

PROTECTING THE RIGHTS OF FUTURE ACCUSED DURING THE INVESTIGATION STAGE OF INTERNATIONAL CRIMINAL COURT OPERATIONS



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
July 2008

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COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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INTERNATIONAL CRIMINAL
COURT OPERATIONS**

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International Criminal Court
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EXECUTIVE SUMMARY

The Rome Statute of the International Criminal Court (ICC), together with the Rules of Procedure and Evidence (ICC Rules) and the Regulations of the Court, contain a variety of provisions aimed at securing a fair trial for the accused and achieving an “equality of arms” between the Prosecution and the defense. Among these are provisions that protect the rights of *future* accused during the investigative stage of the Court’s operations by allowing the appointment of counsel to represent the interests of the defense even where no suspect has been identified or charged by the Court. Such provisions are necessary because of the unique manner in which the ICC simultaneously possesses jurisdiction over a “situation,” *i.e.*, an entire country or region of a country in which a vast array of atrocities may have occurred, and individual “cases,” *i.e.*, a particular accused charged with a particular crime or crimes.¹ Importantly, proceedings taking place in the context of a situation, such as those regarding victim participation or evidentiary issues – each of which involve the participation of the Prosecution – may affect the cases against individual accused yet to be identified by the Court. By allowing the appointment of so-called “*ad hoc* defense counsel” to represent the

¹ According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6, ICC-01/04-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006). On the other hand, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

interests of these future accused, the constitutive documents of the ICC promote the equality of arms between the Prosecutor and the defense in future cases.

This report looks at the various provisions of the ICC's governing documents aimed at safeguarding the rights of future accused before the Court, the drafting history of those provisions, and the approach adopted to date by the ICC Pre-Trial Chambers in interpreting those provisions. We then offer recommendations as to how the practices of the ICC might be improved to more fully ensure that the rights of future accused are protected during the situation phase of proceedings, as protecting these rights is critical to guaranteeing the fundamental right to a fair trial for those accused eventually charged and brought before the ICC.

Textual Analysis and *Travaux Préparatoires*

While the Rome Statute and ICC Rules contain some measures that help protect the rights of future accused during the situation stage of proceedings, the *travaux préparatoires* suggest that defense rights in situation-related proceedings were not extensively contemplated during the drafting of those documents. Rather, the greatest protections for the rights of future accused during the situation stage of the ICC's operations came with the adoption of the Regulations of the Court, which were drafted by the judges of the ICC and passed in 2004.

- First, Regulation 76 provides that a Chamber may appoint *ad hoc* counsel for the defense under circumstances specified in the Rome Statute or ICC Rules, or where the interests of justice so require. Subsection (2) of Regulation 76 states that, where a Chamber decides to appoint *ad hoc* defense counsel, the individual lawyer may be selected from the Office of Public Counsel for the Defence – discussed directly below – or the Registry may select a lawyer not previously associated with the Court.

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- Second, Regulation 77 establishes the Office of Public Counsel for the Defence (OPCD) as a permanent unit of the Court, which falls within the remit of the Registry for administrative purposes, but is otherwise a wholly independent office. According to Regulation 77, the mandate of OPCD includes representing and protecting the rights of the defense during the initial stages of an investigation, providing legal and logistical support and assistance to defense counsel, and appearing before the Chamber in respect of specific issues relevant to the interests of the defense. Finally, as mentioned above, OPCD may be appointed to serve as *ad hoc* counsel for the general interests of the defense during the investigation stage of ICC proceedings pursuant to Regulation 76(2).

Review of Defense Issues during Investigations in the Democratic Republic of Congo, Darfur, and Uganda

Appointment of Individual Attorneys, Not Otherwise Employed by the ICC, as ad hoc Defense Counsel

Between 2005 and early 2007, the Pre-Trial judges presiding over the situations in the Democratic Republic of Congo, Darfur, and Uganda situations appointed an individual attorney to serve as *ad hoc* defense counsel under Regulation 76(1) on four different occasions:

- In the Democratic Republic of Congo (DRC) situation, PTC I appointed an attorney pursuant to Article 56 of the Rome Statute, which allows for the appointment of *ad hoc* defense counsel for the purpose of participating in the Prosecutor's collection of evidence not likely to be available at future trials of individual accused. In addition, PTC I appointed a second attorney as *ad hoc* defense counsel for the purposes of responding to applications from victims seeking to participate in situation-related proceedings. Although neither the Rome Statute nor the ICC Rules require the appointment of *ad hoc* defense counsel in proceedings arising out of victims' applications to participate during the situation phase of the Court's operations, Rule 89(1) does provide that both the Prosecution and "the defence" shall be entitled to reply to each victim's application.

- Pre-Trial Chamber II, following the rationale employed by PTC I, also appointed *ad hoc* counsel to represent the interests of the defense by responding to victims' applications to participate in the Uganda situation.
- Finally, in the context of the Darfur situation, *ad hoc* counsel for the defense was appointed to "represent and protect the general interests of the defence" during proceedings held pursuant to ICC Rule 103, which authorizes the filing of *amicus* briefs and provides that both the Prosecution and "the defence" shall be entitled to respond to submissions made by outside observers under the rule.

Notably, one of the attorneys appointed as *ad hoc* defense counsel in the DRC situation and the attorney appointed in the Darfur situation each sought to submit observations to the Chamber challenging the jurisdiction of the Court and the admissibility of the relevant situation for which he was appointed. However, in both instances, PTC I refused to admit the submissions, holding that under Article 19 of the Rome Statute, only an accused person or a person for whom a warrant of arrest or a summons to appear had been issued could challenge jurisdiction or admissibility.

In the Darfur situation, *ad hoc* counsel also filed a request with the Chamber seeking permission to attend an on-site meeting that the ICC Prosecutor was planning to hold in Sudan. The Chamber denied this request, holding that the attorney had been appointed strictly for the purpose of responding to the *amicus* submissions requested by the Chamber pursuant to Rule 103. Later, the ICC Registrar refused to pay the *ad hoc* defense counsel any fees in connection with the request to be present at the Prosecutor's meeting in Sudan, including payment for the time spent on the request itself, as well as the application for leave to obtain interlocutory appeal of the Chamber's decision denying the

request. PTC I upheld the Registrar's decision, explaining that it found the *ad hoc* counsel's submissions to be "frivolous and vexatious."

Appointment of OPCD as ad hoc Counsel

In May 2007, without explanation, Pre-Trial Chamber I – which had previously appointed outside counsel for the purpose of responding to victims' applications to participate at the situation stage of proceedings – switched course and appointed OPCD as *ad hoc* counsel in both the DRC and the Darfur situations.

- In the DRC and the Darfur situations, OPCD has filed numerous submissions requesting access to various files which it believes are necessary to adequately respond on behalf of future accused to the victims' participation applications. It has been unsuccessful with respect to virtually all of these requests. Among the most recent decisions by Pre-Trial Chamber I in the DRC situation was its refusal of a request by OPCD to contact the outside attorney who had served as *ad hoc* defense counsel for purposes of responding to victims' applications in the same situation for well over one year before OPCD was assigned to the task.
- In the context of the Darfur situation, OPCD made yet another attempt to challenge the jurisdiction of the Court at the situation stage of proceedings. However, the request was denied on the same grounds that PTC I had denied previous requests to challenge jurisdiction, namely, that the *ad hoc* counsel – whether that was an individual not otherwise affiliated with Court or OPCD – had no standing under Article 19 to lodge such a challenge at the situation stage.
- Finally, although OPCD has not been appointed as *ad hoc* defense counsel in the Uganda situation, the Office has filed observations in the context of the situation in Uganda on behalf of the general interests of future accused.

Analysis and Recommendations

While it is clear that the Pre-Trial Chambers of the ICC – and indeed every organ of the Court – are still working out how various provisions of the Rome Statute and related documents are to be applied, the history outlined above demonstrates that certain adjustments are already warranted in terms of the appointment and mandate of *ad hoc* counsel to protect the rights of the defense during situation proceedings before the Court.

- *The Pre-Trial Chambers Should Resume Appointments of Unaffiliated Lawyers to Serve as ad hoc Defense Counsel in the Context of a Situation*

As described above, PTC I seems to have made a shift away from appointing individual attorneys not otherwise affiliated with the Court as *ad hoc* counsel, instead assigning the tasks once given to those attorneys to OPCD as a whole. This practice is certainly warranted under the Regulations of the Court, which expressly provide that the Chambers may appoint counsel for the interests of defense from the Registrar’s list of counsel or from OPCD. However, as a practical matter, two significant factors weigh in favor of using counsel outside of OPCD to represent the interests of defense in proceedings taking place in the context of a situation.

First, given the broad scope of OPCD’s potential mandate, it is easy to imagine a scenario where OPCD’s appointment as *ad hoc* counsel for the defense at the situation stage would result in conflicts of interest that could interfere with other aspects of the Office’s mandate. For instance, an attorney appointed as *ad hoc* defense counsel for the purposes of protecting the general interests of the defense in the context of a “unique investigative opportunity” under Article 56 is likely to gain information regarding evidence that may help some

future accused, while harming others. If OPCD were to fill this role, it is difficult to see how the Office could later provide neutral advice to two defense teams that may have different views about the meaning of the evidence or the weight that should be assigned thereto. Furthermore, OPCD has in the past been called upon to represent individual accused at his or her initial appearance before the Court, before the accused has had time to secure permanent defense counsel. While OPCD has itself insisted that such appointments must be limited in scope and timing, extensive participation by OPCD in proceedings at the situation phase may present conflicts of interest that could preclude even limited representation by OPCD of any individual accused arrested in the context of that situation.

Second, even if no conflicts of interest were to arise from the appointment of OPCD as ad hoc defense counsel during the situation phase of proceedings, the limited resources of the Office – which is staffed with a total of just six individuals and operates on a tight budget – suggest that its members should focus on supporting independent defense counsel and serving as a voice for the general interests of defense at the ICC, rather than engaging in the representation of potential or known accused. Allowing OPCD to focus on logistical and legal support to defense counsel would permit the defense, like the Office of the Prosecutor, to build an institutional memory, despite the fact that defense counsel in each situation and case is likely to be located far from the Court and be focused on a limited set of facts and legal arguments. Furthermore, without additional duties as ad hoc defense counsel at the situation stage, OPCD would be in a better position to provide an institutional voice to future and known accused coming before the Court by raising common defense issues before the Chambers, such as those relating to conditions of detention or the availability of interpreters, and by

representing the interests of the defense when decisions are made about resource allocations and administrative processes at the Court.

- *The Court Should Strive to Maintain the Same Counsel in the Same Situation, and Otherwise Adopt a More Flexible Approach to Information Sharing among Counsel*

Assuming that *ad hoc* defense counsel is appointed from the Registrar's list of independent attorneys not otherwise affiliated with the Court, it would be ideal if the same attorney could serve as *ad hoc* counsel throughout the proceedings in a given situation. This would serve the cause of efficiency, as newly appointed counsel will not be immediately familiar with the Court's procedures in relation to issues such as victim participation at the situation stage. At the same time, allowing the same attorney or team of attorneys to serve as *ad hoc* counsel in a situation would likely increase the quality of representation.

Of course, the Chamber may occasionally find cause to terminate its contract with a particular attorney during the situation phase of proceedings, and it is also possible that appointed counsel may be unable to continue in his or her role over a long period of time. To the extent the Chambers must appoint new *ad hoc* defense counsel at the situation stage, we recommend that the newly appointed attorneys not be automatically barred from communicating with former *ad hoc* counsel in the same situation, as was the case in the DRC situation. Although confidential information must remain protected where there is a change in counsel, there may be compelling reasons to permit some level of communication between and among attorneys appointed as *ad hoc* counsel at the situation stage. Thus, under circumstances where a change in *ad hoc* counsel is required within the same situation, the Chambers should give due consideration to the new attorney's request to contact his or her predecessor.

- *The Mandate of Each ad hoc Defense Counsel Should Be Clearly Defined at the Time of the Appointment*

Regardless of whether ad hoc counsel is appointed from within OPCD or from a list of independent counsel unaffiliated with the ICC, it is critical that the Pre-Trial Chambers clearly define the mandate of ad hoc counsel at the time of appointment. As seen in the Darfur situation, the attorney appointed as ad hoc counsel interpreted his mandate as being much broader than intended by the Pre-Trial Chamber, which in turn led to a lengthy dispute regarding attorneys' fees that did not end favorably for the defense attorney. While the suspension of pay, or the threat thereof, may be a valuable disciplinary tool, it could also undermine the independence of counsel, where a counsel has legitimate questions, for example, regarding his role/mandate and seeks to represent defense interests vigorously in accordance with the ICC's Professional Code of Conduct. Greater clarity regarding the limits of counsel's role would help avoid the result seen in the Darfur situation without running the risk of limiting counsel's actions legitimately believed to be in the interest of future accused.

- *Although ad hoc Counsel Lacks Standing to Challenge Jurisdiction and Admissibility at the Situation Stage, Pre-Trial Chambers Likely Have Authority to Make Such Determinations Proprio Motu Where Warranted*

As explained above, *ad hoc* counsel in both the DRC and Darfur situations were rejected in their attempts to challenge the jurisdiction of the Court and/or the admissibility of the situation. In its responses to these requests, PTC I has cited Article 19(2) of the Rome Statute, which provides, in relevant part, as follows:

2. Challenges to the admissibility of a case ... or challenges to the jurisdiction of the Court may be made

by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under [A]rticle 58...

