Defence counsel in international criminal law

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THE RIGHT TO LEGAL ASSISTANCE

2.1 INTRODUCTION

It has been argued that a criminal 'defendant needs a lawyer as urgently as a sick man needs a doctor, and in many instances even more urgently, for while nature often heals the sick without outside aid, it seems to have little concern for the plight of the accused.'[1] The stakes are generally high for an accused in criminal proceedings. He may lose his liberty even before a verdict is reached.[2] In addition, an often powerful state will be his opponent. Therefore, the accused needs a professional to counterbalance the prosecution side, face the judges, help him defend himself against the allegations, and advise him on any available defence strategies.

In international criminal proceedings, a prosecutor charges the accused on behalf of the international community.[3] The seat of an international criminal court often being remote from the crime scenes under its jurisdiction,[4] while in custody accused and suspects, being far away from their relatives, remain in considerable isolation.[5] Cases brought before international criminal courts are generally complex, because of the crimes involved and the accused often being held responsible for crimes committed by persons other than himself or his co-perpetrators, such as his subordinates. Upon conviction, long sentences are likely to be imposed. All these circumstances make adequate legal assistance at international criminal courts a *sine qua non*, the right of an accused to conduct his own defence notwithstanding.

The right to have legal assistance in criminal proceedings is widely recognized as a fundamental human right. It is enshrined in the Statutes of international criminal courts.[6] Those provisions bear a strong resemblance to related provisions of international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR)[7] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[8] The ICTY's first Annual Report

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[1] Fellman, David, The Defendant's Rights, Rinehart & Company, Inc., New York, 1958, p. 112.

[2] Where the death penalty is legitimate, he may even lose his life.

[3] Cf. also *infra*, Chapter IV, paragraph *4.3.2*.

[4] This is the case for the ICTY, the ICTR and the ICC.

[5] After being sentenced by an international criminal court, most accused will also be detained in a different country than their home country.

[6] Article 21(4) of the ICTY Statute, Article 20(4) of the ICTR Statute and Article 67(1) of the ICC's Rome Statute,

[7] See Article 14(3) of the ICCPR.

[8] See Article 6(3) of the ECHR. Cf. also Article 7(1)(c) of the African Charter on Human and Peoples' Rights (ACHPR), adopted 27 June, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct., 1986. Article 7 of the African Charter provides that 'the right to defence, including the right to be defended by counsel of his choice' is an element of an individual's right to have his cause heard; and, Article 8(2)(d-e) of the American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22

emphasized that 'the rights of the defence, including the right to counsel regardless of means, are fully safeguarded'.[9] The fair trial provisions of the Statutes of the *ad hoc* Tribunals merely provide minimum guarantees. They entitle the accused to conduct his defence in person; or, through legal assistance of his choice; to be informed, if he has no legal assistance, of this right; and, to be assigned legal assistance where the interests of justice so require, and free if the accused is indigent.

Although legal assistance is not a new phenomenon and forms of legal assistance have long been existent,[10] the right to be represented by a defence counsel in criminal cases, even for free, has not always been self-evident. To provide its context, paragraph 2.2 portrays how this right developed in Anglo-American countries with a common law tradition and in European continental countries with a civil law tradition.

According to the ECHR, courts must 'ensure that the accused had the benefit of a fair trial, including an opportunity for an adequate defence.'[11] How to tailor legal assistance so that it will be adequate in the special context of international criminal proceedings is a complicated issue. The majority of accused apply for legal assistance provided by the court. According to the ECHR, courts should take 'measures, of a positive nature, calculated to permit the officially-appointed lawyer to fulfil his obligations in the best possible conditions'.[12] This Chapter examines whether or not international criminal courts provide the proper conditions for legal assistance to be effective.

The costs involved in conducting international criminal cases are intrinsically high. Not only their complexity and length account for this, but also the costs of translation and of travel involved. Human rights courts have established that courts should ensure that the right to legal assistance is not merely theoretical, but that it is practical and effective, and independent of formalistic requirements.[13] It is an important challenge for international criminal courts to ensure this. It falls to be considered as to what the legal representation of an accused should encompass as an effective minimum. More than one defence counsel may be necessary to safeguard an effective right to legal assistance in international criminal proceedings. What a defence team in international criminal proceedings consists of, particularly under the legal aid system, is examined in paragraph 2.3. Remuneration of defence counsel under the legal aid system of international criminal courts is also addressed.

The right to legal assistance involves having competent counsel. As a relatively new form of justice, it may be a first-time experience for many defence

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November 1969, entered into force 18 July 1978. Cf. also ECHR, *Lala/ Pelladoah v. The Netherlands* (Appl. No. 14861/89), 22 September 1994, § 34.

[9] ICTY First Annual Report (UN Doc. A/49/342), 29 August1994, par. 23.

[10] Cf. for instance, Note, 'An Historical Argument for the Right to Counsel during Police Interrogation', 73 *Yale Law Journal* (1964), May 1964, pp. 1000-1057, p. 1019; Armbrüster, Klaus, *Die Entwicklung der Verteidigung in Strafsachen* (Berlin: Duncker & Humblot, 1980), p. 31.

[11] ECHR, *Goddi v. Italy* (Appl. no. 8966/80), 9 April 1984, § 31.

[12] For instance, a court could adjourn a hearing to grant a lawyer 'time and facilities […] to study the case-file, prepare his pleadings and, if appropriate, consult his client' as prescribed by Article 6(3)(b) of the Convention. *Idem.*

[13] See *ibid.*, § 27; *Lala/ Pelladoah*, *supra* note 8, § 34. See also ECHR, *Artico v. Italy* (Appl. no. 6694/74), 13 May 1980, § 33.

counsel to conduct an international criminal case. Paragraph 2.5 examines how international criminal courts can ensure that defence counsel is competent and sufficiently able to provide adequate representation in international criminal proceedings.

The fair trial provisions of the Statutes of international criminal courts further entitle an accused to communicate with counsel of his own choosing. The degree to which the right to counsel of his own choosing applies to an accused who receives legal aid from an international criminal court is questionable. This will be addressed in paragraph 2.6. The degree to which an accused is enabled to communicate with his defence counsel is determined in paragraph 2.7.

2.2 HISTORICAL BACKGROUND OF THE RIGHT TO LEGAL ASSISTANCE

2.2.1 The Common Law System

In England, for centuries, according to common law, if no points of law needed to be discussed, ordinary criminal defendants were not allowed the assistance of defence counsel.[14] They were deemed to be better off without 'the artificial Defence of others speaking for them'. It was considered 'more moving and convincing' to let defendants speak on their own behalf.[15] Additionally, it was believed that a person's lies would be exposed when he would be put to trial and would have to speak. Lawyers would interfere with the truth if defendants were to hide behind them.

However, the 1696 Treason Trials Act enshrined defence rights for persons accused of Treason.[16] It obliged the court to assign up to two defence counsel on the request of the accused. Note that "assign" in this context does not mean that the court would pay for counsel. In this era, the accused himself was expected to pay. In addition, counsel was only allowed to assist the accused in dealing with the legal aspects of his case. He would cross-examine witnesses while the accused was supposed to answer all questions on facts. Defence counsel could assist the accused in the pre-trial as well as the trial phase. Defence counsel were being allowed in treason cases, because professional prosecution counsel conducted them. In its Preamble, the Treason Trials Act provided that an accused of high treason "should bee justly and equally tried, and […] should not bee debarred of all just and equal Means for Defence of their Innocencies".[17] This portrays an early notion of the principle of equality of

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[14] See Langbein John, H., *The Origins of Adversary Criminal Trial* (Paperback), (New York: Oxford University Press, 2005), pp. 10 and 11.

[15] Hawkins, William, *A Treatise of the Pleas of the Crown: or A System of the Principal Matters Relating to that Subject, Digested under their Proper Heads. Vol. II* (London: In the Savoy, 1721), p. 400. These passages of Hawkins are also cited by Langbein (2005), *supra* note 14, pp. 33-36.

[16] An Act for regulateing of Tryals in Cases of Treason and Misprision of Treason, 7 Wil. 3., c.3 (1696), available at www.british-history.ac.uk/report.asp?compid=46810, lastly visited 13 February 2007.

