if the CBF does not adequately provide for defense counsel, the ICB and other organizations can seek outside funding from NGOs, states parties, and the like. However, one can only imagine that, while NGOs and states parties are willing to donate funds to the OTP budget to support its prosecution of international criminals, such NGOs and states parties may be less likely to give financial support to the group seeking to secure an acquittal for such defendants. Thus, securing adequate funding from the Court itself is crucial for the success of counsels' ability to represent defendants.

D. Defense Counsel Should Have the Same Privileges and Immunities As the OTP

The privileges and immunities granted to the OTP must be extended to defense counsel as well. It is likely that members of the OTP initially received privileges and immunities akin to those of government representatives because members of the OTP are seen as international civil

²⁵⁵ Human Rights Watch, Darfur: ICC Prosecutor Briefs Security Council; Security Council Should Declare Support for Court's Investigation, June 29, 2005, at <http://hrw.org/english/docs/2005/06/29/sudan11233.htm> (last visited January 8, 2008).

servants. Conversely, defense counsel are not typically viewed in the same light. This view is incorrect. Defense counsel at the Court should be treated as public servants, for they too are officers of the Court, tasked with ensuring that justice is meted out fairly. In particular, those defense counsel who work for the OPCD or who are paid by the Court are in fact employees of the Court, and deserve the privileges that go with that employment.

Furthermore, the work of defense counsel places them in a more precarious position, as their work is governed by their duty to represent their clients, not by a personal belief in the merits of their client's defense. Defense counsel also face the threat of politically-motivated arrests in unwelcome host countries where they must perform investigations. Because of the dangers inherent in representing defendants accused of such heinous international crimes, defense counsel must receive privileges and immunities equal to those of the OTP. The Court should improve this imbalance by making agreements between the Court and the state in which crimes allegedly occurred to ensure the safe and uninhibited travel of defense counsel to such states. Without such protection, many well-qualified counsel may choose not to represent defendants, or may be unable to properly perform their work.

E. Strengthen and Develop the OPCD

The OPCD is among the least developed components of the Court. This is no doubt because there is very little about it in the Rome Statute and it is one of the last parts of the Court to begin operating. Before defense counsel became necessary, the OTP had to be staffed and equipped to begin investigating situations and cases, and the Chambers had to be operational to start governing those investigations and hearing early appeals. Defense counsel only began to participate when the Court began hearing situations and cases. As such, the OPCD did not need to do work for the Court until after the OTP and Chambers had been operational for some time.

Despite this delay, the OPCD can become a strong institution at the Court. The OPCD is now fully operational, and has been led by Principal Counsel Mr. Keïta since January 2007. Given his years of experience in international criminal law and his work with the ICB, Mr. Keïta will no doubt provide astute leadership for the OPCD. In addition, the OPCD has begun its work representing the general interests of the defense with its representation of Mr. Lubanga prior to the appointment of Ms. Mabilie, and of Mr. Germain Katanga, the second suspect in ICC custody. As Mr. Lubanga and Mr. Katanga are the first named defendants to be brought before the Court, their cases have allowed the OPCD to begin fleshing out its role.

The exact role of the OPCD must also be made clear. It seems that the OPCD will only represent defendants until they have secured counsel to represent them. After that, the OPCD will provide general assistance to defense counsel, by, for example, performing legal research common to most defendants. The aid provided by the OPCD for counsel representing named defendants can thus help lessen the workload of defense counsel, especially if counsel for named defendants can ask the OPCD to perform legal research on its behalf.

However, this also creates the potential for conflicts of interest within the OPCD. For example, the OPCD may be asked to perform legal research for multiple defendants whose defenses are incompatible with each other. In such a situation, the OPCD may either have to refuse to provide aid to one defendant, or may have to develop a method for partitioning its office and employees so that research and support for each defendant does not embroil the other.

In addition, concerns have been raised that because the OPCD operates out of the Registry, it serves the Registry and the Court first and defendants second.²⁵⁶ This creates an inappropriate conflict of interest. For the OPCD to effectively represent defendants at the ICC,

²⁵⁶ Email from Steven M. Kelliher, Vice President of the ICB, to Daniel Arshack, Director, ICDA-USA, Member of ICB, of Arshack, Hajek & Lehrman, PLLC (December 20, 2007, 09:17:53 EST) (on file with author).

the OPCD must maintain allegiance to defendants first, and must be sure to keep information obtained from defendants confidential, even from the Registry.

These potential conflicts indicate that the OPCD must take a back seat to counsel who are hired by defendants or who are appointed for indigent defendants by the Court. Such counsel are far less likely to have the same potential for conflict of interests among different defendants. Indeed, the Court can ensure that an attorney does not represent defendants with potential conflicts of interest by prohibiting counsel from representing two defendants accused of crimes arising out of the same situation. Furthermore, counsel for individual defendants will not have the same institutional ties to the Registry and other organs of the Court as the OPCD. Therefore, institutional conflicts faced by the OPCD are far less likely to arise with individual counsel.

Nevertheless, it is clear that the OPCD can be an integral part of defense work at the ICC. Thus, the Court and the ASP must ensure that the OPCD continues to develop, providing the OPCD with sufficient staff, funding, and facilities. In particular, the Court must allocated adequate resources for OPCD and OPCV, also based out of the Registry, to ensure that both are equally strong. Although it is important that victims have representation at the Court, it is equally important that defendants have adequate counsel and means to prepare a defense.

F. Defense Counsel Must Have Greater Impact on the Court's Development

To ensure that defense counsel have input into further institutional developments at the Court, the ASP should, pursuant to RPE 20(3), facilitate the establishment of an independent representative bodies for defense counsel, which the Registrar could then consult as it develops the Code of Professional Conduct. The ICB and other organizations of lawyers are well suited for this task. It has been operational for over four years, has a membership of well over one hundred individual members and over seventy member organizations from around the world, and

has spoken and published extensively about defense-related issues at the ICC. Indeed, the ICB currently seeks to have the ASP fulfill its wish to facilitate the establishment of the ICB and thus convey to the Registrar that it is an independent and representative body of counsel with which he should consult. If it succeeds, other organizations of lawyers will be encouraged to seek the same status, thus adding to the voices of counsel at the Court. At its sixth session in New York in November and December 2007, the ASP took the step of noting “the important work of independent representative bodies of counsel or legal associations, including any international legal association relevant to Rule 20, sub-rule 3, of the Rules of Procedure and Evidence.”²⁵⁷

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As the Court takes on more cases, and as defense counsel have more opportunity to practice before the Court, the work of defense counsel, from appointment, to investigation, to trial, and finally through appeal, will become more effective. However, if the Court does not address the problems that defendants and defense counsel have experienced, defendants will not realize the full due process rights to which they are ostensibly entitled under the foundational documents of the Court. The Court can serve justice only if all parties before the Court, including defendants, are treated justly.

²⁵⁷ ICC-ASP/6/Res.2, December 14, 2007, para. 15.