Specifically, the Chamber has repeatedly concluded that, from the perspective of the defense, only a known accused or the known target of a warrant or summons to appear may raise challenges to the Court's jurisdiction and/or admissibility.

While the plain text of Article 19(2) supports the Chamber's interpretation, it should be noted that the PTC itself likely possesses inherent authority to ensure that jurisdiction is present in any given situation. Indeed, as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has held, the power of a court to determine its own competence is central to the inherent jurisdiction of that court and thus does not need to be expressly provided for in the court's constitutive documents. Hence, although it is difficult to envision the Prosecution pursuing an entire investigation – as opposed to an individual case – that is clearly beyond the ICC's jurisdiction, the Pre-Trial Chamber is not without power to act in the event that such a situation was referred to the Court and taken up by the Prosecutor. In addition, according to Pre-Trial Chamber I, the Court has an obligation to ensure that every *situation* meets the so-called “gravity threshold” of Article 17(1)(d), a prerequisite to admissibility under the Rome Statute. While the Chamber did not specify when or how this analysis would be conducted for any given situation, it is conceivable that the PTC could examine the gravity of a situation pursuant to Article 19(1), which authorizes the Court to determine, on its own motion, questions of admissibility under Article 17. As with jurisdiction, it may be difficult to imagine a situation so lacking in gravity that the PTC will feel the need to act *proprio motu* to analyze whether Article 17(1)(d) has been met at the investigation stage of proceedings. Nevertheless, it is important to stress the

Chamber's power to protect the rights of future accused, and the resources of the Court, in the event that the Prosecutor is investigating a situation that clearly lies beyond the scope of the Rome Statute.

I. INTRODUCTION

It is well-recognized that, in order to be “established according to the rule of law, [a court or tribunal] must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”² A similarly accepted principle is that ensuring an “equality of arms” between the Prosecution and Defense – a phrase often used as shorthand for the notion that the Defense should never be placed at a substantial disadvantage vis-à-vis the Prosecution in terms of its ability to present its case – is fundamental to the overall fairness of criminal proceedings.³

As a general matter, Article 67 of the Rome Statute establishing the International Criminal Court (ICC) ensures that an accused person – *i.e.*, an individual charged with crimes under the Rome Statute or for whom a warrant of arrest or summons to appear has been issued by the Court – is provided certain minimum rights in the determination of any charge.⁴ In addition, Article 55(2) provides for the rights of suspects –

² *Prosecutor v. Dusko Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, ¶ 45 (ICTY Appeals Chamber, 2 October 1995) (citing Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides *inter alia* that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,” and the jurisprudence of the United Nations Human Rights Committee interpreting that requirement).

³ *See Prosecutor v. Dusko Tadić*, Judgment, Case No. IT-94-1-A, ¶ 44 (ICTY Appeals Chamber, 15 July 1999) (again citing findings of the Human Rights Committee under the ICCPR).

⁴ *See* Rome Statute of the International Criminal Court, adopted on 17 July

i.e., individuals not yet charged with any crime, but who are under investigation by the ICC Prosecutor – during questioning.⁵ Finally, the

1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, Art. 67(1), U.N. Doc. A/CONF.183/9 (1998) (“In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; (c) To be tried without undue delay; (d) Subject to [A]rticle 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute; (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks; (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; (h) To make an unsworn oral or written statement in his or her defence; and (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”).

⁵ *Id.* Art. 55(2) (“Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require,

constitutive documents of the ICC⁶ recognize that, under certain circumstances, special measures are required to protect the rights of *future* accused during the investigative stage of the Court's operations.⁷ Thus, the Pre-Trial Chambers of the ICC may appoint counsel to represent the interests of the defense in proceedings even before any suspect is identified or individual is charged. Such provisions are necessary because of the unique manner in which the ICC simultaneously possesses jurisdiction over a "situation," *i.e.*, an entire country or region of a country in which a vast array of atrocities may have occurred, and individual "cases," *i.e.*, a particular accused charged with a particular crime or set of crimes.⁸ For example, the ICC is currently operating in the Democratic Republic of Congo (DRC), which is one of the four "situations" before the Court at this time. Within that situation, three cases have been initiated – one against Thomas Lubanga Dyilo, one joint case against Germaine Katanga and Mathieu Ngudjolo Chui, and one against Bosco Ntaganda. Importantly, proceedings taking place in the context of the DRC situation, such as those regarding victim participation or evidentiary issues – each of which involve the participation of the Prosecution – may affect the cases against individual accused yet to be identified by the Court. By allowing the appointment of so-called "*ad hoc* defense counsel" to represent the interests of these future accused, the

and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”).

⁶ See generally *id.*; International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002; International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, *entered into force* 26 May 2004.

⁷ See *infra*, §§ II and III of this report.

⁸ See *supra* n. 1.

documents governing the ICC promote the equality of arms between the Prosecutor and the defense in future cases.⁹

This report looks at the various provisions of the ICC's governing documents aimed at safeguarding the rights of future accused before the Court, the drafting history behind those provisions, and the approach adopted by the ICC Pre-Trial Chambers under the various provisions to date. We then offer recommendations as to how the practices of the ICC might be improved to more fully ensure that defense rights are protected during the situation phase of proceedings, as protecting these rights is critical to guaranteeing the fundamental right to a fair trial for those accused eventually charged and brought before the ICC.

⁹ This model is "heavily influenced by the civil law tradition of judicial supervision of criminal investigations," in which an investigating judge "supervises the prosecutor closely in determining when counsel should be appointed to protect the interests of the defense or other measures should be taken." Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 Int'l Law. 21, 24 (Spring 2000). As Mr. Gallant notes, in most common-law systems, "the appointment of counsel without a client with whom counsel could consult would be seen as highly anomalous," but the procedure holds "great promise for improving the fairness of criminal proceedings by providing a device for discovery and preservation of testimony or evidence by the defense early in the criminal process." *Id.*

II. TEXTUAL ANALYSIS AND *TRAVAUX PRÉPARATOIRES*

A. ROME STATUTE

A review of the drafting history of the Rome Statute, as well as the final version of the document itself, suggests that the drafters did not extensively contemplate the protection of defense rights during the investigation stage of the ICC's proceedings. Indeed, in the 1994 Draft Statute prepared by the International Law Commission (ILC), "the investigation of crimes within the jurisdiction of the Court was entirely under the control of the Prosecutor; judicial intervention at the investigative stage was limited to the issuance of warrants and orders, or examination of the indictment filed by the Prosecutor,"¹⁰ and no role was contemplated for defense.

Although the lack of attention to defense rights was criticized by the 1995 *ad hoc* Committee, which highlighted the fact that the Draft Statute "did not include any provision directed at assisting an accused person to collect evidence or intervene in investigative acts performed by the Prosecutor,"¹¹ it was not until 1996 that concrete proposals were made to ensure the protection of defense interests at the investigation stage.¹² Specifically, several States supported the idea of providing a

¹⁰ Fabricio Guariglia, *Article 56: The Role of the Pre-Trial Chamber in relation to a unique investigative opportunity*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 735, 736 (Otto Triffterer ed., 1999).

¹¹ *Id.*

¹² See, e.g., *Proposals made by the delegation of The Netherlands*, at 4, 12 August 1996 (noting that without judicial supervision during on-site investigations the defense would have no ability to "exercise the right to investigate" which would impact "the integrity of the proceedings").

judicial role during the investigation phase of the Court's proceedings in order "to ensure that there was at least partial 'equality of arms' between an accused or a suspect and the Prosecutor at the stage of investigation and prosecution."¹³ The Pre-Trial Chamber (PTC) was thus developed as a separate organ of the Court, primarily for the purpose of ensuring that "the prejudice to the accused resulting from the particular nature of the ICC proceedings – conducted away from the country of the defendants and away from where the evidence and witnesses were readily available – would be minimized."¹⁴

In addition to creating the Pre-Trial Chamber, the drafters of the Rome Statute included an express provision designed to protect the rights of prospective accused in relation to the collection of evidence that is not likely to be available in the future. Specifically, Article 56(1)(b) of the Rome Statute provides that, where the Prosecutor determines that a "unique opportunity [exists] to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial," the PTC may "take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence."¹⁵ Article 56(2), in turn, provides that the "measures referred to in paragraph 1(b) may include,"¹⁶ *inter alia*:

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or *where there has not yet been such an arrest or appearance or counsel has not*

¹³ Guariglia, *supra* n. 10, at 736.

¹⁴ *Id.*

¹⁵ Rome Statute, *supra* n. 4, Art. 56(1)(b).

¹⁶ *Id.* Art. 56(2).

*been designated, appointing another counsel to attend and represent the interests of the defence.*¹⁷

Thus, Article 56 ensures that the interests of future accused are represented with respect to evidence that, “because of its nature, cannot be fully reproduced at trial (e.g., a mass-grave exhumation).”¹⁸

B. ICC RULES OF PROCEDURE AND EVIDENCE

The passage of the ICC Rules of Procedure and Evidence (ICC Rules) in 2000 did not lead to any significant expansion of defense rights at the investigation stage of the Court’s proceedings. Rule 47(2) builds on Article 56 of the Rome Statute by affirming the need to “protect the rights of the defence” during the taking of testimony that may not be available subsequently during the course of the Prosecutor’s investigations.¹⁹ Again, this might involve the appointment of counsel to “attend and represent the interests of the defence,” even if no person has been arrested or otherwise appeared before the Court in connection with charges against him or her.²⁰ However, Rule 47(2) is the only specific provision adopted in the ICC Rules covering defense rights during the situation phase of proceedings.

Notably, during the drafting of the ICC Rules, some consideration was given to the idea of creating a permanent office for the defense.²¹ For

¹⁷ *Id.* (emphasis added).

¹⁸ Guariglia, *supra* n. 10, at 737.

¹⁹ ICC Rules, *supra* n. 6, R. 47(2).

²⁰ Rome Statute, *supra* n. 4, Art. 56(2)(d).

²¹ See, e.g., Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, 1 Essex Human Rights Rev. 66, 77 (August 2004) (explaining that “many state parties” at the third session of the Preparatory Commissions responsible for drafting the ICC Rules of Procedure and Evidence argued “that there needed to be an independent defence office to represent the rights of the defence.”); Elise Groulx, *The*

example, France, Germany, Canada and the Netherlands submitted a joint proposal recommending the establishment of a distinct unit within the Registry that would be “responsible for guaranteeing the rights of the Defence consistent with the principle of fair trial as defined in the Statute and as applied by the Court.”²² A number of outside observers – including Amnesty International and the International Criminal Defense Attorneys Association – supported the idea that the Rules of Procedure and Evidence should create a separate defense unit in the structure of the ICC.²³ At the same time, however, the proposal raised concerns about whether such an office would be compatible with the Rome Statute.²⁴ Opponents of a separate defense

Defense Pillar: Making the Defense a Full Partner in the International Criminal Justice System, 25-OCT Champion 20, 24 (September/October 2001) (noting that France, Germany, Canada and the Netherlands supported the creation of an office for defence under the ICC Rules).

²² Proposal submitted by Canada, France, Germany and the Netherlands in connection with article 43 of the Rome Statute of the International Criminal Court concerning the Rules of Procedure and Evidence as regards document PCNICC/1999/DP.1, PCNICC/1999/WGRPE(4)/DP.2/Rev.1, ¶ 1, 6 August 1999.

²³ See, e.g., Amnesty International, *International Criminal Court: Procedural Issues at the third session of the Preparatory Commission*, AI Index: IOR 40/004/1999, § 1, 1 December 1999 (“Amnesty International strongly believes that the Registrar should establish an independent office of defence counsel which would have the responsibility for ensuring that the rights of the defence to have adequate time and facilities for a defence and to conduct a defence were respected.”); Groulx, *supra* n. 21, at 24 (lamenting the fact that no independent office for the defence was created under the ICC Rules, as recommended by the International Criminal Defense Attorneys Association); Gallant, *supra* n. 9, at 42 (“The court’s structure could be greatly strengthened by the creation of a Bureau of Defense Counsel, analogous to the Office of the Prosecutor. In the ICC Statute, there is currently no defense office of any type. This has the potential to create an institutional bias in the court towards the interests of the prosecution.”).

²⁴ Gerard Dive, *Composition and Administration of the Court: The Registry*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 262, 278 (Roy S. Lee ed., 2001).

unit argued that since the Statute only made an explicit reference to the creation of a Victims and Witnesses Unit,²⁵ no other specialized unit was envisioned within the Registry.²⁶ Those in support of the unit countered that the fact that the Victims and Witnesses Unit was specifically provided for just meant that it had to be created but not necessarily to the exclusion of other units to be established in the future.²⁷

Ultimately, the Rules did not create a separate defense unit, but Rule 20 does require that the Registry be organized “in a manner that promotes the rights of the defense, consistent with the principle of fair trial as defined in the Statute.”²⁸ Rule 20 also requires that the Registry carry out its functions “in such a manner as to ensure the professional independence of defense counsel.”²⁹ The open-ended language of this provision therefore left open the possibility that additional measures could be adopted in favor of defense rights – including the creation of a separate defense unit – under either the Regulations of the Registrar or the Regulations of the Court.³⁰

²⁵ See Rome Statute, *supra* n. 4, Art. 43(6) (“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”).

²⁶ Dive, *supra* n. 24, at 278.