[17] In order for him to receive useful advise from his counsel, the accused was also entitled to a copy of the indictment, but not to obtain the witnesses' names. See *supra* note 16, 7 & 8 Will. 3, c. 3 (1696).

arms. No prosecution counsel participated in ordinary felony cases in this period.[18] Private prosecution was undertaken by victims, next of kin or by a jury of accusation. At regular trials, the "complaining witness" informed the jury of the alleged crime.[19] Only because treason was a crime against the King, a special procedure was followed.[20] In such cases there was little trust in the impartiality of judges (who might rather please the King than the defendant) to watch over the defendant's rights.[21] An additional reason for granting the right to defence counsel in these cases, was the complexity inherent to this crime.[22]

Towards the 1730-ies, the prosecution of ordinary felony cases in England became professionalized. Prosecution solicitors conducted pre-trial preparations[23] and prosecution counsel started participating in trials.[24] However, prosecutorial evidence, in part, because of the use of so-called crown witnesses, became increasingly unreliable.[25] For a short while, defence counsel being prohibited, but prosecution counsel and solicitors becoming active, the accused was in a far worse position than his adversary. This made judges keen to balance the position of the defence and prosecution.[26] Eventually, accused of felonies became entitled to defence rights, including the right to have defence counsel, as well. But, defence counsel initially only participated where legal matters were at stake and where his skills were required.[27] He was not allowed to address the jury or to comment on the facts.[28] Only from the 19th century onwards, did the use of defence counsel in trials become significant.[29] From 1836 onwards, all restrictions on defence counsel and his acting on behalf of the accused were removed. 'Criminal trials became', in Langbein's words, 'an opportunity for defense counsel to test the prosecution case.'[30] It was no longer the accused who would speak at his trial, but his lawyer on his behalf.

In the United States, the right to counsel in federal courts was derived from the Sixth Amendment[31] of the American Constitution.[32] An unqualified right to

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[18] Cf. Langbein John, H., 'The Origins of Public Prosecution at Common Law', 17 *American Journal of Legal History* (1973), pp. 313-335, pp. 316-317.

[19] See *ibid.*, pp. 317-318. The investigation of crimes and other prosecutorial roles, such as binding witnesses and orchestrating prosecution, were performed by so-called "Justices of the Peace" at least from the 16th Century onwards, when the Marian Statutes (1554, 1555) came into force. These Justices of the Peace would bind the private accuser to attend trial and give evidence. See *ibid.*, p. 319 *et seq*.

[20] As Treason was a crime against the King, and as the court belonged to the King, he himself could not be a prosecutor in his own court. See Langbein *supra* note 14, p. 12 in footnote 14.

[21] See Langbein *supra* note 14, p. 32.

[22] See *ibid.*, p. 85.

[23] *Ibid.*, pp. 111 *et seq*.

[24] *Ibid.*, pp. 147 *et seq*.

[25] Ibid, pp. 158-165 and 168.

[26] *Ibid.*, p. 168.

[27] *Ibid.*, p. 168.

[28] *Ibid.*, p. 296.

[29] Ibid, p. 170.

[30] *Ibid.*, p. 310.

[31] The first ten amendments to the US Constitution USA are the "Bill of Rights". It was proposed on 8 June 1789 and passed by Congress 25 September 1789.

[32] See *Powell v. Alabama*, 287 U.S. 45 (1932). It should be noted that the Constitution was at first only applied to cases at federal level, not to state level courts. See, for instance, *Betts v. Brady*, 316 U.S. 455

counsel in state courts was derived from the 14th Amendment's right to due process, at first only in capital cases,[33] later in all felony cases.[34] It was acknowledged that 'lawyers in criminal courts are necessities, not luxuries.'[35] Therefore, since the 1960-ies, the right to legal assistance in the United States applies also to those who cannot afford to pay for it.[36] According to the Supreme Court in *Gideon v. Wainwright*: '[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'[37] In *Argersinger v. Hamlin*, the Supreme Court decided that the right to freely assigned counsel applied to all offences involving a prison sentence, including petty offenses and misdemeanors, as the issues involved in any such cases could be highly complicated.[38] The Court considered this broad provision of legal aid to be affordable.[39] According to Justice Stevens in *Padilla*, it is "the hallmark of due process" for a citizen to have access to counsel to protect him 'from official mistakes and mistreatment'.[40] Merely assigning counsel is not sufficient to guarantee effective assistance and adequate preparation of the trial.[41] Competent counsel should be assigned to the accused.[42] However, as 'advocacy is an art and not a science', it is deemed that the professional judgment of a lawyer should not too readily be mistrusted.[43]

2.2.2 The Civil Law System

On the European continent, during the Middle Ages, accused in criminal trials were not allowed to have lawyers representing their interests. Accused were supposed to

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(1942), at 461. It took states a while longer to take up this right in their constitutions, starting from 1774 in New Hampshire until 1868 in North and South Carolina. See *Betts v. Brady*, at 466.

[33] *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Betts v. Brady*, *supra* note 32, at 462. In *Betts*, a right to assigned legal assistance in non-capital cases before state courts was only granted if a lack of such assistance would result in a 'trial […] offensive to the common ideas of fairness and right'. Id., at 473. Cf. also Yale Kamisar, 'Betts v. Brady Twenty Years Later. The Right to Counsel and Due Process Values', 61 Michigan Law Review 219 (1962), pp. 254 *et seq*. U.S. Federal law required counsel also for indigent accused in capital cases since 1790. See 1 Stat. 118 (1790).

[34] In *Johnson v. Zerbst*, the Supreme Court argued that justice would not be done without legal assistance to an accused in a criminal case before a federal court, facing a learned and experienced prosecution counsel demanding his incarceration. Legal assistance is 'necessary to ensure fundamental human rights of life and liberty'. See 304 U.S. 458 (1938), at 462-463. In *Gideon v. Wainwright*, the 6th Amendment fundamental requirement to be assigned counsel was held applicable through the 14th Amendment guarantee of due process, to indigent defendants accused of felonies in state courts. *Betts v. Brady* was hereby overruled.

[35] *Gideon v. Wainwright*, 372 U.S. 335 (1963), at 344.

[36] Cf. for instance, Amsterdam, Anthony G., The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. Law Review (1970), pp. 785-815, pp. 794-796.

[37] *Gideon v. Wainwright*, 372 U.S. 335 (1963), at 344.

[38] See *Argersinger v. Hamlin*, 407 U.S. 25 (1972), at 37.

[39] See *idem*, in footnote 7.

[40] *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), Justice Stevens' Dissenting Opinion (joined by Breyer, Ginsberg and Souter).

[41] See *Powell v. Alabama*, 287 U.S. 45 (1932), at 71.

[42] See *McMann v. Richardson*, 397 U.S. 759 (1970), at 771.

[43] See *Strickland v. Washington*, 466 U.S. 668 (1984), at 681.

speak for themselves. By the end of the Middle Ages, in France, the '*Ordonnance de Villers-Cotterêts*' of 1539 and the *Ordonnance* of 1670 still largely deprived the accused of a lawyer.[44] However, restricted access to counsel was permitted. The preparatory texts of this *Ordonnance* claim that the right to counsel for an accused is not just a right because of the law; it is a natural right of the accused to have recourse to another person for advice.[45]

Criminal proceedings were secretive in this period. Being an object of investigation, the accused should not be assisted to distort the truth. In Germany, in the old form of process in which the aggrieved party would prosecute, the accused was not allowed to be represented.[46] By the end of the Middle Ages this form of process was replaced by a process in which an official would investigate crimes and prosecute the suspect (*Offizialprinzip*).[47] In 1530, the *Constitutio Criminalis Carolina*, the first German Penal Code, provided a formal right to legal assistance to the accused.[48] This right was limited, but an important improvement compared to the situation before Carolina.[49] The focus in this inquisitorial procedural system was on the investigation of the material truth. As the accused was an object of investigation rather than a subject of the proceedings, there was no need for a separate person to defend the accused's rights. Guarding defence rights would properly be the task of the judge or even the prosecutor.[50] However, the realization that this defence function would overburden the judge was one of the reasons for Germany (then still part of the Holy Roman Empire) to reform its inquisitorial process.[51] Nonetheless, the use of torture to extract the desired investigation result from the accused, long overshadowed the procedural value of having a defence counsel.[52]

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[44] *Ordonnance de 1539*, Article162; *Ordonnance de 1670*, titre XIV, Article 8, as cited by Astaing, A. and G. Clément (2002). "Les "Muets Volontaires" dans la Procédure Pénale Française de l'Epoque Moderne et Contemporaine." The Legal History Review 70 (3-4): 291-316, p. 294 and 296.

[45] '*Il faut considérer aussi que ce conseil qu'on a accoutumé de donner aux accusés n'est point un privilège accordé par les ordonnances ni par les lois ; c'est une liberté acquise par le droit naturel, qui est plus ancien que toutes les lois humaines. La nature enseigne en effet à l'homme d'avoir recours aux lumières des autres, quand il n'en a pas assez pour se conduire ; et d'emprunter du secours, quand il ne se sent pas assez fort pour se défendre.'* See online version of the 1670 Ordonnance, http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm, lastly visited 10 January 2007.