²⁷ *Id.*

²⁸ ICC Rules, *supra* n. 6, R. 20(1).

²⁹ *Id.* R. 20(2).

³⁰ Dive, *supra* n. 24, at 278-279.

C. REGULATIONS OF THE COURT

Although the drafters of the ICC Rules of Procedure and Evidence did little to advance defense rights at the investigation stage, the ideas that defense interests should be protected during the situation phase of proceedings and that the ICC would benefit from an office dedicated to the rights of the defense, were revived with the Regulations of the Court, adopted in 2004.³¹

1. Regulation 76: Ad hoc Defence Counsel

Regulation 76(1) provides that a “Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require.”³² By its language, Regulation 76(1) could be applied at either the situation or case stage, and indeed, the Pre-Trial Chambers have repeatedly used Regulation 76(1) to appoint “*ad hoc* defense counsel” at the situation stage of proceedings.³³ Subsection (2) of Regulation 76

³¹ The Court Regulations are judge-made rules, created under the authority of Rome Statute Article 52(1), which provides that the “judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.” Rome Statute, *supra* n. 4, Art. 52(1).

³² Regulations of the Court, *supra* n. 6, Reg. 76(1).

³³ See *infra* Section III. Interestingly, at least one judge who participated in drafting the Regulations of the Court – ICC Judge Hans-Peter Kaul – has written that the purpose of Regulation 76 is “to prevent, where possible, trials from being hijacked by the defendant” by allowing for the “judicial appointment of defense counsel” where necessary. Hans-Peter Kaul, *Developments at the International Criminal Court – Construction Site for More Justice: The International Criminal Court After Two Years*, 99 Am. J. of Int’l Law 370, 377 (April 2005). Judge Kaul explains:

the inclusion in Regulation 76 of the option to appoint counsel against the will of the accused if the interests of justice so require was extensively debated. In the end it was agreed that, although the judges were mindful that in

states that, where a Chamber decides to appoint *ad hoc* defense counsel, the individual lawyer may be selected from the Office of Public Counsel for the Defence – discussed directly below – or the Registry may select a lawyer not previously associated with the Court.³⁴

principle the defendant is allowed to conduct his or her own defense, the special nature of the international criminal proceedings, and the interests of the Court and other participants in fair and expeditious proceedings, could override this principle in certain circumstances.

Id. This passage suggests that Regulation 76 was intended to allow a Chamber to override a particular defendant's decision to represent himself or herself at trial in the event that such defendant's self-representation was seriously disrupting the Court's operations. Nevertheless, as discussed below, other Pre-Trial Chamber judges that also participated in the drafting of the Regulations of the Court seem to have adopted the view that the language allowing for appointment of *ad hoc* defence counsel where the interests of justice so require can apply during proceedings in which no individual accused or suspect has been identified, but where general defense interests are nevertheless at stake. *See infra* Section III.

³⁴ Regulations of the Court, *supra* n. 6, Reg. 76(2) (“Where the Chamber decides to appoint counsel in accordance with subregulation 1, and where the counsel considered for appointment is not included in the list of counsel, the Registrar shall first decide on the eligibility of that counsel to be included in the list in accordance with regulation 70. The Chamber may also appoint counsel from the Office of Public Counsel for the defence.”). The “list of counsel” referred to in Regulations 76(2) is the list of qualified attorneys that have been pre-approved by the ICC Registrar for participation in proceedings before the Court. *See* ICC Rules, *supra* n. 6, R. 21(2) (“The Registrar shall create and maintain a list of counsel who meet the criteria set forth in [R]ule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.”); *id.* R. 22 (“A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one

2. Regulation 77: Office of Public Counsel for the Defence

Pursuant to the authority of Rule 20 discussed above,³⁵ Regulation of the Court 77(1) provides that the “Registrar shall establish and develop an Office of Public Counsel for the Defence” (OPCD).³⁶ The OPCD “shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office,” meaning that “[c]ounsel and assistants within the Office shall act independently.”³⁷ According to Regulation 77(4), the “tasks” of OPCD “shall include representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of [Article 56(2)(d)] and [Rule 47(2)].”³⁸ In addition, Regulation 77(5) states that OPCD shall “provide support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate: (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues.”³⁹ Finally, as mentioned above, OPCD may be appointed to serve as *ad hoc* counsel for the general interests of the defense during

of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.”). As of October 2007, 351 persons had expressed an interest in being included in the Registrar’s list, 221 of which have been admitted and are eligible to act as counsel before the ICC. See Int’l Criminal Court, *List of Counsel*, 24 October 2007, available at http://www.icc-cpi.int/library/defence/Defense_Counsel_List_English.pdf.

³⁵ See *supra* n. 28 and accompanying text.

³⁶ Regulations of the Court, *supra* n. 6, Reg. 77(1).

³⁷ *Id.* Reg. 77(2).

³⁸ *Id.* Reg. 77(4). See also *supra* n. 15 *et seq.* and accompanying text (describing Article 56); *supra* n. 19 *et seq.* and accompanying text (describing Rule 47).

³⁹ Regulations of the Court, *supra* n. 6, Reg. 77(5).

the investigation stage of ICC proceedings pursuant to Regulation 76(2).⁴⁰

⁴⁰ *See supra* n. 34 *et seq.* and accompanying text.

III. REVIEW OF DEFENSE ISSUES DURING THE INVESTIGATIONS IN THE DEMOCRATIC REPUBLIC OF CONGO, DARFUR, AND UGANDA

A. APPOINTMENT OF INDIVIDUAL ATTORNEYS, NOT OTHERWISE EMPLOYED BY THE ICC, AS *AD HOC* DEFENSE COUNSEL OFFICE OF THE PROSECUTOR

Between 2005 and early 2007, the Pre-Trial judges presiding over the situations in the Democratic Republic of Congo, Darfur, and Uganda situations appointed an individual attorney, not otherwise affiliated with the ICC, to serve as *ad hoc* defense counsel under Regulation 76(1) on four different occasions.

1. Democratic Republic of Congo

The first appointment of an *ad hoc* defense counsel under Regulation 76(1) was made in the context of the situation in the DRC,⁴¹ following the Prosecutor’s notification to Pre-Trial Chamber I (PTC I) of a “unique investigative opportunity to carry out forensic examinations” under Article 56.⁴² As noted above, Article 56 of the Rome Statute provides that, where the Prosecutor determines that a “unique opportunity [exists] to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial,” the PTC may “take such measures as may be necessary to... protect the rights of the defence,” including appointing counsel to represent the “interests of the

⁴¹ *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor’s Request for Measures under Article 56, ICC-01/04-21 (Pre-Trial Chamber I, 26 April 2005).

⁴² *Id.* at 2.

defence.”⁴³ Thus, in April 2005, in conjunction with its decision to approve certain forensic examinations of evidence relating to the Prosecutor’s investigation in the DRC, PTC I ordered the Registrar to appoint an *ad hoc* defense counsel to represent the general interests of the defense for the purpose of those examinations.⁴⁴ On 1 August 2005, Mr. Tjarda van der Spoel was officially appointed for the role.⁴⁵

Shortly after his appointment, Mr. Van der Spoel made his first submission to the Chamber, challenging not only the existence of a unique investigative opportunity, but also making “preliminary remarks on issues of jurisdiction and admissibility.”⁴⁶ In response, the Prosecutor argued, *inter alia*, that Mr. Van der Spoel’s remarks should be disregarded because he had “exceed[ed] the scope of the submission” as determined by PTC I’s decision appointing *ad hoc* defense counsel.⁴⁷ For its part, the Chamber held that Mr. Van der Spoel’s challenges were inadmissible before the Court because he lacked standing to challenge the jurisdiction and/or admissibility of the situation under Article 19 of the Rome Statute.⁴⁸ Specifically, the Chamber found that “[c]hallenges to the jurisdiction of the Court or

⁴³ See *supra* n. 15 *et seq.* and accompanying text (citing Article 56).

⁴⁴ *Situation in DRC*, Decision on the Prosecutor’s Request for Measures under Article 56, *supra* n. 41, at 3.

⁴⁵ Appointment Of Mr. Tjarda Van Der Spoel As Ad Hoc Counsel For The Defence Pursuant To The Decision Of Pre-Trial Chamber I Dated 26 April 2005, ICC-01-04-76 (Registry, 1 August 2005).

⁴⁶ *Situation in the Democratic Republic of Congo*, Decision following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility filed on 31 October 2005, ICC-01-04-93, at 2-3 (Pre-Trial Chamber I, 10 November 2005) (summarizing the confidential submission received from Mr. Van der Spoel).

⁴⁷ *Id.* at 3 (summarizing the confidential submission received from the Prosecutor).

⁴⁸ *Id.* at 4.

the admissibility of a case pursuant to [A]rticle 19(2)(a) of the [Rome] Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under [A]rticle 58.”⁴⁹ Because no warrant of arrest or summons to appear had been issued and thus no case had arisen, the Chamber concluded, *ad hoc* counsel for the defense had no procedural standing to make a challenge under Article 19(2)(a).⁵⁰

Pre-Trial Chamber I also decided to appoint *ad hoc* counsel for the situation in the DRC for the purpose of responding to applications submitted under Rule 89 by victims seeking to participate at the investigation stage of proceedings.⁵¹ Rule 89(1) provides, in relevant part, that victims wishing to participate in proceedings before the Court must submit a written application to the Registrar, and that copies of all such applications will be provided to “the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.”⁵² Although no accused yet existed, PTC I deemed it “necessary, in order to represent and protect the interests of the defence during the application proceedings of [R]ule 89 in the Rules”

⁴⁹ *Id.* See also Rome Statute, *supra* n. 4, Art. 19(2).

⁵⁰ *Situation in DRC*, Decision following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility filed on 31 October 2005, *supra* n. 46, at 4. Rome Statute, *supra* n. 4, Art. 19(2).

⁵¹ *Situation in the Democratic Republic of Congo*, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, ICC-01-04-73, at 5 (Pre-Trial Chamber I, 21 July 2005). The Rome Statute provides that, “[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Rome Statute, *supra* n. 4, Art. 68(3).

⁵² ICC Rules, *supra* n. 6, R. 89(1).

⁵³ to appoint *ad hoc* counsel for the purpose of responding to victims' applications.⁵⁴ Accordingly, the Registrar appointed a second lawyer, Mr. Joseph Tsimanga, to serve as *ad hoc* defense counsel.⁵⁵ It is unclear whether there was a specific reason that this assignment was given to Mr. Tsimanga as opposed to Mr. Van der Spoel. Mr. Tsimanga was also re-appointed as *ad hoc* defense counsel in May 2006 for purposes of responding to a subsequent set of victims' applications under Rule 89.⁵⁶

2. *Darfur*

Turning to the situation in Darfur, the first appointment of *ad hoc* defense counsel occurred in relation to Pre-Trial Chamber I's July 2006 decision to invite Louise Arbour and Antonio Cassese to "submit in writing their observations on issues concerning the protection of victims and the preservation of evidence in Darfur."⁵⁷ The Chamber's call for written submissions from Ms. Arbour and Mr. Cassese was issued pursuant to Rule 103(1) of the ICC Rules of Procedure and Evidence, which states that the Chamber may "invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."⁵⁸ The

⁵³ *Situation in DRC*, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, *supra* n. 51, at 4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Situation in the Democratic Republic of Congo*, Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and the Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, ICC-01/04-147 (Pre-Trial Chamber I, 18 May 2006).

⁵⁷ *Situation in Darfur, Sudan*, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-10, at 5 (Pre-Trial Chamber I, 24 July 2006).

⁵⁸ ICC Rules, *supra* n. 6, R. 103(1).

decision to appoint *ad hoc* defense counsel arose due to the language in Rule 103(2), which provides that the “Prosecutor and the defence *shall* have the opportunity to respond to the observations submitted under sub-rule 1.”⁵⁹ Hence, in addition to requesting the submissions from Ms. Arbour and Mr. Cassese, PTC I’s July 2006 decision ordered the Registrar “to appoint an *ad hoc* counsel to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan during the proceedings pursuant to [R]ule 103.”⁶⁰

The following month, in August 2006, the Registrar appointed Mr. Hadi Shalluf as *ad hoc* counsel in accordance with the Chamber’s decision.⁶¹ Rather than filing a response to the *amicus* observations, however, Mr. Shalluf submitted a request that PTC I determine questions of jurisdiction and admissibility prior to taking any further action with respect to the situation in Darfur.⁶² In response, the Office of the Prosecutor (OTP) argued, as it had in response to the similar filing made by Mr. Van der Spoel in the DRC situation,⁶³ that Mr. Shalluf had exceeded his mandate, which was limited to addressing the

⁵⁹ *Id.* R. 103(2) (emphasis added).

⁶⁰ *Situation in Darfur, Sudan*, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, *supra* n. 57, at 6.

⁶¹ *Situation in Darfur, Sudan*, Decision of the Registrar Appointing Mr. Hadi Shalluf as *ad hoc* Counsel for the Defence, ICC-02-05-12 (Registry, 25 August 2006).