[46] Armbrüster, Klaus, *supra* note 10, p. 49. Only clerics and vassals, when being judged by their superior, were obliged to be represented by so-called '*advocati*'. Those *advocati* could not freely be chosen by the accused.

[47] Armbrüster, Klaus, *supra* note 10, pp. 47, 48.

[48] Article 14 gave an accused the right to communicate with the person supporting him in his lawsuit. Article 73 gave the 'bystander' of the imprisoned accused the right to receive transcripts of the interrogations. Gerhard Hartstang, Der deutsche Rechtsanwalt. Rechtsstellung und Funcktion in Vergangenheit und Gegenwart, (C.F. Müller Juristischer Verlag: Heidelberg 1986), p. 14.

[49] See Armbrüster, Klaus, *supra* note 10, p. 63.

[50] The region Bavaria expressly provided in its law (*Codex Iuris Bavarici Criminalis* of 1751) that the judge should *ex officio* perform the job of the lawyer. See *ibid.*, pp. 63, 64.

[51] See *ibid.*, pp. 65, 66.

[52] See *ibid.*, pp. 66, 67.

The French Enlightenment movement[53] led in promoting the right to legal assistance for criminal defendants in civil law systems of the European Continent.[54] The French *Code d'Instruction Criminelle* of 1808 contained the right of the accused to have defence counsel assigned to him.[55] In the late 19th Century, France, Belgium, Germany and the Netherlands – inspired by Anglo-American procedure – reformed their criminal procedure and granted the accused and his lawyer more rights, especially during the investigation stage.[56] From 1848 onwards German criminal procedure was reformed along the lines of the English and French examples.[57] During the Enlightenment, the individual became more important and therefore more deserving of individual rights.[58] Even in criminal proceedings, an accused would be more on a par with the state.[59] The 1877 German Criminal Procedural Code[60] finalized the developments towards a formal right to defence counsel in criminal proceedings, including the pre-trial stage.[61] In France, the '*Loi Constans*' of 1897 gave the lawyer the right to give an accused assistance from the first arraignment onwards.[62]

Since the right to legal assistance was enshrined in article 6 of the European Convention on Human Rights, continental European countries have granted every accused in criminal proceedings the right to at least one defence counsel.[63] Monitoring this treaty, the European Court of Human Rights has prompted courts to ensure that this right is not merely theoretical, but that it is practical and effective.[64] Even if the accused waives his right to be present at his trial, he will not lose his right to be

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[53] This resulted in the *Déclaration des droits de l'Homme et du citoyen* of 26 August 1789. This French Declaration however did not contain the right to legal assistance, unlike its predecessor in the USA, the Bill of Rights in the 6th Amendment. See *supra* note 31.

[54] Cf. Spaniol, Margret, *The Right to Assistance of Defence Counsel under the Constitution and under the European Convention on Human Rights* (Das Recht auf Verteidigerbeistand im Grundgesetz und in der Europäischen Menschenrechtskonvention) (Berlin: Duncker & Humblot, 1990) p. 1, footnote 3.

[55] *Code d'instruction criminelle*, 1808, *Ch.* III, Article 294 and 295. This Code is available online at http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1929/code_1808_2.htm, lastly visited 10 January 2007.

[56] Cf. Spronken, Taru, *Defence. A Study into the Regulation of Professional Conduct of Advocates in Criminal Cases* (Verdediging: een onderzoek naar de normering van het optreden van advocaten in strafzaken) (Deventer: Gouda Quint, 2001), p. 7.

[57] See Armbrüster, Klaus, *supra* note Armbrüster, Klaus, *Die Entwicklung der Verteidigung in Strafsachen* (Berlin: Duncker & Humblot, 1980) p. 98.

[58] Cf. *ibid.*, p. 99.

[59] Cf. *ibid.*, p. 100.

[60] *Strafprozessordnung* of 1 February 1877, which came into force 1 October 1879.

[61] Cf. Armbrüster, Klaus, *Die Entwicklung der Verteidigung in Strafsachen* (Berlin: Duncker & Humblot, 1980) Armbrüster, Klaus, *supra* note Armbrüster, Klaus, *Die Entwicklung der Verteidigung in Strafsachen* (Berlin: Duncker & Humblot, 1980)p. 126.

[62] Cf. Astaing, Antoine and Clément, Gérard, 'Les "Muets Volontaires" dans la Procédure Pénale Française de l'Epoque Moderne et Contemporaine', 70 *The Legal History Review* (2002), 291-316, p. 309.

[63] The German Criminal Procedure Code, for instance, allows a maximum of three chosen defence counsel to an accused in all stages of criminal proceedings. See *Strafprozessordnung* of 7 April 1987, lastly amended 22 December 2006, Section 137.

[64] See *Artico*, *supra* note 13, § 33; *Goddi*, *supra* note 11, § 27; *Lala/ Pelladoah*, *supra* note 8, § 34.

adequately defended and represented in court by counsel.[65] The accused is entitled to free legal aid if he lacks the means to pay for representation and the "interests of justice" require that it will be granted for free.[66]

Nevertheless, the scope of the right to legal assistance in criminal proceedings on the European Continent is still influenced by inquisitorial notions. For instance, to prevent interference with the truth-finding process, Dutch and French criminal procedure do not allow legal assistance during police interrogations.[67] The ECHR considers this practice to be permissible as long as the trial, considered as a whole, is fair.[68] Further implications of procedural perspectives on the right to legal assistance are examined in Chapter IV of this study.

2.3 General Scope of Legal Assistance at International Criminal Courts

2.3.1 Legal Framework

The Statutes of the *ad hoc* Tribunals and the ICC provide that legal assistance will be assigned to an accused 'in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'.[69] Suspects are also entitled to legal assistance.[70] The Rules of Procedure and Evidence (RPE/Rules)[71] further stipulate the right to legal assistance for accused[72] and suspects.[73] A particular section of the Rules addresses the appointment of counsel, his qualifications, the procedure for his assignment under the legal aid system, and how to deal with his professional misconduct.[74] The assignment of legal assistance under the legal aid system of the *ad hoc* Tribunals is governed by the Directives on the

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[65] See *Lala/ Pelladoah*, *supra* note 8, § 33. See also § 27 in which it is argued that courts could not make an accused attend his proceedings by threatening to take away his fundamental right to be represented by a defence counsel.

[66] There will be no need for the accused to prove any prejudice for a violation of Article 6(3)(c) to be established. See *Artico*, *supra* note 13, § 35; ECHR, *Boner v. UK,* (Appl. No. 18711/91), 28 October 1994, § 36.

[67] See, for instance, Taru Spronken and Marelle Attinger, Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union, published by the European Commission, 12 December 2005, available at http://arno.unimaas.nl/show.cgi?fid=3891, lastly visited 25 January 2007, pp. 67 and 73. This study illustrates that in 2005, 17 out of 25 European jurisdictions allowed counsel to attend such interrogations.

[68] See *inter alia*, ECHR, *Magee v. UK* (Appl. No. 28135/95), 6 June 2000, §§ 44-46; ECHR, *Murray v. UK* (Appl. No. 18731/91), 8 February 1996, § 66; ECHR, *Brennan v. UK* (Appl. No. 39846/98), 16 October 2001, §§ 46 and 48; First Section of the ECHR, *Öcalan v. Turkey* (Appl. No. 46221/99), 12 March 2003, §§ 141-143.

[69] Article 21(4)(d) of the ICTY Statute, Article 20(4)(d) of the ICTR Statute and Article 67(1)(d) of the ICC Statute.

[70] Article 18(3) ICTY Statute, Article 17(3) ICTR Statute and Article 55(2) ICC Statute.

[71] Unless otherwise provided, the ICTY version of the RPE mentioned in this study is IT/32/Rev. 40, 12 July 2007; the ICTR version is of 15 June 2007 and the ICC version is ICC-ASP/1/3, 9 September 2002.

[72] Rules 63(A) ICTY RPE and ICTR RPE provide a right to counsel during questioning for the accused.

[73] See Rules 42 ICTY RPE and ICTR RPE.

[74] Rules 44-46 ICTY RPE; Rules 44-46 ICTR RPE; Rules 20-22 ICC RPE.