⁶² *Situation in Darfur, Sudan*, Conclusions aux fins d’exception d’incompétence et d’irrecevabilité, ICC-02-05-20, at 6 (*Ad hoc* Counsel for Defence, 9 October 2006) (in French only) (“Attendu que la chambre préliminaire 1, avant toute autre procédure qu’elle pourrait engager, doit trancher et décider sur l’exception d’incompétence et sur l’irrecevabilité soulevées par le conseil *ad hoc* pour la défense.”). In his submission, Mr. Shalluf made reference to an ICTY decision by Judge Antonio Cassese stressing the importance of addressing challenges to a court’s jurisdiction at the outset of a case. *Id.*

⁶³ *See supra* n. 47 and accompanying text.

observations of Ms. Arbour and Mr. Cassese regarding issues of victim protection and the preservation of evidence in Darfur.⁶⁴ Furthermore, the OTP argued, *ad hoc* defense counsel had “no *locus standi* under Article 19(2) of the Statute to challenge the jurisdiction of the Court or the admissibility of the situation in Darfur at this time.”⁶⁵ On 22 November 2006, the PTC issued a decision reminiscent of its earlier decision in the DRC situation in which it held that the Rome Statute made no provision for challenges to the ICC’s jurisdiction or admissibility by *ad hoc* defense counsel.⁶⁶ Mr. Shalluf attempted to obtain interlocutory appeal of the Chamber’s decision, but the request was denied.⁶⁷

⁶⁴ *Situation in Darfur, Sudan*, Prosecutor’s Reply to *Ad Hoc* Counsel’s “Conclusions Aux Fins d’Exception d’Incompétence et d’Irrecevabilité,” ICC-02-05-29, ¶¶ 7, 8 (Office of the Prosecutor, 10 November 2006) (“The *Ad Hoc* Counsel Response does not address the subject matter which the Chamber invited *Ad Hoc* Counsel to address... Instead, the *Ad Hoc* Counsel Response challenges the admissibility of the situation in Darfur and the jurisdiction of the Court... *Ad Hoc* Counsel has not complied with the Decision since he has not responded to either the Cassese Observations or the Arbour Observations.”).

⁶⁵ *Id.* ¶ 8.

⁶⁶ *Situation in Darfur, Sudan*, Decision on the Submissions Challenging Jurisdiction and Admissibility, ICC-02/05-34-tENG, at 3 (Pre-Trial Chamber I, 22 November 2006) (“... pursuant to [A]rticle 19(2) of the Statute, the jurisdiction of the Court or the admissibility of a case may only be challenged by certain States or by an accused or by a person for whom a warrant of arrest or a summons to appear has been issued under [A]rticle 58 [and] at this stage of the proceedings no warrant of arrest or summons to appear has been issued [and] *Ad Hoc* Counsel for the Defence has no procedural standing to make a challenge under [A]rticle 19(2)(a) of the Statute.”).

⁶⁷ *Situation in Darfur, Sudan*, Decision on the *Ad Hoc* Counsel for the Defence’s Request for Leave to Appeal, ICC-02-05-39, ¶ 14 (Pre-Trial Chamber I, 8 December 2006).

A few weeks later, on 18 December 2006, Mr. Shalluf filed another request with Pre-Trial Chamber I.⁶⁸ Noting a recent announcement by the Prosecutor that the OTP intended to visit fourteen individuals arrested by the Sudanese government for violations of international humanitarian law and human rights abuses, Mr. Shalluf requested that such meetings be conducted in the presence of defense counsel.⁶⁹ Indeed, Mr. Shalluf requested that *ad hoc* defense counsel be granted “leave to attend all criminal proceedings in the Situation in Darfur, be it within the court, or outside, or abroad[,]” relating to “questioning, interviewing witnesses and victims, witness confrontations, etc.”⁷⁰ Once again, the request was rejected, this time on the premise that the mandate of *ad hoc* counsel is “strictly restricted” to the terms of his appointment.⁷¹ The Chamber stated that:

... *ad hoc* Counsel for the Defence, as per the order of the Chamber, was appointed by the Registrar, to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan during particular proceedings, pursuant to [R]ule 103 of the Rules, namely: inviting observations on issues concerning the protection of victims and the preservation of evidence in Darfur; [and] accordingly, 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... [therefore] the *ad hoc* Counsel for the Defence request

⁶⁸ *Situation in Darfur, Sudan*, 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-tEN, at 3 (*Ad hoc* Counsel for Defence, 18 December 2006).

⁶⁹ *Id.* at 3.

⁷⁰ *Id.*

⁷¹ *Situation in Darfur, Sudan*, Decision on the *Ad hoc* Counsel for Defence Request of 18 December 2006, ICC-02-05-47, at 5 (Pre-Trial Chamber I, 2 February 2007).

falls out the [*sic*] parameters of his legally assigned responsibilities.⁷²

Mr. Shalluf again sought the leave of PTC I to obtain interlocutory appeal of the decision denying his request.⁷³ In his application, Mr. Shalluf argued *inter alia* that “any restriction or limitation of the role of counsel is inconsistent with the [Rome] Statute and with the principle of the independence of counsel.”⁷⁴ On 21 February 2007, PTC I dismissed the request for leave to appeal.⁷⁵ Notably, in its decision the Chamber stated that “at this stage of the investigations, the [OPCD] - and not the *Ad hoc* Counsel appointed for the purpose of specific proceedings under [R]ule 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.”⁷⁶ In other words, PTC I suggested that OPCD would have the right to participate in proceedings conducted by the Prosecutor in Darfur, but that the unaffiliated attorney appointed as *ad hoc* defense counsel could not. There is no indication that OPCD was ever invited to the proceedings in Darfur, however.

⁷² *Id.*

⁷³ *Situation in Darfur, Sudan*, 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, at 4 (*Ad hoc* Counsel for Defence, 4 February 2007).

⁷⁴ *Id.* at 5.

⁷⁵ *Situation in Darfur, Sudan*, 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, at 5 (Pre-Trial Chamber I, 21 February 2007).

⁷⁶ *Id.* at 7.

Against this backdrop, a dispute developed between the Head of the Division of Victims and Counsel and Mr. Shalluf regarding the latter's legal fees, which were to be paid by the ICC Registrar.⁷⁷ Specifically, the Division Head challenged the fees claimed by Mr. Shalluf in connection with the hours he worked in December 2006 and January 2007.⁷⁸ Mr. Shalluf responded in January 2007 that "since he had not received any instructions from the Chamber his mandate encompass[e] all duties and obligations of defence counsels in general, under [A]rticles 5 and 6 of the Code of Professional Conduct."⁷⁹ Nevertheless, on 13 February 2007, Mr. Shalluf received a

⁷⁷ *Situation in Darfur, Sudan*, Decision on the Request for Review of the Registry's decision of 13 February 2007, ICC-02-05-66, at 3 (Pre-Trial Chamber I, 15 March 2007) (summarizing the procedural history of the dispute).

⁷⁸ *Id.*

⁷⁹ *Id.* at 4. The ICC Code of Professional Conduct, adopted by the Assembly of States Parties at the third plenary meeting in 2005, applies to "to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court." Int'l Criminal Court, Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, Art. 1, 2 December 2005. Article 5 provides:

Before taking office, counsel shall give the following solemn undertaking before the Court: "I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court."

Id. Art. 5. Article 6 states:

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:
 - (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or

letter from the Division Head stating not only that Mr. Shalluf would receive no payment for work conducted between December 2006 and January 2007, but also that he would not be paid for his work in November 2006.⁸⁰ The Division Head justified his decision “on the ground that the *ad hoc* Counsel had been acting beyond the scope of his mandate.”⁸¹

Mr. Shalluf sought review of the Division Head’s decision by the Pre-Trial Chamber, requesting that PTC I: (i) declare the decision of the Head of the Division of Victims and Counsel unlawful, flawed, void and unfair; (ii) declare that the work done by the *ad hoc* Counsel fell within the scope of his mandate; and (iii) order the Registrar to pay the *ad hoc* Counsel’s fees for work performed between 1 December 2006 and the date of the filing.⁸² However, PTC I dismissed the request for review, explaining that it agreed “with the submission of the Registrar that the continuous filings of the *ad hoc* Counsel are frivolous and vexatious,” and that it considered the filings to be an “abuse of process.”⁸³ Finally, the Pre-Trial Chamber ordered the 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.”⁸⁴ Again, Mr. Shalluf’s application for

(b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Id. Art. 6.

⁸⁰ *Situation in Darfur, Sudan*, Decision on the Request for Review of the Registry’s decision of 13 February 2007, *supra* n. 77, at 4 (summarizing the 13 February 2007 letter, which is available in French only). On 6 March 2007, the Registrar approved of the decision of the Head of the Division of Victims and Counsel. *Id.*

⁸¹ *Id.*

⁸² *Id.* at 4 (summarizing Mr. Shalluf’s submission).

⁸³ *Id.* at 7.

leave to obtain interlocutory appellate review of the decision was denied.⁸⁵

3. *Uganda*

The chamber presiding over the situation in Uganda, Pre-Trial Chamber II (PTC II), did not have cause to appoint *ad hoc* defense counsel until 1 February 2007, when Single Judge Mauro Politi determined that such counsel would be appointed for purposes of responding to victims' applications submitted under Rule 89(1).⁸⁶ Echoing the July 2005 decision of Pre-Trial Chamber I in the context of the DRC situation, Judge Politi noted that Rule 89(1) entitles both "the Prosecutor and the defence" to submit observations on victims' applications.⁸⁷ He also reviewed the meaning of Regulation 76(1), noting that it allows the appointment of counsel generally "where the interests of justice so require."⁸⁸ Accordingly, Judge Politi concluded that the circumstances required the appointment of defense counsel "for the purpose of allowing the proper development of the procedure enshrined in rule 89, paragraph 1 of the Rules and preserving the overall fairness of the proceedings."⁸⁹ Ms. Michelyn C. St-Laurent was selected for the role.⁹⁰ Shortly after her appointment, on 5 March 2007,

⁸⁴ *Id.* at 8.

⁸⁵ *Situation in Darfur, Sudan*, Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007, ICC-02-05-70 (Pre-Trial Chamber I, 27 March 2007).

⁸⁶ *Situation in Uganda*, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation, ICC-02/04-01/05-134 (Pre-Trial Chamber II, 1 February 2007).

⁸⁷ *Id.* ¶ 14.

⁸⁸ *Id.* ¶ 15.

⁸⁹ *Id.*

⁹⁰ *Situation in Uganda*, Solemn Undertaking of Ms. Michelyne C. St-

Ms. St-Laurent filed her initial observations on the applications for participation in the proceedings.⁹¹ She also successfully challenged a submission made by the Office of Public Counsel for Victims (OPCV) regarding the applications, arguing that the observations of OPCV were submitted without legal authority and were *ultra vires*.⁹²

Pre-Trial Chamber II ruled on a portion of relevant victims' applications in August 2007, deferring decision on a number of other applications until further documentation was obtained from those victims.⁹³ On 14 March 2008, PTC II ruled on the remaining victims' applications.⁹⁴ Shortly thereafter, Ms. St-Laurent, still acting as *ad hoc* counsel for the defense with regard to the victims' applications, filed a request for leave to obtain interlocutory appeal of the Chamber's 14 March 2008 decision.⁹⁵ At the time of this writing, PTC II had issued no decision on Ms. St-Laurent's request.

Laurent, ICC-02-04-86 (1 March 2007).

⁹¹ See *Situation in Uganda*, Defence Application for Leave to Appeal the Decision on victims' application for participation issued on 14 March 2008, ICC-02/04-128 (*Ad hoc* Counsel for Defence, 25 March 2008) (in which Ms. St-Laurent summarizes her submission of 5 March 2007, which is not publicly available).

⁹² *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, ¶ 4 (Pre-Trial Chamber II, 10 August 2007) (in which Single Judge Mauro Politi describes his earlier decision holding that the observations submitted by OPCV were inadmissible).

⁹³ *Id.*

⁹⁴ *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, ICC-02/04-1251 (Pre-Trial Chamber II, 14 March 2008).

⁹⁵ See *Situation in Uganda*, Defence Application for Leave to Appeal the Decision on victims' application for participation issued on 14 March 2008,

B. APPOINTMENT OF OPCD AS *AD HOC* DEFENSE COUNSEL

1. *Democratic Republic of Congo*

As explained above, on two separate occasions between July 2005 and May 2006, PTC I appointed Mr. Joseph Tsimanga to serve as *ad hoc* defense counsel in the DRC situation, specifically for the purpose of responding to applications submitted by victims seeking to participate in proceedings arising out of the investigation in the DRC.⁹⁶ However, the next time that PTC I sought observations from the Prosecution and the defense on victims' applications to participate, the Chamber switched course. Specifically, on 23 May 2007, PTC I assigned the task of responding to victims' applications on behalf of the defence to OPCD, rather than to Mr. Tsimanga or any other individual lawyer appointed according to Regulation 76(1).⁹⁷

Between July and September 2007, various submissions were made by OPCD, the Prosecutor, and victims' representatives regarding, *inter alia*, the scope of information relating to victims' applications to which OPCD was entitled for purposes of submitting observations on those applications.⁹⁸ In one of these filings, OPCD asserted that, under

ICC-02/04-128 (*Ad hoc* Counsel for Defence, 25 March 2008).

⁹⁶ See *supra* n. 55 *et seq.* and accompanying text.

⁹⁷ *Situation in the Democratic Republic of Congo*, Decision authorising the filing of observations on applications for participation in the proceedings, ICC-01/04-329-tEN (Pre-Trial Chamber I, 23 May 2007). Although the Chamber gave no explanation as to its change in approach with respect to *ad hoc* defense counsel, it is likely that the earlier appointments were selected from the list of unaffiliated counsel, rather than OPCD, because OPCD was not fully operational until January 2007. See ICC Newsletter, *The Office of Public Counsel for the Defence becomes fully operational*, ICC-PIDS-NL-15/07_En, at 4 (May 2007).

⁹⁸ See, e.g., *Situation in the Democratic Republic of Congo*, Demande du

Court Regulation 77(4), OPCD had been given a “representative function vis-à-vis the general rights of the defence, as opposed to [an] ancillary support function,” and that therefore OPCD’s “obligations and powers mirror those of a defence counsel” appointed to “represent the rights of the defence (or a particular suspect)”.⁹⁹ It also argued that OPCD was “in effect, continuing the mandate of the former *ad hoc* counsel for the defence,” and was “therefore entitled to receive any documents which were conveyed to the *ad hoc* counsel for the defence” pursuant to certain decisions handed down by PTC I prior to OPCD’s appointment in May 2007.¹⁰⁰ The PTC disagreed with this characterization, however. Specifically, in a decision dated 11 September 2007, PTC I held that:

the mandate of the OPCD is limited in its scope pursuant to [a previous order by PTC I regarding victims’ applications] and is not intended to be the continuation of the mandate of the former *ad hoc* counsel for the defence and therefore, contrary to what OPCD claims, it is not automatically “entitled to

représentant légal des victimes (expurgé), ICC-01/04-361 (Victims’ Representative, 20 July 2007); *Situation in the Democratic Republic of Congo*, Public Redacted Version of Response to ‘Demande du représentant légal des victimes (expurgé),’ ICC-01/04-364 (Office of Public Counsel for the Defence, 26 July 2007); *Situation in the Democratic Republic of Congo*, Request for Single Judge to order the Prosecutor to disclose exculpatory materials, ICC-01/04-378 (Office of Public Counsel for the Defence, 28 August 2007); *Situation in the Democratic Republic of Congo*, Request for access to previous filings, and an extension of the page limit and time limit, ICC-01/04-379, ¶¶ 14-15 (Office of Public Counsel for the Defence, 29 August 2007); *Situation in the Democratic Republic of Congo*, Prosecution’s observations on the request by the OPCD for access to previous filings and for extension of page and time limits, ICC-01/04-387 (Office of the Prosecutor, 5 September 2007).

⁹⁹ *Situation in the Democratic Republic of Congo*, Request for access to previous filings, and an extension of the page limit and time limit, *supra* n. 98, ¶¶ 14-15.

¹⁰⁰ *Id.* ¶ 21.

receive any documents which were conveyed to the *ad hoc* counsel for the defence...”¹⁰¹

The PTC also stated that “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses,” and that therefore OPCD should not contact the former *ad hoc* counsel for the defense directly.¹⁰² In response, OPCD filed a “Request for Clarification” in which it asked the PTC to clarify, *inter alia*, “the scope and correlation between the respective mandates of the *ad hoc* counsel for the Defence and the OPCD.”¹⁰³ Pre-Trial Chamber I declined the request, however, claiming that its 11 September 2007 decision was clear.¹⁰⁴ Finally, OPCD requested “leave to communicate with *ad hoc* Counsel for the Defence in relation to the public legal and procedural aspects” of the Chamber’s 11 September 2007 decision.¹⁰⁵ The Chamber again rejected OPCD’s request, although it held that the former *ad hoc* counsel could contact OPCD if he voluntarily chose to do so.¹⁰⁶

¹⁰¹ *Situation in the Democratic Republic of Congo*, Decision on the request by the OPCD for access to previous filings, ICC-01/04-389, at 6-7 (Pre-Trial Chamber I, 11 September 2007).

¹⁰² *Id.*

¹⁰³ *Situation in the Democratic Republic of Congo*, Request for Clarification, ICC-01/04-390, at 11 (Office of Public Counsel for the Defence, 12 September 2007).

¹⁰⁴ *Situation in the Democratic Republic of Congo*, Decision on the request for clarification by the OPCD, ICC-01/04-403 (Pre-Trial Chamber I, 3 October 2007).

¹⁰⁵ *Situation in the Democratic Republic of Congo*, Request for leave to contact *ad hoc* Counsel for the Defence, ICC-01/04-425 (Office of Public Counsel for the Defence, 3 January 2008).

¹⁰⁶ *Situation in the Democratic Republic of Congo*, Decision on the “Request for leave to contact *ad hoc* Counsel for the Defence,” ICC-01/04-427 (Pre-Trial Chamber I, 4 January 2008).

OPCD also made a request to the Office of the Prosecutor in which OPCD sought “information or statements which would affect the credibility or contradict the assertions” contained in the victims’ applications.¹⁰⁷ According to OPCD, the Prosecution had refused the request on the basis that it “did not consider that the information requested was relevant, or that the OPCD had a right to exculpatory materials.”¹⁰⁸ OPCD therefore filed another submission with Pre-Trial Chamber I, requesting an order that the Prosecutor search for and disclose to the OPCD any exculpatory material falling within the ambit of Article 67(2) of the Rome Statute, which provides that “the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”¹⁰⁹ In support of its request, OPCD submitted, *inter alia*, that the “Prosecution’s disclosure obligations under [A]rticle 67(2) should be interpreted in a broad manner to include any information which contradicts or discredits the [victim] applicant’s

¹⁰⁷ See *Situation in the Democratic Republic of Congo*, Request for the Single Judge to Order the Prosecutor to disclose exculpatory materials, *supra* n. 98, ¶ 2 (summarizing OPCD’s confidential request dated 20 July 2007). In particular, OPCD requested any information which would suggest the following: “1. that the intensity of hostilities in the villages (and their immediate environs) cited in the application did not meet the requisite threshold for an armed conflict during the period of time cited in the applications; 2. that the villages mentioned in the applications or their environs may have been inhabited by persons affiliated with armed groups; 3. that the persons mentioned in the applications may have had links to armed groups; 4. that the persons mentioned in the applications may have committed criminal acts; [and] 5. any other information which would impact on their credibility.” *Id.*

¹⁰⁸ *Id.* ¶ 3.

¹⁰⁹ *Id.* ¶ 43.

assertions.”¹¹⁰ The Office also noted that, as of the date of the submission, none of the observations filed by the Office of the Prosecutor in response to victims’ applications to participate during the investigation stage of proceedings addressed the question as to whether the particular applicants met the criteria to be recognized as a victim entitled to participate before the ICC.¹¹¹ Instead, the OTP had only challenged the general right of any victim to participate in proceedings during the investigation phase, *i.e.*, before any individual suspect(s) had been identified.¹¹² In addition, OPCD stressed that it “does not have any investigative opportunities,” meaning the Office is “fully dependant at this stage on the information provided by the applicants themselves, and any further details or information which might be provided by the Prosecution.”¹¹³

On 7 December 2007, Pre-Trial Chamber I issued a decision dismissing the OPCD’s request for disclosure from the Office of the Prosecutor, holding that OPCD was not entitled to the requested material because “the fact that one or several natural or legal persons may be entitled to the procedural status of victim is not, *per se*, prejudicial to the Defence.”¹¹⁴ OPCD then filed for leave to obtain interlocutory appeal of the decision in relation to the following two issues:

¹¹⁰ *Id.* ¶ 41.

¹¹¹ *Id.* ¶ 4.

¹¹² *Id.* ¶ 6.

¹¹³ *Id.* ¶¶ 8-9.

¹¹⁴ *Situation in the Democratic Republic of Congo*, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-01/04-417, ¶ 4 (Pre-Trial Chamber I, 7 December 2007).

(i) whether the [victim] application process is a distinct procedure, unrelated to the modalities of participation of the criminal proceedings before the Court, which is not *per se* prejudicial to the Defence; and

(ii) whether the Chamber is only obliged to provide the Prosecution and the Defence with copies of the application, and is thus not obliged to provide or order the applicants to provide information extrinsic to the applications themselves.¹¹⁵

One month later, the Chamber granted OPCD leave to appeal the 3 December 2007 decision, however it defined the relevant issue on appeal as follows:

whether [A]rticle 68(3) of the [Rome] Statute can be interpreted as providing for a ‘procedural status of victim’ at the investigation stage of a situation and the pre-trial stage of a case, and:

(i) if so, whether [R]ule 89 of the Rules and [R]egulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? or

(ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with?¹¹⁶

¹¹⁵ *Situation in the Democratic Republic of Congo*, Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor,” ICC-01/04-419, ¶ 56 (Office of Public Counsel for the Defence, 13 December 2007).

¹¹⁶ *Situation in the Democratic Republic of Congo*, Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation

As of the time of this writing, these questions are pending before the Appeals Chamber.

2. *Darfur*

On 23 May 2007, the same day that Pre-Trial Chamber I authorized OPCD to respond to victims' applications to participate in proceedings arising out of the DRC situation, the Chamber took a similar decision regarding victims' applications to participate in the Darfur situation.¹¹⁷ As with its decision in the DRC situation, PTC I gave no explanation as to why it was choosing to designate OPCD for the purposes of responding to the applications rather than appointing *ad hoc* counsel under Regulation 76(1), as the Chamber had done in the DRC situation on two occasions,¹¹⁸ and as PTC II had done in the context of the situation in Uganda.¹¹⁹

Shortly after being appointed *ad hoc* defense counsel, OPCD submitted a request to Pre-Trial Chamber I in which the Office sought "an opportunity to present legal submissions on the issue of the Court's jurisdiction."¹²⁰ However, the Chamber denied the request,

86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," ICC-01/04-438, at 8 (Pre-Trial Chamber I, 23 January 2008).

¹¹⁷ *Situation in Darfur, Sudan, Situation in Darfur, Sudan*, Decision authorising 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, at 4 (Pre-Trial Chamber I, 23 July 2007) (OPCD "shall be entitled to reply to the application for participation of victims at this initial stage of the investigation.").

¹¹⁸ See *supra* n. 55 *et seq.* and accompanying text.

¹¹⁹ See *supra* n. 90 *et seq.* and accompanying text.

¹²⁰ *Situation in Darfur, Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06,

applying the same rationale that it had applied in denying previous requests from *ad hoc* defense counsel seeking to challenge the Court's jurisdiction,¹²¹ namely, that OPCD lacked standing under Article 19 of the Rome Statute to raise such a challenge.¹²²

Other than the request relating to the Court's jurisdiction, OPCD's work at the situation stage of the Darfur proceedings has largely paralleled the Office's work in the DRC situation, discussed immediately above. For example, OPCD has sought the same types of information relating to victims' applications for participation in the Darfur situation as it has sought in the DRC situation,¹²³ with no greater success in the Darfur context.¹²⁴ In addition, Pre-Trial

a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02-05-111, ¶ 25 (Pre-Trial Chamber I, 14 December 2007) (in which the Pre-Trial Chamber summarizes OPCD's confidential application dated 8 June 2007).

¹²¹ See *supra* n. 46 *et seq.* and accompanying text; n. 62 *et seq.* and accompanying text.

¹²² *Situation in Darfur, Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *supra* n. 120, ¶ 25.

¹²³ See, e.g., *Situation in Darfur, Sudan*, Public Redacted Version of Request for the Single Judge to order the production of relevant supporting documentation pursuant to Regulation 86(2)(e), ICC-02/05-95 (Office of Public Counsel for the Defence, 21 August 2007); *Situation in Darfur, Sudan*, Request for the Single Judge to order the Prosecutor to disclose exculpatory materials, ICC-02/05-97 (Office of Public Counsel for the Defence, 24 August 2007).

¹²⁴ See, e.g., *Situation in Darfur, Sudan*, Decision on the Requests of the OPCD and the Legal Representatives of the Applicants Regarding the Transmission of the Report of the Registry under Rule 89 of the Rules of Evidence and Procedure, ICC-02/05-93 (Pre-Trial Chamber I, 21 August 2007); *Situation in Darfur, Sudan*, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-110 (Pre-Trial Chamber I, 3 December 2007).

Chamber I granted OPCD leave to obtain interlocutory appeal regarding the exact same questions identified by the Chamber as eligible for appeal in the context of the DRC situation.¹²⁵ This appeal, as with the appeal in the DRC situation, remains pending at the time of this writing.

3. *Uganda*

As mentioned above, Ms. Michelyn C. St-Laurent was appointed as *ad hoc* defense counsel in March 2007 for the purpose of responding to victims' applications to participate in proceedings relating to the overall situation in Uganda.¹²⁶ As of the time of this writing, Ms. St-Laurent continues to be the only counsel appointed by Pre-Trial Chamber II in connection with the Uganda situation. However, OPCD did file observations with the Chamber in relation to a Notification by the Board of Directors of the Trust Fund for Victims¹²⁷ that it intended to undertake specific activities in the territory of Northern Uganda.¹²⁸ Specifically, OPCD submitted observations pursuant to Regulation 50

¹²⁵ *Situation in Darfur, Sudan*, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," ICC-02/05-118 (Pre-Trial Chamber I, 23 January 2008). *See also supra* n. 116 and accompanying text.

¹²⁶ *See supra* n. 90 *et seq.* and accompanying text.

¹²⁷ The Trust Fund for Victims is an independent institution established under the Rome Statute for "the benefit of victims of crimes within the jurisdiction of the [ICC], and of the families of such victims." Rome Statute, *supra* n. 4, Art. 79.