Assignment of Defence Counsel.[75] These also provide for legal aid for detained witnesses.[76] The ICC's legal aid system is regulated in the Regulations of the Court and the Regulations of the Registry.[77] Professional ethical standards are incorporated in Codes of Professional Conduct for Defence Counsel.[78]

2.3.2 Legal Representation during the Initial Stage of Proceedings

The Human Rights Committee (HRC) has held the right to counsel applicable to all stages of criminal proceedings,[79] including the investigation stage.[80] The ECHR as a general rule deems that the right to legal assistance applies during police interrogations. However, it may be restricted as long as the trial, considered as a whole, is fair.[81] The *ad hoc* Tribunals' legal provisions provide the right to legal assistance throughout trial, in preparation of trial proceedings, and while a suspect or accused is questioned by the Prosecutor of the Tribunal.[82] At the ICC, the right to counsel during interrogations extends to those conducted by national authorities as well. It has been incorporated in the Rome Statute. [83]

In *Rwamakuba*, the ICTR Trial Chamber determined that the accused's lack of legal assistance during the initial four and a half months of his detention called for a remedy.[84] Because the accused had been acquitted, he received 2000 USD as financial compensation for this violation of his right to legal assistance.[85] In *Delalić et al*, the ICTY Trial Chamber, arguing that suspects have an 'unfettered right to counsel' under

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[75] ICTY Directive on the Assignment of Defence Counsel (IT/73/REV.11), 11 July 2006 (hereinafter: ICTY Directive); ICTR Directive on the Assignment of Defence Counsel, 15 June 2007 (hereinafter: ICTR Directive).

[76] For instance, for witnesses falling under Rule 90*bis*. See Article 5(iii) of the ICTY Directive Rev. 11 and Article 2(B) of the ICTR Directive of 24 April 2004. This has not always been the case. See Third Annual Report of the ICTY (1996), UN Doc. A/51/292-S/1996/665 (hereinafter: ICTY Third Annual Report), par. 106.

[77] ICC Regulations of the Court (ICC-BD/01-01-04), 26 May 2004; ICC Regulations of the Registry (ICC-BD/03-01-06-Rev. 1), 25 September 2006.

[78] ICC Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1); ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal (IT/125), 12 June 1997; ICTR Code of Professional Conduct for Defence Counsel, 8 June 1998.

[79] See, for instance, *Brown v. Jamaica*, CCPR/C/65/D/775/1997 (11 May 1999), § 6.6; HRC, *Aliev v Ukraine,* CCPR/C/78/D/781/1997 (18 September 2003), § 7.3.

[80] For instance, in *Aliev v. Ukraine*, the accused receiving no opportunity to consult or to be represented by a lawyer during his first five months of detention, while risking capital punishment, amounted to a violation of Article 14(1) and 14(3)(d) of the ICCPR. See HRC, *Aliev v Ukraine, supra* note 79, §§ 7.2, 7.3 and 8.

[81] See *supra*, paragraph 2.2.3, note 67.

[82] See Article 18(3) ICTY Statute and Rule 42(A)(i) ICTY RPE; Article 17(3) ICTR Statute and Rule 42(A)(i) ICTR RPE.

[83] See Article 55(2)(c) of the Rome Statute of the ICC.

[84] ICTR Tr. Ch. III, Judgement, *Rwamakuba* (Case No. ICTR-98-44C-T), 20 September 2006, para. 218 & 220.

[85] See ICTR Tr. Ch. III, Decision on Appropriate Remedy, *Rwamakuba* (Case No. ICTR-98-44C-T), 31 January 2007, §§ 62, 73 and IV.

the law of the Tribunal,[86] determined that statements of a suspect who was deprived of legal assistance during interrogations should be excluded from the evidence.[87] Thus, the *ad hoc* Tribunals are willing to provide compensation for suspects that have been deprived of legal assistance while being interrogated. International criminal courts seem to be more demanding than the ECHR in this respect.

The Rules of the *ad hoc* Tribunals prescribe that on the initial appearance of an accused the Trial Chamber should ensure that his right to counsel is respected.[88] The Registrar, the head of the Registry which is the court's administrative organ, is responsible for the assignment of legal assistance and for administering the legal aid system of the *ad hoc* Tribunals.[89] If an accused has not engaged a permanent counsel at his initial appearance, international courts should guarantee that he has legal representation. A "duty counsel" may be assigned to the accused in that case to assist him in the initial phase of the proceedings. To ensure that counsel will be available when needed for an accused's initial appearance, the Registrar keeps a separate list of duty counsel candidates.[90] At the ICC, duty counsel may represent the interests of a particular accused in the initial stage of proceedings, or may be appointed 'to represent the interests of the defence' in general.[91] To prevent delay of the proceedings, the ICC has also appointed duty counsel when defence counsel had withdrawn.[92] In the '*Situation in the Democratic Republic of Congo*', the ICC has ordered the Registrar to appoint an "*ad hoc* counsel for the defence", not to one accused in particular, but 'to protect the general interests of the defence for the purpose of forensic examinations'. It was likely that certain evidence that the Prosecution wanted to have forensically examined would not be available at trial.[93] The ICC thus seems to push the temporal scope of application of the right to legal assistance to its limits.

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[86] ICTY Tr. Ch. II, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, *Delalić, Mucić, Delić and Landžo* (Case No. IT-96-21-Y), 2 September 1997, § 51.

[87] In *Delalić et al.* the judges therefore excluded the statements made to the Austrian authorities from the evidence. See ICTY Tr. Ch. II, Decision on the Defence Motion to Exclude Evidence, *Delalić, Mucić, Delić and Landžo* (Case No. IT-96-21-Y), 2 September 1997, in particular §§ 35 and 55. Cf. Spronken, Taru (2001), *supra* note 56, p. 459 and Sluiter, G.K., 'Case comment: Prosecutor v. Zdravko Mucic, Decision on the Defence motion to exclude evidence (in Dutch),' 23 *NJCM Bulletin* (1998), pp. 75-87.

[88] See Rule 62(A)(i) of the ICTY RPE IT/32/Rev. 40 (Adopted On 11 February 1994, as lastly Amended 12 July 2007) and Rule 62(A)(i) of the ICTR RPE (Adopted on 29 June 1995, as lastly amended on 15 June 2007).

[89] See Rules 44-45 ICTY RPE and Rules 44-45 ICTR RPE.

[90] See Rules 45(C) and 62(B) ICTY RPE; Rule 44*bis* ICTR RPE.

[91] See Regulation 73 ICC Regulations of the Court.

[92] See ICC Pre-Tr. Ch. I, Appointment of Duty Counsel, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-870), 19 April 2007.

[93] ICC Pre-Trial Chamber I, Decision on the Prosecutor's Request for Measures under Article 56, '*Situation in the Democratic Republic of Congo*' (Case No. ICC-01/04), 26 April 2005. A further example of a case in which *ad hoc* counsel was appointed, the *Darfur situation.* will be discussed in Chapter VI, paragraph 6.5.

2.3.3 Legal Assistance during the (Pre-)Trial and Appeal Stages

The Statutes and the RPE of the *ad hoc* Tribunals and the ICC, the *ad hoc* Tribunals' Directives on Assignment of Defence Counsel[94] and the ICC's Regulations[95] do not specify what legal assistance should be available to an accused in a particular case. The number of defence counsel to be appointed or the overall composition of a defence team may depend on whether an accused is able to hire his own lawyers or whether he relies on legal aid. A defence team assigned by a Tribunal generally comprises one lead counsel and one co-counsel, one or two investigators and one or two legal assistants.

According to the European Commission of Human Rights, Article 6(3)(c) ECHR does not guarantee a right to an unlimited number of defence counsel.[96] At the *ad hoc* Tribunals, accused that could afford it have been able to hire more than two lawyers. At some stages, five persons were enlisted as defence counsel of the accused Kordić, who privately financed his counsel.[97] Thus, at the *ad hoc* Tribunals, an accused seems to be able to retain an unlimited number of counsel when privately funding his legal assistance. Nonetheless, the costs involved in financing a number of defence counsel for a long duration are so high, that few individuals can afford this. In *Kordić*, shortly before the judgement, it turned out that some of his defence counsel had not been compensated by the accused for their representation for more than a year.[98]

Financial considerations also necessitate a limit on the number of counsel to be appointed under the legal aid system of an international criminal court. When the first accused, *Tadić*, was tried before the ICTY, a single defence counsel was assigned to him. The *ad hoc* Tribunals' Directives on the Assignment of Defence Counsel initially entitled suspects and accused to have only one counsel.[99] This was a considerable shortcoming.[100] In *Tadić,* as soon as it became apparent that one counsel was insufficient to provide for an effective defence,[101] one more counsel and a consultant were assigned to the accused and the Directive was amended to provide for that extra counsel, "co-counsel", to be assigned in exceptional circumstances.[102] Co-

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[94] For the ICTY: ICTY Directive No. 1/94, IT/73/REV. 10; for the ICTR: Document prepared by the Registrar and approved by the Tribunal on 9 January 1996 as lastly amended 15 May 2004.

[95] ICC Regulations of the Registry and ICC Regulations of the Court.

[96] See EComHR, *Ensslin, Baader and Raspe v. Germany* (Appl. Nos.7572/76, 7586/76 and 7587/76), 8 July 1978, at p. 89, § 19.