¹²⁸ *Situation in Uganda*, Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, ICC-02/04-114 (Trust Fund for Victims, 28 January 2008).

of the Regulations of the Trust Fund,¹²⁹ which provide, in part, that the Board of Directors may only undertake “specified activities” where:

the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project ... would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to [A]rticle 19, admissibility pursuant to [A]rticles 17 and 18, or violate the presumption of innocence pursuant to [A]rticle 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹³⁰

In its application seeking leave from Pre-Trial Chamber II to submit observations on the Notification, OPCD explained that the interests of justice required that the Chamber, prior to making a decision under Regulation 50, consider “observations from the parties in relation to the impact of the proposed activities on the predetermination of any issues before the Court, the fairness and impartiality of the proceedings and the rights of the Defence.”¹³¹ In addition, OPCD observed that it must be permitted to submit observations because the notification was “filed in the Uganda situation file as opposed to a specific case, and as such, there [was] no duly constituted Defence

¹²⁹ *See Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-122 (Office of Public Counsel for the Defence, 12 March 2008).

¹³⁰ Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, Reg. 50, 3 December 2005.

¹³¹ *Situation in Uganda*, Request for leave to file observations in relation to the “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential annex, ICC-02/04-122, ¶ 3 (Office of Public Counsel for the Defence, 6 February 2008).

team which is entitled to respond.”¹³² The Chamber agreed, holding that “the general component of fairness... requires those concerned by the Notification to be accorded equal procedural treatment” and acknowledging that the proposed activities of the Board of Directors “might have an impact on crucial issues before the Chamber.”¹³³ Thus, OPCD was permitted to file the observations on behalf of the general interests of defense in the Uganda situation on 12 March 2008.¹³⁴ PTC I subsequently approved the Board’s proposed activities in Uganda.¹³⁵

¹³² *Id.* ¶ 5.

¹³³ *Situation in Uganda*, Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-120, at 3-4 (Pre-Trial Chamber II, 5 March 2008).

¹³⁴ *Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-122 (Office of Public Counsel for the Defence, 12 March 2008).

¹³⁵ *Situation in Uganda*, Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification, ICC-02/04-126 (Pre-Trial Chamber I, 19 March 2008).

IV. ANALYSIS AND RECOMMENDATIONS

While it is clear that the Pre-Trial Chambers of the ICC – and indeed every organ of the Court – are still working out how various provisions of the Rome Statute and related documents are to be applied, the history outlined above demonstrates that certain adjustments are already warranted in terms of the appointment and mandate of *ad hoc* counsel to protect the rights of the defense during situation proceedings before the Court.

A. THE PRE-TRIAL CHAMBERS SHOULD RESUME APPOINTMENTS OF UNAFFILIATED LAWYERS TO SERVE AS *AD HOC* DEFENSE COUNSEL IN THE CONTEXT OF A SITUATION

As described above, the Pre-Trial Chambers of the ICC seem to have shifted away from appointing individual attorneys not otherwise affiliated with the Court as *ad hoc* counsel, instead assigning the tasks once given to those attorneys to OPCD as a whole. This practice is certainly warranted under the Regulations of the Court, which expressly provide that the Chambers may appoint counsel for the interests of defense from the Registrar's list of counsel or from OPCD.¹³⁶ However, as a practical matter, two significant factors weigh in favor of using counsel outside of OPCD to represent the interests of defense in proceedings taking place in the context of a situation.

1. Conflicts of Interest are Likely to Arise if OPCD is Appointed as ad hoc Counsel

Given the broad scope of OPCD's potential mandate, it is easy to imagine a scenario where OPCD's appointment as *ad hoc* counsel for

¹³⁶ See *supra* n. 34 and accompanying text.

the defense at the situation stage would result in conflicts of interest that could interfere with other areas of the Office's work. Consider the following example, which deals with the appointment of counsel for the general interests of the defense in the context of a "unique investigative opportunity" under Article 56:¹³⁷

[T]he fact [is] that several persons, some with conflicting defenses, may have evidence given against them during a single "unique investigative opportunity." Where the targets of the investigation are clear, separate counsel may be appointed for each potential accused. The court, however, may not know in advance the identity of those against whom evidence will be given. For this reason, "defense" counsel may be placed in the position of attempting to protect the interests of more than one potential accused, who at later stages may try to blame each other for the alleged crimes.¹³⁸

As this hypothetical suggests, a lawyer who represents the interests of all prospective accused in the context of a "unique investigative opportunity" will be involved in the collection of evidence that, depending on its use, could assist the defense of one accused while harming the interests of another accused. If OPCD were to fill this role, it is difficult to see how the Office could later provide neutral advice to two defense teams who may have different views toward the meaning of the evidence or the weight that should be assigned thereto. Furthermore, OPCD has in the past been called upon to represent an individual accused at his or her initial appearance before the Court, before the accused has had time to secure permanent defense counsel.¹³⁹ While OPCD has itself insisted that such appointments

¹³⁷ See *supra* n. 15 *et seq.* and accompanying text (quoting Article 56).

¹³⁸ Gallant, *supra* n. 9, at 23-24.

¹³⁹ See, e.g., *Prosecutor v. Germain Katanga*, Decision on the appointment of a duty counsel, ICC-01/04-01/07-52, at 2 (Pre-Trial Chamber I, 5 November

must be limited in scope and timing,¹⁴⁰ extensive participation by OPCD in proceedings at the situation phase may present conflicts of interest that could preclude even limited representation by OPCD of any individual accused arrested in the context of that situation.

Interestingly, Trial Chamber I recently dealt with the issue of potential conflicts of interest¹⁴¹ arising from the work of another unit of the ICC – the Office of Public Counsel for Victims – which is an office that shares many similarities with OPCD in terms of structure and mandate. OPCV, like OPCD, was created with the adoption of the Regulations of the Court in 2004.¹⁴² Specifically, Regulation 81 provides that the Registrar “shall establish and develop an Office of Public Counsel for victims,”¹⁴³ which shall “provide support and assistance to the legal representative for victims and to victims, including, where appropriate: (a) [l]egal research and advice; and (b) [a]ppearing before a Chamber in respect of specific issues.”¹⁴⁴ In addition, Regulation 80(4) states that a Chamber “may appoint a legal

2007) (noting “the ‘Déclaration d’acceptation de désignation’ filed by the Registry on 19 October 2007 in which Mr Xavier-Jean Keïta, Principal Counsel of the OPCD accepted appointment as duty counsel to Germain Katanga for the purpose of his first appearance before the Chamber”).

¹⁴⁰ See Xavier-Jean Keïta, Principal Counsel of the OPCD, *The Equality of Arms in International Criminal Proceedings: The Role of the Office of Public Counsel for the Defence (OPCD) at the International Criminal Court*, Joint Seminar on Int’l Criminal Law with Bars from Asia and the Pacific, Tokyo, 17-19 May 2007 (noting that OPCD’s team is too small to get “involved in any case currently in progress, as far as its facts and background are concerned”).

¹⁴¹ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, ICC-01/04-01/06-1211 (Trial Chamber I, 6 March 2008).

¹⁴² See Regulations of the Court, *supra* n. 6, Reg. 81(1).

¹⁴³ *Id.*

¹⁴⁴ *Id.* Reg. 81(4).

representative of victims where the interest of justice so require,” and may select the appointed counsel “from the [OPCV].”¹⁴⁵ As of January 2008, OPCV was “providing assistance to legal representatives in all situations and cases pending before the Court,”¹⁴⁶ and was also itself serving as the legal representative to victims in the Uganda and DRC situations.¹⁴⁷

The litigation regarding potential conflicts of interest arising from the work performed by OPCV first arose in October 2007, when OPCV filed a request with Trial Chamber I seeking to access confidential documents in the case against Thomas Lubanga Dyilo.¹⁴⁸ In response, the Trial Chamber determined that its decision on the request would depend “to a large extent on the role envisaged for [OPCV] during the trial” in the *Lubanga* case.¹⁴⁹ The Chamber therefore scheduled a status conference on the subject of OPCV’s role in the *Lubanga* proceedings and solicited related submissions from several parties, including OPCV, the Prosecutor, defense counsel for Mr. Lubanga, and the legal representatives of two sets of victims participating in the *Lubanga* case, neither of which was employed by OPCV.¹⁵⁰ Among

¹⁴⁵ *Id.* Reg. 80(4).

¹⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Submissions of the OPCV on its Role in the Proceedings, ICC-01/04-01/06, ¶ 1 (Office of Public Counsel for Victims, 7 January 2008).

¹⁴⁷ *Id.* ¶ 1.

¹⁴⁸ *Id.* ¶¶ 2-3.

¹⁴⁹ *Lubanga*, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* n. 141, ¶ 3.

¹⁵⁰ *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 146; *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Submissions for the Status Conference on 9 January 2008, ICC-01/04-01/06-1109 (Office of the Prosecutor, 7 January 2008); *Prosecutor v. Thomas Lubanga Dyilo*, Conclusions de la Defense relatives a l’“Order setting out the schedule for submissions and hearing on further subjects which require determination

the topics addressed in the parties' submissions and at the status conference was whether OPCV should be permitted to serve as the legal counsel for individual victims in proceedings, or whether the Office should be limited to providing support and assistance to non-OPCV affiliated victims' counsel and raising general issues of concern to all victims before the Court. The OPCV itself believed it had a right to perform both roles, and argued that it could prevent conflicts of interest from arising by dividing the Office into two teams: one for the representation of individual victims, and one for the provision of support to outside attorneys.¹⁵¹ Each of the other parties disagreed.¹⁵²

In March 2008, the Trial Chamber issued a decision holding, *inter alia*, that OPCV should be limited to providing "support and assistance to the legal representatives of victims and to victims who have applied to participate" in proceedings before the Court, rather than representing individual victims.¹⁵³ In explaining its decision, the Chamber expressed concern over "potential conflicts of interest that

prior to trial," ICC-01/04-01/06 (Defense, 7 January 2008); *Prosecutor v. Thomas Lubanga Dyilo*, Conclusions des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d'autres questions à déterminer avant le procès, ICC-01/04-01/06-1107 (Legal Representatives for Victims a/0001/06 to a/0003/06, 7 January 2008); *Prosecutor v. Thomas Lubanga Dyilo*, Conclusion du représentant legal de la Victime a/0105/06 sur "Order Setting out the Schedule for Submissions and Hearing on further subjects which require determination prior to Trial," ICC-01/04-01/06-1106 (Legal Representative for Victim a/0105/06, 7 January 2008).

¹⁵¹ *Lubanga*, Submissions of the OPCV on its Role in the Proceedings, *supra* n. 146, ¶¶ 32-40; *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 9 January 2008 Status Conference, ICC-01/04-01/06-T-67, 5:16-6:4 (9 January 2008).

¹⁵² *Lubanga*, Prosecution's Submissions for the Status Conference on 9 January 2008, *supra* n. 150, ¶¶ 4-5. *See also* *Lubanga*, Transcript of 9 January 2008 Status Conference, *supra* n. 151, at 5:1-5; 16: 7-25; 18: 18-23.

¹⁵³ *Lubanga*, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* n. 141, ¶ 32.

may emerge between victims represented by the Office, on the one hand, and those to whom the Office should be providing support and assistance, on the other.”¹⁵⁴ The Chamber also noted that its decision was not intended to “deter the Office from appearing before the Chamber in respect of specific issues (at the request of victims, their representatives or the Chamber)” on “issues of general importance and applicability.”¹⁵⁵

Despite substantial differences in the clients served by OPCV and OPCD, the reasoning behind Trial Chamber I’s decision to limit the role of OPCV due to potential conflicts of interest applies with equal – if not greater – force in support of limiting the role of OPCD, whose clients are individuals on trial for the most serious international crimes and the lawyers representing them. Indeed, OPCD has itself recognized that its members should have a narrow role in representing individual accused at the case stage, using arguments that apply equally to OPCD’s role at the situation phase.¹⁵⁶ For example, following a request from Pre-Trial Chamber I that OPCD temporarily step in for Mr. Lubanga’s counsel in order to file a particular brief on behalf of Mr. Lubanga, OPCD observed the following:

it is not the remit of the OPCD to address substantive issues and to join a Defense team to replace a lawyer previously chosen by the person being prosecuted: that would imply taking a position as to the facts and the merits and sharing confidential information which would prevent the Office from providing, under the

¹⁵⁴ *Id.* ¶ 31.

¹⁵⁵ *Id.* ¶¶ 33, 35.

¹⁵⁶ *See, e.g., Prosecutor v. Thomas Lubanga Dyilo*, Observations of the Office of Public Counsel for the Defence on the Decision of Pre-Trial Chamber I entitled “Decision on the defence request for extension of time,” ICC-01/04-01-06 (Office of Public Counsel for the Defence, 12 February 2007) .

same conditions of equality and equity, the same assistance to another Defense team which might be given responsibility for differing and contrary interests. The conflicts of interest would paralyse the remit which would normally be that of the OPCD.¹⁵⁷

Current OPCD Associate Counsel, Melinda Taylor, voiced a similar sentiment during a June 2006 speech given while she was serving as the sole staff member of the OPCD.¹⁵⁸ Specifically, Ms. Taylor remarked that she would like to avoid conducting “factual analysis” of particular cases, preferring that the OPCD limit itself to “conducting legal research”¹⁵⁹ because she couldn’t “afford to be conflicted from other cases.”¹⁶⁰ While the office has grown since that time, it is still not “envisaged that the office will have one lawyer per individual accused.”¹⁶¹ As the current Principal Defender, Xavier-Jean Keita has said, “OPCD is not an Office of Public Defenders, as is the case in some legal systems,” meaning that the Office is “not mandated to replace the [Defence] Counsel who are on the list held by the Registrar, or to replace and take on the role of a Defence team.”¹⁶² Interestingly, the Defense Office at the Special Court for Sierra Leone, discussed in further detail below,¹⁶³ was initially conceived on a “Public Defender model,” meaning that, unlike OPCD, the SCSL

¹⁵⁷ *Id.* ¶ 12.