[97] Cf. for instance, ICTY Tr. Ch., Decision on Defence Motions for Judgement of Acquittal, *Kordić and Čerkez* (Case No. IT-95-14/2), 6 April 2000. In the appellate stage, three counsel were enlisted. Cf., for instance, ICTY App. Ch., Judgement, *Kordić and Čerkez* (Case No. IT-95-14/2-A), 17 December 2004. ICTY Tr. Ch. III, Judgement, *Kordić and Čerkez* (Case No. IT-95-14/2-T), 26 February 2001, Annex IV(B)(2), p. 330-331, § 16.

[98] See ICTY Tr. Ch. III, Judgement, *Kordić and Čerkez, supra* note 97, Annex IV(B)(2), p. 330-331, § 16.

[99] See Article 16(a) of the ICTY Directive, UN Doc. IT/73/Rev. 1 (1994), which read: "A suspect or accused shall only be entitled to have one counsel assigned to him". Cf. Article 15(A) ICTR Directive on the Assignment of Defence Counsel (1 July 1999).

[100] Cf. ICTY Third Annual Report, *supra* note 76, par. 106.

[101] According to the ICTY Third Annual Report, 'it was clear that the assignment of a single advocate was insufficient to meet the demands placed on counsel.' *Idem*.

[102] At the Directive's third revision (1996), clause (C) was added to Article 16: 'Under exceptional circumstances and at the request of the person assigned as counsel, the Registrar may […] assign a second counsel to assist the lead counsel….' The phrase "under exceptional circumstances" was

counsel could be assigned 'when the trial is about to begin or in exceptional circumstances where the bulk of work so justifies'.[103] Currently, co-counsel may be appointed "whenever appropriate" (ICTR Directive) or "in the interests of justice" (ICTY Directive).[104] In practice, co-counsel are appointed in virtually all cases at the *ad hoc* Tribunals.[105]

When co-counsel is appointed, the original counsel is designated "lead counsel" and will be the director of the team. Lead counsel should initiate requests for the appointments of co-counsel.[106] He is also responsible for requesting the appointment of assistants and investigators.[107] He needs the Registrar's approval for the appointment of other defence team members.[108] At the ICTR, it has been determined that an indigent accused has a right to counsel remunerated by the Tribunal, but the Statute does not entitle him 'to the services of an investigator at the expense of the Tribunal'.[109] The Registrar has discretion in determining whether or not to appoint an investigator on the request of lead counsel[110] and can appoint investigators and legal assistants up to a total number of three persons.[111] Under the Directive of the ICTY, counsel, experts, legal assistants, investigators, translators or interpreters also seem to be eligible for assignment.[112] Defence teams have also been assigned language assistants,[113] and case managers[114] and have frequently sought advice from expert consultants.[115]

The law of the ICC appears to be more specific as to what legal assistance may be provided to an accused. That the defence can have the assistance of experts

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replaced by "in the interests of justice" in Rev. 8, 15 December 2000. Cf. also Article 15(C) of the ICTR Directive, stipulating that the Registrar may assign co-counsel upon the request of lead counsel 'whenever appropriate'.

[103] See Guidelines for the Remuneration of Counsel Appearing before the ICTR, 1 September 1998, available from the ICTR website (hereinafter: ICTR Remuneration Guidelines), par. 1.5.1.

[104] See Article 16 ICTY Directive (Rev. 11); Article 15 ICTR Directive (2004).

[105] See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (UN Doc. A/54/634), November 1999 (hereinafter: Expert Report), par. 204.

[106] See Article 16 ICTY Directive (Rev. 11); Article 15 ICTR Directive (2004).

[107] See ICTR Tr. Ch. I, Decision on the Accused's Request for Withdrawal of his Counsel, *Ngeze* (Case No. ICTR-97-27-I), 29 March 2001 (hereinafter: Decision on the Accused's Request).

[108] In *Nyiramasuhuko and Ntahobali*, given its administrative powers and responsibilities, the Registry was considered responsible for 'organizing and appointing defence investigators'. ICTR President, The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions Pertaining to the Assignment of an Investigator, *Nyiramasuhuko and Ntahobali* (Case No. ICTR-97-21-T), 13 November 2002 (hereinafter: Decision on the Application), § 3.

[109] *Ibid.,* §§ 7 and 13.

[110] Idem.

[111] Cf. ICTR Remuneration of Defence Team Members under the Legal Aid Program of the ICTR, Manual for Practitioners, available from the ICTR website (hereinafter: ICTR Remuneration Manual for Practitioners), par. 3.

[112] See Article 16(F) ICTY Directive (Rev. 11).

[113] See Ellis, Mark S., 'The Evolution of Defence Counsel appearing before the International Criminal Tribunal for the Former Yugoslavia', *New England Law Review* (2003), Summer 2003, pp. 949-973, p. 955.

[114] See, for instance, Transcript *Haradinaj et al.* (Case No. IT-04-84-PT), 1 March 2007, p. 256, where counsel for Brahimaj introduced his case manager to the Trial Chamber.

[115] Cf. Expert Report, *supra* note 105, par. 204.

and professional investigators is stipulated in the ICC RPE.[116] Persons with relevant expertise, such as law professors, may assist defence counsel.[117] The assistance may include help with the presentation of the case.[118] Nevertheless, neither the Rules, nor the Statute of the ICC specify the number of defence counsel or of defence support staff members to be assigned to one defence team. In addition, there is no specific mention of co-counsel.

At the *ad hoc* Tribunals, lead counsel is primarily responsible for the defence. As to his defence team, lead counsel 'must ensure that the team functions as such and that the members of the team supplement each other and do not duplicate the work.' [119] For the Tribunal, he is 'the principal interlocutor […] for any correspondence or any kind of communication among those representing the Registrar and the Bar.'[120] Moreover, it has been argued that 'the general manner in which Counsel conducts the defence is within the purview of his role as director of the defence team'.[121] His authority to direct the defence is a consequence of his primary responsibility over the financial resources of the defence team.[122] He bears final responsibility for compliance with the directions of the Defence Section of the Registry.[123]

Co-counsel could 'share the workload of counsel in preparing the case of the Accused'.[124] Since exceptional circumstances are no longer necessary for co-counsel to be appointed, it could seem that the importance of his role in a defence team in an international criminal case is fully recognized. In *Akayesu,* the accused complained that lead counsel and co-counsel's "uncoordinated rotational work system" was 'worse than one in which the accused is entitled to only one counsel who, at least, will keep track of the various stages and proceedings of the trial.'[125] This system prejudiced his rights, because it actually left him not with 'two counsel, but one counsel on duty alternating with the other, both of whom come from two different countries, do not receive transcripts of hearings in which they are absent and, therefore, are unaware of the proceedings.'[126] This illustrates the problem of properly dividing the difficult workload for the defence of one accused in a complex and protracted trial between two counsel with completely different backgrounds. Even though this may be difficult, when trials continue for years, it cannot reasonably be demanded of one individual to

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[116] The Registrar shall supply 'support for professional investigators necessary for the efficient and effective conduct of the defence'. Rule 20(1)(b) ICC RPE.
[117] See Rule 22(1) ICC RPE.
[118] See Regulation 68 of the Regulations of the Court.
[119] See ICTR Remuneration Guidelines, *supra* note 103, par. 1.6.
[120] See Transcript, *Djukić* (case No. IT-96-20), 4 March 1996, p. 4.
[121] ICTR Tr. Ch. II, Decision on Nzirorera's Motion for Withdrawal of Counsel, *Nzirorera* (Case No. ICTR-98-44-T), 3 October 2001 (hereinafter: Decision on Nzirorera's Motion), § 19.
[122] See ICTR Tr. Ch. I, Decision on Request for Private Representation of Gratien Kabiligi, *Bagosora et al* (Case No. ICTR-98-41-T), 4 March 2005 (hereinafter: Decision on Request for Private Representation), § 8.
[123] See Decision on the Accused's Request, *Ngeze*, *supra* note 107. As to this section of the Registry, see *infra,* Chapter III, paragraph 3.2.2.
[124] ICTY Tr. Ch., Decision on Motion Seeking Review of Registrar's Decision Denying the Assignment of Ms Virginia Lindsay as Co-counsel, *Bralo* (Case No. IT-95-17-S), 21 September 2005.
[125] ICTR App. Ch., Judgement, *Akayesu* (Case No. ICTR-96-4-A), 1 June 2001, § 73(4).
[126] *Ibid.*, § 73(4).

conduct an accused's defence before an international criminal court alone. But arguably, guidelines as to a more even or formal division of duties between co-counsel and lead counsel may be desirable.

In *Bagosora et al*, counsel of one of the accused was removed from the case for fraudulent behaviour. This immediately created serious problems for the defence of his client, as counsel was not allowed to continue to conduct the defence on a private basis, pro bono. Inevitably, it took time for the accused to get a defence team together again.[127] Because the accused was not tried alone, but together with several others, this also delayed the trial of his co-accused.[128] In *Ndindiliyimana et al.*, the Prosecutor and Trial Chamber of the ICTR argued that the sole purpose of co-counsel is to substitute lead counsel whenever necessary, rather than to complement him throughout trial.[129] In addition to the help of a legal assistant, the Chamber considered one counsel to be sufficient to guarantee an adequate defence to an indigent accused.[130] In international criminal cases, the assistance of co-counsel is necessary and important. Serious representational problems may occur when lead counsel is withdrawn from a case or is ill.

Legal assistants are generally less qualified than counsel who must have 7 or 10 years of experience. It is questionable whether or not a legal assistant can adequately complement the defence if no additional defence counsel is appointed. This is particularly doubtful where representational activities are concerned. If there is no co-counsel, it can sometimes be necessary for a legal assistant to perform such duties. An exceptional case in this respect was *Kupreškić et al.*, at the ICTY. Counsel requested the court whether his legal assistant could examine those defence witnesses in court, with whom he had conducted interviews. Apparently, the legal assistant concerned had failed the English exam of the Registry and could therefore not be assigned as co-counsel. The Chamber argued that witness examination 'is the primary responsibility of counsel, who must exercise all due diligence in carrying out this responsibility, regardless of whether he or his assistant have held the preparatory interviews with the witnesses.'[131] Since counsel was available and his legal assistant failed to fulfil the necessary requirements for being a defence counsel, the request was denied. Undoubtedly, a line has to be drawn between the duties that counsel performs and those of his legal assistant. Unless a legal assistant is admitted to a recognized Bar, he has no rights of audience. However, the current RPE allow the language requirement to be disregarded for co-counsel on the condition that lead counsel fulfils it.[132] This particular requirement solely applies because it concerns an international court. If a legal assistant fulfils all other requirements and if it would make the defence

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[127] This case will be given more attention in Chapter VI, especially in paragraph 6.4.2.1 Disciplinary Proceedings Incorporated in Codes of Professional Conduct.

[128] On joint case and its implications for the defence, see *infra,* Chapter V, paragraph 5.7.

[129] See ICTR Tr. Ch. II, Decision on Defence Oral Motion for Adjournement [sic] of the Proceedings. *Ndindiliyimana et al.* (Case No. ICTR-2000-56-T), 8 October 2004 (hereinafter: Decision on Defence Oral Motion).

[130] *Ibid.*, § 7.

[131] ICTY Tr. Ch. II, Decision on the Request of 24 June 1999 by Counsel for the Accused Santic to allow Mr. Mirko Vrdoljak to examine the Defence Witnesses, *Kupreškić et al.* (Case No. IT-95-16), 25 June 1999, § 3.

[132] See *infra*, paragraph 2.4.

more effective if he performs a few particular and clearly defined representational tasks, this should arguably outweigh formalities that have little to do with any legal capabilities as counsel.

The same issue arose in *Thomas Lubanga Dyilo* at the ICC. It was examined whether the law of the ICC allows counsel's assistant to conduct representational activities on behalf of an accused.[133] The Appeals Chamber concluded that '[t]he authority of assistants is limited to rendering assistance to counsel in the presentation of the case before a Chamber. They have no authority to replace counsel or stand in for him/her, except perhaps with the authorization of the latter.'[134] The ICC therefore does not exclude the possibility that counsel delegates representational duties to those who assist him.

International criminal courts aim to try those individuals who bear the most responsibility for crimes committed under their jurisdiction. As a result, cases are generally sizeable and complex. In consequence, it cannot be upheld that a legal assistant in addition to lead counsel is by definition a sufficient safeguard for an adequate defence when co-counsel resigns, such as in *Ndindiliyimana et al.* Counsel should remain careful about delegating any of his representational duties to others than co-counsel.

Another question is as to whether a defence team can function with less capacity during the appeal stage in comparison to the capacity required during the (pre-)trial stages. In *Pakelli*, the ECHR considered that only with 'the services of a lawyer at the appeal stage of proceedings, a person can make 'a useful contribution to the examination of the legal issues arising'.[135] In most domestic criminal proceedings, legal assistance is mandatory on appeal.[136] At international criminal courts, the right to legal assistance certainly applies to appeal proceedings, but may be limited as compared to the scope of this right during (pre-)trial proceedings. At the ICTR, if lead counsel needs the assistance of a co-counsel during appeal proceedings, he should submit a reasoned application as to why he needs a co-counsel, even if co-counsel has assisted him previously.[137] In addition, counsel may apply for only one investigator and one legal assistant for the appeal stage.[138]

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[133] See ICC App. Ch., Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-834), 21 February 2007, § 13.

[134] *Ibid.,* § 15.

[135] ECHR, Judgment, *Pakelli v. Germany* (Appl. No. 8398/78), 25 April 1983, § 38.

[136] See, for instance, *Martinez* v. *Court of Appeal of California*, 528 U.S. 152 (2000), at 161, 162. The U.S. Supreme Court argued that the right to self-representation on appeal is no necessary component of fair appellate proceedings. Legal representation is the standard, not the exception. *Idem*, at 162. See also, the French Code of Criminal Procedure (*Code d'Instruction Criminelle de 1808*), Article 294; German Code of Criminal Procedure (*Strafprozeßordnung*) 1987, Section 140; Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) 1926, Article 41(1)(B)

[137] See ICTR Remuneration Manual for Practitioners, *supra* note 111, par. 16.

[138] See *idem*, par. 18.

International criminal appellate proceedings do not involve a review *de novo* of the facts, or retrial.[139] The Trial Chamber is primarily responsible for the findings of facts and the evaluation of evidence.[140] Under the Statutes of the *ad hoc* Tribunals, 'an error on a question of law invalidating the decision', or 'an error of fact which has occasioned a miscarriage of justice' may be raised as grounds for appeal.[141] This may be a valid reason for assigning fewer defence team members. On the other hand, the Rules of the *ad hoc* Tribunals leave room for introducing fresh evidence into appellate proceedings.[142] Therefore, substantial manpower, including investigators, may still be required. Nonetheless, it remains a fact that on appeal additional evidence will not be admitted lightly. It will not be 'admissible in the absence of a reasonable explanation as to why the evidence was not available at trial.'[143] Evidence which was not presented to the Trial Chamber due to a lack of diligence on the part of counsel will not be accepted on appeal.[144] This alone emphasizes how important it is to have a properly equipped defence team during (pre-)trial proceedings.

Under the ICC Statute, grounds of appeal are wider. They comprise procedural error, error of fact, error of law, and, only where a convicted person is concerned, 'any other ground that affects the fairness or reliability of the proceedings or decision'.[145] It follows that a substantial defence team may be justified in ICC appellate proceedings.

2.3.4 Legal Aid System

The provision of legal aid to be freely assigned to indigent accused and suspects requires a transparent system. According to Khan and Dixon, the ICTY's legal aid system is *sui generis* but is based on the same leading principles as domestic legal aid systems.[146] According to a report of the UN Secretary-General, five important principles underlie the current legal aid system of the ICTY. The accused should be 'partially or fully incapable of paying for his defence'; solely 'necessary and reasonable' defence expenses will be remunerated;[147] the defence should efficiently manage its case; the legal aid system must attract good quality defence counsel; and, there must be equality of arms vis-à-vis the prosecution, and an appropriate resource level.[148] This system is similar to the legal aid system of the ICTR.

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[139] See ICTY App. Ch., Judgement, *Furundžija* (Case No. IT-95-17/1-A), 21 July 2000, § 40. Cf. for instance, Cassese, Antonio, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 433.

[140] See, for instance, ICTY App. Ch., Judgement, *Kunarac et al.* (Case No. IT-96-23&23/1-A), 12 June 2002, § 39.

[141] See Article 25 ICTY Statute and Article 24 ICTR Statute.

[142] See Rules 115 of the ICTY and ICTR RPE.

[143] ICTY App. Ch., Judgement, *Tadić* (Case No. IT-94-1-A), 15 July 1999, § 16.

[144] See idem.

[145] See Article 81(1) ICC Statute.

[146] See Dixon, Rodney and Khan, Karim A.A., May, Richard (Eds.), *Archbold, International Criminal Courts. Practice, Procedure and Evidence* (London, United Kingdom: Sweet & Maxwell, 2003), par. 20-34, p. 933.

[147] Cf. Article 23(A) ICTY Directive (Rev. 11).