¹⁵⁸ Remarks of Melinda Taylor, Associate Counsel, Office of Public Counsel for Defence at the International Criminal Court, *On Issues Encountered by the Defense Bar During the Operation of the ICTY and Warnings that the ICC Must Take Steps To Improve Their Situation*, at 3, 13 June 2006.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.*

¹⁶² Keita, *supra* n. 140, at 7.

¹⁶³ See *infra* at n. 174, *et seq.* and accompanying text.

Defense Office would represent “all accused at all stages.”¹⁶⁴ However, it “soon became apparent” that this model was impossible in the context of an international criminal court, as “there was potentially a grave conflict of interest in the Defence Office’s representing accused who are charged with many of the same crimes and who might well, therefore, implicate each other in the course of their defence.”¹⁶⁵

Again, although each of the statements by OPCD quoted above relates to the case stage of proceedings, the same arguments apply in the context of a situation, as any information gathered by an OPCD staff member through his or her participation in proceedings on behalf of future accused – i.e., because OPCD has been appointed *ad hoc* counsel at the situation stage – will potentially give rise to conflicts of interest when individual accused who are actually brought before the Court require the assistance of OPCD.

2. *The ICC as a Whole Will Benefit If OPCD is Permitted to Focus on the Office’s Legal and Logistical Support Functions*

Even if no conflicts of interest were to arise from the appointment of OPCD as *ad hoc* defense counsel during the situation phase of proceedings, the limited resources of the Office – which is staffed with a total of six individuals operating on a fixed budget¹⁶⁶ – suggest that

¹⁶⁴ John R.W.D. Jones, *et al.*, The Special Court for Sierra Leone: A Defence Perspective, 2 J. Int’l Crim. Just. 211, 213 (March 2004).

¹⁶⁵ *Id.*

¹⁶⁶ Keïta, *supra* n. 140, at 7 (“At the moment, in addition to the Principal Counsel (P5), the OPCD includes an Associate Counsel (P2), a Case Manager (P1), a Legal Assistant (P1) and an Intern, together with the valuable assistance of an Administrative Assistant, who to our great benefit is also a lawyer.”). OPCD’s budgetary allocation for the 2007 fiscal year represented less than one percent of the total allocation given to the Registry

its members should focus on supporting independent defense counsel and serving as a voice for the general interests of defense at the ICC, rather than engaging in the representation of potential or known accused. Notably, Trial Chamber I came to a similar conclusion with respect to the Office of Public Counsel for Victims in its March 2008, saying:

during this early stage in the Court's existence it is critical that [OPCV] concentrate[] its limited resources on the core functions given to it under the Rome Statute framework which... is to provide support and assistance to the legal representatives of victims and to victims who have applied to participate (rather than representing individual victims).¹⁶⁷

As with the Chamber's findings regarding potential conflicts of interest arising from OPCV's work, this logic applies with equal or greater force in the context of OPCD, given the different nature of its client base. Without proper support and assistance, the lawyers appointed or selected to represent the accused before the ICC will likely face an unequal playing field as compared to the Office of the Prosecution, which will have been investigating a particular situation for months or years before any individual is arrested and will have experience dealing with common issues of law arising across cases, such as joint criminal enterprise, command responsibility, and the elements of crimes covered by the Rome Statute. Furthermore, staff members of the OTP will be well-versed in the operations and procedures of the ICC, which represents a unique mix of common law

as a whole. *See* ICC Assembly of State Parties, Proposed Programme Budget for 2008 of the International Criminal Court, ICC-ASP/6/8, at 53, 119 (25 July 2007).

¹⁶⁷ *Lubanga*, Decision on the role of the Office of Public Counsel for Victims and its request for access to documents, *supra* n. 141, ¶ 32.

and civil law traditions and thus operates unlike any domestic court in which a defense lawyer may have previously practiced.

Notably, the notion that accused and their counsel should receive institutionalized support in the context of international criminal bodies is a relatively new concept. While the Tokyo and Nuremberg tribunals established in the wake of World War II guaranteed a right to counsel, they otherwise “paid very little attention to the rights of the accused.”¹⁶⁸ Decades later, when the international criminal tribunals for the former Yugoslavia and Rwanda were created by the United Nations Security Council, defense rights received greater attention and improved over the life of the tribunals,¹⁶⁹ but no permanent organ was created within the tribunals to represent the rights of defense.¹⁷⁰ This presented serious problems for accused and their counsel. In a domestic system, difficulties arising from the absence of an institutionalized role for defense within the judiciary is often overcome

¹⁶⁸ Alison Thompson & Michelle Staggs, *The Defence Office at the Special Court for Sierra Leone: A Critical Perspective*, UC Berkeley War Crimes Studies Center, at 14, 26 April 2007. *See also* Skillbeck, *supra* n. 21, at 71 (“At the Nuremberg trials at the conclusion of the war in Europe, the defence lawyers found themselves arguing before a victors’ tribunal in a system that they did not understand.”).

¹⁶⁹ Thompson & Staggs, *supra* n. 168, at 14. *See also* Mark Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 *New Eng. L. Rev.* 949, 950-51 (Summer 2003) (“The position of defense counsel of the ICTY has improved considerably since the Tribunal’s first case. The ICTY has made important changes to its rules and procedures to alleviate some of the financial and work burdens that initially plagued defense counsel appearing before it.”); Skillbeck, *supra* n. 21, at 73 (noting that, when “the first defendant was to be tried before the ICTY, it is fair to say that there had been hardly any consideration of the rights of the defence,” but explaining that issues such as the quality of defence representation improved over the years the *ad hoc* tribunals have been in operation).

¹⁷⁰ Skillbeck, *supra* n. 21, at 73-74.

through the development of local defense bars, which in turn “provide education, information, and an ‘institutional memory’ for new counsel or counsel taking on a new type of case.”¹⁷¹ But in the context of an international criminal body – and in particular one such as the ICC which has jurisdiction spanning the globe – the geographic and cultural disparities among defense counsel have meant that “defence teams often function very independently of each other,” and thus they do not “enjoy the benefits of shared institutional knowledge built up over the years, and the advantages of economies of scale.”¹⁷² Such disadvantages are exacerbated by the nature of the charges tried in international criminal bodies, the defence of which requires “[e]xtensive investigations, sophisticated legal research and argumentation as well as a massive degree of expertise and resources.”¹⁷³

The first international criminal body to create a permanent role for the defense within the structure of the court itself was the Special Court of Sierra Leone (SCSL). Specifically, the SCSL Defense Office was established in 2004 for the “purpose of ensuring the rights of suspects and accused” at the Special Court.¹⁷⁴ The authors of a comprehensive report on the Defence Office describe the benefits of the permanent office as follows:

The idea of employing several full-time lawyers in a permanent office is designed to offer a measure of institutional support to the independent defence teams, a feature that has been absent in other international tribunals. This institutional support is meant to parallel,

¹⁷¹ Gallant, *supra* n. 9, at 42.

¹⁷² Remarks of Melinda Taylor, *supra* n. 158, at 2-3.

¹⁷³ Thompson & Staggs, *supra* n. 168, at 16.

¹⁷⁴ Special Court for Sierra Leone, Rules of Procedure and Evidence, *as amended* 29 May 2004, R. 45.

albeit on a much smaller scale, the support available to senior prosecuting attorneys, who are able to draw upon a pool of staff at the [Office of the Prosecutor]. It offers the Defence so-called “repeat player” benefits, such as institutional knowledge on the conflict and patterns of atrocities, legal expertise on motions and other cross-cutting issues. In terms of their administrative functions, [Defence Office staff members] are also tasked with assisting the defence teams in arranging the logistics of up-country investigative trips, facilitating international travel arrangements, ensuring proper access to office space and liaising with the different sections of the court on behalf of counsel.¹⁷⁵

In addition, the SCSL Defence Office has provided “an important voice regarding issues of common interest to defense with other organs and units of the Special Court and the outside world.”¹⁷⁶ For example, the Defence Office has played an important role in overseeing detainee welfare, which has been particularly useful in the context of the SCSL because the majority of the defense lawyers were not based in Freetown.¹⁷⁷ At the same time, the Defence Office has advocated for amendments to the SCSL Rules of Procedure and Evidence and lobbied for adequate funding for defense counsel, experts, investigators, and other fees necessary to ensure accused received fair trials in the Special Court.¹⁷⁸

¹⁷⁵ Thompson & Staggs, *supra* n. 168, at 22. *See also* Groulx, *supra* n. 21, at 24 (“[T]here is no international bar association in charge of qualifying lawyers. This void has prevented lawyers from receiving adequate training, support and advocacy at the international level.”).

¹⁷⁶ Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone*, Volume 16, No. 8(A), at 22, September 2004.

¹⁷⁷ Thompson & Staggs, *supra* n. 168, at 49.

¹⁷⁸ *Id.* at 56. *See also* Human Rights Watch, *Bringing Justice*, *supra* n. 176, at 22 (“The principal defender [of the SCSL Defence Office] has advocated for amendments of the SCSL Rules with the judges and for additional resources for the Defense Office with the Registry.”).

As mentioned above, the creation of a permanent defense office in the context of the ICC was supported by many states, non-governmental offices, and other commentators well before the Regulations of the Court were passed establishing OPCD.¹⁷⁹ One such advocate described the importance of the proposed office as follows:

A Bureau of Defense Counsel would add balance to the institutional arrangements of the court. As the ICC Statute stands, the prosecutor will have an effective voice in issues such as revising the Rules of Procedure and Evidence, the regulations of the court, the ongoing budgetary process, and other issues of overall policy and day-to-day operations. Indeed, the Presidency, the three-judge administrative organ of the court, “shall coordinate with and seek the concurrence of the Prosecutor on all [administrative] matters of mutual concern.” Defense counsel and others concerned with issues of fairness to the accused do not have an institutional voice in the system.¹⁸⁰

With the creation of OPCD, this institutional voice has been established within the framework of the world’s first permanent international criminal court. Moreover, the members of OPCD embrace the idea of providing institutionalized support to all accused coming before the ICC.¹⁸¹ Indeed, the Office’s stated goal is to provide

¹⁷⁹ See *supra* n. 21 *et seq.* and accompanying text.

¹⁸⁰ Gallant, *supra* n. 9, at 42.

¹⁸¹ Remarks of Melinda Taylor, *supra* n. 158, at 2 (saying that the “main challenge of [OPCD] will be to attempt to alleviate the structural, political and procedural advantages that the Prosecution enjoys by virtue of the fact that it is a unified organ of the Court.”). Ms. Taylor went on to observe: “Merely because the phrases fair trial, and rights of the accused appear several times in the Statute and the Rules does not automatically mean that the trials will actually be fair. Rather, fairness is often in the details. For that reason, it is essential that defence interests are represented at a range of levels – from the lofty precepts of justice to the banal details of cafeteria

“the same standard of assistance to any person entitled to legal assistance, to any Counsel who requests it, to any defence team which requires its assistance, without its members being faced with conflicts of interest, and in particular without any discrimination whatsoever between those who have the right to use its services.”¹⁸² If the Office fails to provide assistance on these terms, the Office would become, as OPCD’s Principal Counsel Mr. Xavier-Jean Keïta remarked in May 2007, “irreparably tainted.”¹⁸³

Yet, if OPCD is required to represent the interests of future accused in proceedings taking place at the situation phase of the Court’s operations in a particular country, it is less likely to have the time and resources to devote to providing legal and logistical support to independent defense counsel. In fact, even if the appointment of OPCD as *ad hoc* counsel were limited to responding to victims’ applications to participate during the situation stage of proceedings – meaning counsel unaffiliated with the ICC could be used as *ad hoc* counsel in Article 56 proceedings¹⁸⁴ and other instances where the interests of future accused are at stake – OPCD could nevertheless be prevented from fulfilling its support functions, as more than 250 victims have already applied to participate in the situations in DRC, Uganda, and Darfur, and there is no reason to believe this number will decrease over time or as the ICC opens investigations in new countries.¹⁸⁵ Furthermore, as the above description of OPCD’s

access, and library cards.” *Id.*

¹⁸² Keïta, *supra* n. 140, at 7.

¹⁸³ *Id.*

¹⁸⁴ *See supra* n. 15 *et seq.* and accompanying text.

¹⁸⁵ Indeed, the ICC Registrar indicated in its proposed programme budget for 2008 that an estimated 600 victims’ applications would be filed by the end of this year. *See Proposed Programme Budget for 2008, supra* n. 166, at 114.

experience as *ad hoc* counsel to date demonstrates,¹⁸⁶ serving as counsel for the interests of defense for the purpose of responding to victims' applications to participate at the situation stage of proceedings is a difficult process, as very little information has been made available to *ad hoc* defense counsel for the purposes of evaluating the applications, meaning OPCD was not only tasked with submitting observations on each victim's application, but also forced to file multiple submissions with the Court seeking access to the information necessary to make those observations.¹⁸⁷ While this state of affairs may change with the decision of the Appeals Chamber on OPCD's interlocutory appeals in the DRC and Darfur situations, it is likely to remain the case that responding to victims' applications alone will be a time- and resource-intensive process for whomever is appointed to serve as *ad hoc* defense counsel in relation to those applications at the situation stage. If the appointed counsel continues to be OPCD, the Office would necessarily have significantly less time and fewer resources to devote to other aspects of its mandate.