[148] See Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

The courts' administrative organ, the Registry (or the Defence Unit forming part of it) is responsible for managing the Legal Aid Programme in accordance with the Directive,[149] assigning legal assistance and determining the indigence of an accused.[150] The President may review the decisions of the Registrar.[151] Chambers have a general duty to ensure a fair trial to the accused.[152] The Registrar's decisions regarding legal assistance, such as the appointment of counsel, are therefore also subject to judicial supervision. This should ensure that the Registrar complies with the Directive and that he exercises his discretionary powers "fairly and justly".[153] According to the ICTR Trial Chamber in *Nyiramasuhuko et al.*, 'a matter affecting the right of an accused to have the most efficient defence possible in the context of a fair trial […] is a judicial matter which necessitates the supervision of the Trial Chamber seized thereof.'[154]

Not every accused is eligible to receive free legal assistance. According to the ECHR, "the interests of justice" that entitle an accused to free legal aid include the seriousness of the offence, the severity of the sentence at stake for the accused, the complexity of the case, and the personal situation of the accused (*i.e.*, foreign national, level of education, state of health).[155] If his liberty is at risk, if he lacks the proper resources, an accused should have free legal representation.[156] For an effective defence against what may be a final decision, this should also be provided in appellate proceedings.[157] The HRC deems the provision of free legal representation particularly important in cases involving capital punishment, even if it would delay the proceedings.[158] The HRC considers it 'axiomatic that the accused must be effectively assisted by a lawyer'.[159] Given the seriousness and the complexity of the crimes dealt

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Yugoslavia since 1991 - Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system - Report of the Secretary-General (UN Doc. A/58/288), 12 August 2003 (hereinafter: Comprehensive Report on Legal Aid System ICTY), par. 4.

149 Cf., for instance, Decision on the Application, *Nyiramasuhuko and Ntahobali*, *supra* note 108, § 8.

150 Cf. Article 10 ICTR Directive (2004); Article 10 and 11 ICTY Directive (Rev. 11); Regulation 84 and 85 of the ICC Regulations of the Court. At the ICTY the Office of Legal Assistance and Detention (OLAD) is the Section of the Registry dealing with defence issues. At the ICTR, this is the Defense Counsel & Detention Management Section of the Registry. See *infra*, Chapter III, paragraph 3.2.2.

151 See Rule 19 ICTR RPE; Rule 19 ICTY RPE; and Articles 38 (3) and 43(2) ICC Statute.

152 This duty is incorporated in Article 19 of the ICTR Statute; Article 20 of the ICTY Statute and Article 64 of the ICC Statute.

153 ICTR Tr. Ch. I, Decision on a Preliminary Motion by the Defence for the Assignment of a Co-Counsel to Pauline Nyiramasuhuko, *Nyiramasuhuko and Ntahobali* (Case No. ICTR-97-21-T), 13 March 1998 (hereinafter: Decision on a Preliminary Motion), §§ 3-5.

154 *Ibid.*, § 5.

155 ECHR, *Quaranta v. Switzerland* (Appl. No. 12744/87), 24 May 1991, §§ 32-35.

156 See ECHR, *Benham v. UK*, (Appl. No. 19380/92), 10 June 1996, § 61.

157 It should enable a defendant to 'competently address the court' on legal issues. *Boner*, *supra* note 66, § 41. Cf. also ECHR, *Maxwell v. UK* (Appl. No. 18949/91), 28 October 1994, §§ 40-41.

158 HRC, *Saidova v. Tajikistan*, CCPR/C/81/D/964/2001 (20 August 2004), § 6.8.

159 *Idem*. See also *Shukurova v. Tajikistan,* CCPR/C/86/D/1044/2002 (26 April 2006), § 8.5; *Sultanova v. Uzbekistan*, CCPR/C/86/D/915/2000 (19 April 2006), § 7.4; *Brown v. Jamaica*, *supra* note 79, § 6.8; *Robinson v. Jamaica*, CCPR/C/35/D/223/1987 (4 April 1989), § 10.3.

with by international criminal courts, and the substantial prison sentences that may be involved, the provision of free legal aid undoubtedly furthers the interests of justice.

The Statutes of the *ad hoc* Tribunals entitle an accused to be assigned legal assistance where the interests of justice so require and without payment if he lacks sufficient money. The Directives of the *ad hoc* Tribunals entitle an accused who lacks sufficient financial means to be assigned counsel.[160] The majority of accused before the ICTR and the ICTY makes use of assigned legal assistance.[161] The Registrar must 'ensure that an indigent accused is assigned competent legal representation, and also that there is no abuse of the Legal Aid Programme.'[162] How the Registrar is to prevent abuse of the legal aid programme is a complex issue. The main challenge is to determine whether or not an accused who applies for legal aid is indigent. This is considered an "administrative fact-finding procedure".[163] Whether or not an accused is genuinely indigent is difficult to establish, because international criminal courts simply lack the means to investigate this thoroughly.[164] In the course of the ICTY's existence, a formula was developed to establish an individual's indigence.[165] If an accused is found only partially indigent, he will have to contribute to his defence accordingly.[166] For the defence of the accused *Limaj* a fund was raised in Kosovo. The Tribunal deemed that this would cover the costs of the defence of the pre-trial phase and therefore withdrew its legal aid. After the fund had been exhausted, the accused was considered partially indigent[167] and his privately retained counsel became assigned by the Tribunal.[168] However, as the partial aid covered the costs for defence *counsel* alone, the legal assistants of co-accused helped assist Limaj's counsel.[169]

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[160] See Article 6(A) ICTY Directive on the Assignment of Defence Counsel (hereinafter: ICTY Directive), Rev. 11. Cf. Articles 3 and 4 ICTR Directive on the Assignment of Defence Counsel (hereinafter: ICTR Directive), 2004.

[161] From the introduction of the partial indigency system until 2005, 12% of all accused did not demand legal aid from the Tribunals. See Dixon, Rodney and Khan, Karim A.A., *Archbold, International Criminal Courts. Practice, Procedure and Evidence* (United Kingdom: Sweet & Maxwell, 2005), p. 940.

[162] Decision on the Application, *Nyiramasuhuko* & *Ntahobali*, *supra* note 108, § 8.

[163] See ICTY App. Ch., Decision (Appeals Chamber) on Review of the Registrar's Decision to Withdraw Legal Aid From Zoran Žigic, *Kvočka et al.* (Case No. IT-98-30/1), 7 February 2003, § 12. Cf. also ICTY Tr. Ch. I, Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momcilo Krajisnik Partially Indigent for Legal Aid Purposes, *Krajisnik* (Case No. IT-00-39-PT), 20 January 2004, § 16.

[164] See Zappalà, Salvatore, The Rights of the Accused, in Cassese, Gaeta and Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary* Oxford, New York: Oxford University Press, 2002), pp. 1319-1353, p. 1338.

[165] The ICTY Formula can be found in the 'Registry Policy for Determining the Extent to Which an Accused Is Able to Remunerate Counsel', entry into force 4 May 2004, added as Appendix II, to ICTY Reg., Decision, *Drago Nikolić* (Case No. IT-05-88-PT), 25 November 2005.

[166] See, for instance, ICTY Reg., *Miletić* (Case No. IT-05-88-PT), 26 September 2005.

[167] The ICTY Registry has guidelines to determine whether and to what extent an accused is able to remunerate his defence team. See Registry Policy for Determining the Extent to Which an Accused Is Able to Remunerate Counsel, *supra* note 165.

[168] See ICTY Dep. Reg., Decision, *Limaj et al.* (Case No. IT-03-66-T), 10 February 2005.

[169] I am thankful to Caroline Buisman, former legal assistant to the defence at the ICTY, for conveying this to me.

In principle, a Trial Chamber does not engage in the process of the determination of indigence of an accused and the assignment of counsel.[170] It may review the Registrar's decision,[171] but it can be difficult to assess whether or not the Registrar made a proper determination.[172]

The accused must declare his means to the Registrar[173] and has the burden of proof regarding his indigence. However, if the Registrar seeks to withdraw the legal aid once it is being provided, the burden of proof of the accused no longer being eligible for this aid will be on the Registrar.[174] This is not an easy task. The ICTY Registrar's decision to withdraw the assigned legal assistance of several accused solely on the basis of media reports,[175] was reversed by the Trial Chamber. The Registrar should undertake proper investigations were any doubts to arise about an accused's indigence.[176] Only if there is sufficiently reliable evidence, can the drastic step of removing the assignment of the accused's defence counsel in the middle of his trial be justified.[177]

The Directives of the *ad hoc* Tribunals stipulate that legal aid will cover 'the costs of legal representation of the suspect or accused necessarily and reasonably incurred'.[178] This may 'include costs relating to investigative and procedural steps, measures taken for the production of evidence to assist or support the Defence, expenses for ascertainment of facts, consultancy and expert opinion, transportation and accommodation of witnesses, postal charges, registration fees, taxes or similar duties, and all remuneration due to Counsel'.[179] As witnesses are often located in disparate geographic locations, costs for contacting potential defence witnesses and to transfer them to the court are substantial.[180] The Regulations of the ICC provide that legal aid covers 'all costs reasonably necessary as determined by the Registrar for an

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[170] See ICTY Tr. Ch., Decision on Defence Preliminary Motion on the Assignment of Counsel, *Mrkšić, Radić, Šljivančanin and Dokmanović* (Case No. IT-95-13), 30 September 1997 (hereinafter: Decision on Defence Preliminary Motion), § 10.