If OPCD is distracted from its role as a defense-support unit, independent defense counsel representing accused before the Court would not only be placed at a disadvantage vis-à-vis the Office of the Prosecutor in terms of preparation time, but the financial costs of each non-OPCD defense attorney appointed by the ICC, which are borne by the Court itself, will likely be greater absent the legal and logistical assistance of OPCD.¹⁸⁸ On the other hand, if the ICC were to revert to contracting with individual lawyers for purposes of serving as *ad hoc* defense counsel during situation-related proceedings, OPCD could assist those attorneys, as well as the defense teams representing known

¹⁸⁶ See *supra* n. 97 *et seq.* and accompanying text.

¹⁸⁷ See *supra* n. 98 *et seq.* and accompanying text.

¹⁸⁸ Rome Statute, *supra* n. 4, Art. 67(1)(d).

accused in cases before the Court. In addition, OPCD would have the available resources to continue to work on behalf of the general interests of the defense during the situation stage of proceedings, as it did in the Uganda situation with respect to the Notification by the Board of Directors for the Trust Fund for Victims.¹⁸⁹ This is the model currently followed by the recently established Criminal Defence Support Section of the Bosnian War Crimes Chamber, which has an office whose members are devoted to providing “high-quality advice and research to counsel who require it,”¹⁹⁰ but who do not represent individual accused, be they potential or known.¹⁹¹ It should also be the model employed by the ICC.

¹⁸⁹ See *supra* n. 128, *et seq.* and accompanying text.

¹⁹⁰ Thompson & Staggs, *supra* n. 168, at 9.

¹⁹¹ *Id.* See also Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, Vol. 18, No. 1(D), at 23, February 2006 (“OKO offers essential support to the defense in two ways. First, OKO provides assistance directly to defendants (for example, about how to select a qualified defense advocate). Second, OKO provides legal and administrative support to defense advocates. To that end, the defense support provided by OKO is organized into five regional teams, each consisting of one Bosnian lawyer, one Bosnian intern and one international intern (OKO recently received funding for a sixth team to address Srebrenica cases). The respective teams provide advice to individual attorneys defending cases before the State Court and assist with the preparation and presentation of legal arguments, and there is a consultant budget for the payment of experts as the need arises in specific cases.”). Human Rights Watch explains that the creation of the OKO was critical for ensuring the equality of arms between the prosecution and the defense in cases coming before the War Crimes Chamber, particularly in light of the “significant international presence within the Special Department for War Crimes to facilitate effective prosecutions.” *Id.* at 22.

B. THE COURT SHOULD STRIVE TO MAINTAIN THE SAME COUNSEL IN PROCEEDINGS RELATING TO THE SAME SITUATION, AND OTHERWISE ADOPT A MORE FLEXIBLE APPROACH TO INFORMATION SHARING AMONG COUNSEL

Assuming that *ad hoc* defense counsel is appointed from the Registrar's list of independent attorneys not otherwise affiliated with the Court, it would be ideal if the same attorney could serve as *ad hoc* counsel throughout the proceedings in a given situation. This would serve the cause of efficiency, as newly appointed counsel most likely will not be immediately familiar with the Court's procedures in relation to issues such as victim participation at the situation stage. At the same time, allowing the same attorney or team of attorneys to serve as *ad hoc* counsel in a situation would likely increase the quality of representation, as experienced counsel will be better able to anticipate or identify issues likely to affect the interests of future accused.

Of course, we recognize that the Chamber may occasionally find cause to terminate its contract with a particular attorney during the situation phase of proceedings, and it is also possible that appointed counsel may be unable to continue in his or her role over a long period of time. Under such circumstances, we recommend that the newly appointed attorneys not be automatically barred from communicating with former *ad hoc* counsel in the same situation, as seen in the DRC situation.¹⁹² As an initial matter, it is not altogether clear why Pre-Trial Chamber I concluded that Mr. Tsimanga – the first lawyer appointed in the DRC situation to respond to victims' application on behalf of future accused – could voluntarily contact OPCD, but that OPCD could not contact Mr. Tsimanga.¹⁹³ In addition, it seems that, although

¹⁹² See *supra* n. 105 *et seq.* and accompanying text.

¹⁹³ See *supra* n. 106 and accompanying text.

confidential information must remain protected, there may be compelling reasons to permit some level of communication between and among attorneys appointed as *ad hoc* counsel in the situation stage. Thus, under circumstances where a change in *ad hoc* counsel is required within the same situation, the Chambers should give due consideration to the new attorney's request to contact his or her predecessor.

C. THE MANDATE OF EACH *AD HOC* DEFENSE COUNSEL SHOULD BE CLEARLY DEFINED AT THE TIME OF THE APPOINTMENT

Regardless of whether *ad hoc* counsel is appointed from within OPCD or from a list of independent counsel unaffiliated with the ICC, it is critical that the Pre-Trial Chambers clearly define the mandate of *ad hoc* counsel at the time of appointment. As seen in the Darfur situation, the attorney appointed as *ad hoc* counsel interpreted his mandate as being much broader than intended by the Pre-Trial Chamber, which in turn led to lengthy disputes regarding the attorney's fees. The language of the PTC's appointment had authorized Mr. Shalluf "to represent and protect the general interests of the defence in the situation in Darfur, Sudan during the proceedings pursuant to [R]ule 103 and the Decision."¹⁹⁴ Mr. Shalluf read the authorization "to represent and protect the general interests of the defence" as including, *inter alia*, requesting leave to attend meetings being arranged by the Office of the Prosecutor in Sudan.¹⁹⁵ However, the PTC saw the counsel's mandate as limited to addressing issues specifically arising out of the Rule 103 proceedings.¹⁹⁶ Ultimately, the Chamber deemed Mr. Shalluf to have engaged in "frivolous and

¹⁹⁴ *Situation in Darfur, Sudan*, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, *supra* n. 57, at 6.

¹⁹⁵ *See supra* n. 69 and accompanying text; n. 79 and accompanying text.

¹⁹⁶ *See supra* n. 71 *et seq.* and accompanying text.

vexatious” actions, suspended his pay, and terminated his contract with the Court.¹⁹⁷

Given that Mr. Shalluf was the first lawyer to be appointed as *ad hoc* defense counsel pursuant to Rule 103, the language of the Chamber’s appointment authorizing him to represent the “general interests of the defence” during those proceedings, and the absence of any further instructions regarding the limits of his role, Mr. Shalluf’s interpretation of his mandate does not seem entirely unreasonable. While the suspension of pay, or the threat thereof, may be a valuable disciplinary tool, it could also undermine the independence of counsel, where a counsel has legitimate questions, for example, regarding his role/mandate and seeks to represent defense interests vigorously in accordance with the Professional Code of Conduct.¹⁹⁸ Greater clarity regarding the limits of counsel’s role would help avoid the result seen in the Darfur situation without running the risk of limiting counsel’s actions legitimately believed to be in the interest of future accused.

D. ALTHOUGH *AD HOC* COUNSEL LACKS STANDING TO CHALLENGE JURISDICTION AND ADMISSIBILITY AT THE SITUATION STAGE, PRE-TRIAL CHAMBERS LIKELY HAVE AUTHORITY TO MAKE SUCH DETERMINATIONS *PROPRIO MOTU* WHERE WARRANTED

As explained above, *ad hoc* counsel in both the DRC and Darfur situations were rejected in their attempts to challenge the jurisdiction of the Court and/or the admissibility of the situation.¹⁹⁹ In its responses

¹⁹⁷ See *supra* n. 83 *et seq.* and accompanying text.

¹⁹⁸ See ICC Code of Professional Conduct for Counsel, *supra* n. 79.

¹⁹⁹ See *supra* n. 46 *et seq.* and accompanying text; n. 62 *et seq.* and accompanying text; n. 120 *et seq.* and accompanying text.

to these requests, PTC I has cited Article 19 of the Rome Statute,²⁰⁰ which provides, in relevant part, as follows:

2. Challenges to the admissibility of a case ... or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under [A]rticle 58...²⁰¹

Specifically, the Chamber has repeatedly concluded that, from the perspective of the defense, only a known accused or the known target of a warrant or summons to appear may raise challenges to the Court's jurisdiction and/or admissibility.²⁰²

While the plain text of Article 19(2) supports the Chamber's interpretation, it should be noted that the PTC itself likely possesses inherent authority to ensure that jurisdiction is present in any given situation. Indeed, as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia determined in the *Tadić* case, the power of a court to determine its own competence is a "major part" of the "incidental or inherent jurisdiction of any judicial or arbitral tribunal," meaning that the power "does not need to be expressly provided for in the constitutive documents of those tribunals."²⁰³ Thus, although it is difficult to envision the Prosecution pursuing an entire investigation – as opposed to an individual case – that is clearly beyond the ICC's jurisdiction, the Pre-Trial Chamber is not without power to act in the event that such a situation was referred

²⁰⁰ See *supra* n. 48 and accompanying text; n. 66 and accompanying text.; n. 122 and accompanying text.

²⁰¹ Rome Statute, *supra* n. 4, Art. 19.

²⁰² See *supra* n. 48 and accompanying text; n. 66 and accompanying text.; n. 122 and accompanying text.

²⁰³ *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *supra* n. 2, ¶ 18.

to the Court and taken up by the Prosecutor.²⁰⁴ In addition, according to Pre-Trial Chamber I, the Court has an obligation to ensure that every *situation* meets the so-called “gravity threshold” of Article 17(1)(d), a prerequisite to admissibility under the Rome Statute.²⁰⁵ While the Chamber did not specify when or how this analysis would be conducted for any given situation, it is conceivable that the PTC could examine the gravity of a situation pursuant to Article 19(1), which provides that the Court “may, on its own motion, determine the admissibility of a case in accordance with [A]rticle 17.”²⁰⁶ As with jurisdiction, it may be difficult to imagine a situation so lacking in gravity that the PTC will feel the need to act *proprio motu* to analyze whether Article 17(1)(d) has been met at the investigation stage of

²⁰⁴ Notably, in the event that the Prosecutor seeks to proceed with an investigation initiated under his *proprio motu* powers, the Pre-Trial Chamber is required to satisfy itself of the Court’s jurisdiction before authorizing the investigation under Article 15. *See* Rome Statute, *supra* n. 4, Art. 15(4).

²⁰⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Prosecutor’s Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8, ¶ 44 (Pre-Trial Chamber I, 10 February 2006) (“According to a contextual interpretation, the Chamber observes that the gravity threshold provided for in [A]rticle 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision.”). Article 17(1)(d) provides that “the Court shall determine that a case is inadmissible where: ... [t]he case is not of sufficient gravity to justify further action by the Court.” Rome Statute, *supra* n. 4, Art. 17(1)(d). For further reading on the purpose and application of the “gravity threshold” in the ICC, *see* War Crimes Research Office, *The Gravity Threshold of the International Criminal Court*, March 2008, available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonGravityMarch2008.pdf?rd=1>.

²⁰⁶ Rome Statute, *supra* n. 4, Art. 19(1). Although Article 19(1) uses the term “case,” as opposed to “situation,” the Pre-Trial Chamber’s determination that Article 17(1)(d) applies at both the situation and the case phase of proceedings suggests that the Chamber would be able to examine the gravity of either a situation or a case on its own motion under Article 19(1).

proceedings. Nevertheless, it is important to stress the Chamber's power to protect the rights of future accused, and the resources of the Court, in the event that the Prosecutor is investigating a situation that clearly lies beyond the scope of the Rome Statute.

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PROTECTING THE RIGHTS OF FUTURE ACCUSED DURING THE INVESTIGATION STAGE OF INTERNATIONAL CRIMINAL COURT OPERATIONS

The Rome Statute and other constitutive documents of the International Criminal Court (ICC) include a variety of provisions aimed at protecting the fair trial rights of the defense, including certain provisions that safeguard the rights of *future* accused during the investigative stage of the Court's operations. Such provisions are necessary because of the unique manner in which the ICC simultaneously possesses jurisdiction over a "situation," *i.e.*, an entire country or region of a country in which a vast array of atrocities may have occurred, and individual "cases," *i.e.*, a particular accused charged with a particular crime or crimes. Proceedings taking place in the context of a situation, such as those regarding victim participation or evidentiary issues, may affect the cases against individual accused yet to be identified by the Court, and thus the governing documents of the ICC permit the appointment of so-called "*ad hoc* defense counsel" to represent the interests of these future accused.

This report looks at the provisions created for the purpose of safeguarding the rights of future accused before the Court, the drafting history of those provisions, and the approach adopted to date by the ICC Pre-Trial Chambers in interpreting those provisions. We then offer recommendations as to how the practices of the ICC might be improved to more fully ensure that the rights of future accused are protected during the situation phase of proceedings, as protecting these rights is critical to guaranteeing the fundamental right to a fair trial for those accused eventually charged and brought before the ICC.



AMERICAN UNIVERSITY

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Washington College of Law
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