[171] See Article 12 ICTR Directive (2004); Article 13 ICTY Directive (Rev. 11). At the ICC, the Presidency may review the Registrar's decision. See Regulation 85(3) ICC Regulations of the Court.

[172] Decision on Defence Preliminary Motion, *Mrkšić, Radić, Šljivančanin and Dokmanović*, *supra* note *170*, § 12.

[173] See Article 7 ICTY Directive; Article 7 and 8 ICTR Directive; Regulation 84 ICC Regulations of the Court.

[174] See ICTY Tr. Ch., Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, *Kupreškić et al.* (Case No. IT-95-16), 3 September 1999 (hereinafter: Decision on the Registrar's Withdrawal), § 6.

[175] These reports alleged that the accused's legal representation had been funded through auctions organized by a Croatian support group.

[176] See ICTY Tr. Ch., Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, *Kordić and Čerkez* (Case No. IT-95-14/2), 3 September 1999 (hereinafter: Decision on the Registrar's Withdrawal); Decision on the Registrar's Withdrawal, *Kupreškić et al., supra* note 174; ICTY Tr. Ch. II, Judgement, *Kupreškić et al.* (Case No. IT-95-16), 14 January 2000, § 27.

[177] See Decision on the Registrar's Withdrawal, *Kordić and Čerkez*, *supra* note 176, § 4.

[178] See Article 17(A) ICTR Directive (2004); Article 23(A) ICTY Directive (Rev. 11).

[179] Article 17(B) ICTR Directive (2004). Article 23(B) ICTY Directive (Rev. 11) is more specific on the 'investigative and procedural steps', by providing that the costs include the remuneration of assigned members of the defence team.

[180] Cf. for instance, Decision on Request for Private Representation, *Bagosora et al*, *supra* note 122, § 7.

effective and efficient defence'. These include translation and interpretation costs.[181] This leaves considerable scope for interpretation and leeway to the Registrar in providing legal aid.

2.3.5 List of Counsel

To have counsel readily available for assignment, the Registrar maintains a list of qualifying counsel who are willing to be assigned.[182] If the Registrar refuses to admit an applicant to the list, the President can review this decision.[183] A separate list is kept of potential duty counsel.[184] The ICC Registrar also keeps a list of legal assistants and investigators.[185] As several cases run simultaneously, there needs to be a substantial number of counsel.[186] The lists of counsel of the *ad hoc* Tribunals and of the ICC have always contained sufficient candidates.[187]

Only a select number of counsel gets to represent an accused. At the ICC, the Registrar must appoint any lawyer from the list whom the accused has chosen, provided that he is willing and available. If the lawyer preferred by the accused fulfils the necessary requirements, but is not included in the list, the Registrar should admit him to the list and appoint him.[188] This promotes the accused's choice.

The Directives of the *ad hoc* Tribunals do not stipulate that the Registrar *must* appoint a preferred lawyer who does not appear on the list if he qualifies. This could leave the Registrar more room for discretion. At the ICTR, as a rule, the accused selects three counsel from the list[189] and indicates the order of his preference on the

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[181] See Regulation 83(1) of the ICC Regulations of the Court.

[182] See Rule 45 ICTY RPE; Rules 44*bis* and 45 ICTR RPE; and, Rule 21 ICC RPE.

[183] Article 15(C) ICTY Directive; Regulation 72(1) ICC Regulations of the Court. The ICTR Directive does not specifically provide this.

[184] Rule 45(C) and Rule 62(B) ICTY RPE; Rule 44*bis*(A) ICTR RPE. The ICC Registrar will maintain a roster of counsel that are on the general list of counsel for this purpose. See Regulation 73(1) ICC Regulations of the Court.

[185] See Regulations 125 and 137 ICC Regulations of the Registry.

[186] For instance, in 2004, 5 duty counsel, 53 lead counsel and 30 co-counsel were assigned by the ICTR. See ICTR Tenth Annual Report (UN Doc. A/60/229), 15 August 2005, par. 72. A total number of 96 counsels were assigned in 2006. See ICTR 11th Annual Report, 16 August 2006, par. 59.

[187] In 1996, 66 counsel were on the ICTY list, while a total of 13 counsel were assigned to 9 accused. See ICTY Third Annual Report, *supra* note 76, par. 107; in May 1998, 400 counsel had showed their willingness to be assigned by the ICTY. See Beresford, Stuart, 'The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance', 2 *The International Journal of Human Rights* (1998), pp. 49-65, p. 65, footnote 68; in 2000, there were 350. Cf. ICTY Seventh Annual Report (UN Doc. A/55/273), 26 July 2000, par. 230; in 2007, the ICC had admitted 205 candidates to its list. See www.icc-cpi.int/library/defence/Defense_Counsel_List_English.pdf, lastly visited 10 August 2007.

[188] See Regulation 75 ICC Regulations of the Court.

[189] ICTR Tr. Ch. I, Decision on the Motion of the Defence for the Assignment of Co-Counsel for Elizaphan Ntakirutimana, *Ntakirutimana & Ntakirutimana* (Case No. ICTR-96-10-T and Case No. ICTR-96-17-T), 13 July 2001 (Hereinafter: Decision on the Motion of the Defence), § 9. See also, Information Circular No. 2 of 22 November 1999, par. 8, published in Bohlander, Michael, et al., *Defense in International Criminal Proceedings. Cases, Materials and Commentary* (Ardsley, NY USA: Transnational Publishers, 2006), p. 174-175.

application form for legal aid. He may explain his choice on the form.[190] The same procedure is to be followed by lead counsel for the assignment of co-counsel.[191] In *Elizaphan & Gerard Ntakirutimana*, it was argued that even if lead counsel has only one suitable candidate on his mind, he is obliged to inquire after other counsel on the Registrar's list.[192] This "three names procedure" purports to facilitate judicial work and strengthen the rights of the accused.[193] It is convenient for the Registrar because if the preferred counsel or co-counsel is unavailable, it will save the time and trouble of repeating the procedure.[194] However, the Registrar should not simply for reasons of his own convenience refuse the assignment of preferred counsel, if he cannot instantly verify the availability or qualifications of the individual concerned. In *Ntakirutimana*, the Registrar refused to appoint co-counsel, even though the candidate seemed to be available[195] and to have 'valuable experience in criminal proceedings',[196] because lead counsel had proposed one candidate rather than three. Since the three-names procedure should merely be a safety measure to ensure counsel's availability,[197] the Chamber ordered the Registrar to make an effort to appoint the proposed co-counsel.[198]

At the ICTY, a similar procedure seems to be employed.[199] The ICTY Registry gives the accused the opportunity to select a counsel from the list. Similar to the procedure of the ICC, if an accused selects a counsel that qualifies,[200] but is not on the list, the Registrar should admit him. In *Delalić et al.*, this practice was endorsed by the Trial Chamber.[201] In *Bala*, counsel preferred by the accused, a native English speaker with over twenty five years of criminal law experience, was appointed and included in the list.[202]

2.3.6 Legal Aid Compensation Schemes

Remuneration of the defence under any legal aid system is a delicate issue, because of budgetary constraints. At the *ad hoc* Tribunals and the ICC, counsel can only hire a

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[190] Decision on the Motion of the Defence, *Ntakirutimana & Ntakirutimana*, *supra* note 189, § 3.
[191] ICTY Directive Article 16(D) and ICTR Directive Article 15(E).
[192] Decision on the Motion of the Defence, *Ntakirutimana & Ntakirutimana*, *supra* note 189, § 10.
[193] ICTR Tr. Ch. I, Decision on the Motion of the Defence for the Assignment of Co-Counsel for Elizaphan Ntakirutimana, *Ntakirutimana & Ntakirutimana* (Case No. ICTR-96-10-T and Case No. ICTR-96-17-T), 13 July 2001, § 3.
[194] Cf. *ibid.*, § 11.
[195] See *ibid.*, § 12.
[196] See *ibid.*, § 19
[197] See *ibid.*, § 11.
[198] This was done on the provision that he could certify all his qualifications. See *ibid.*
[199] Cf. ICTY Pres., Decision on request for review of the decision of the Registry in relation to assignment of counsel, *Krajišnik* (Case No. IT-00-39-A), 1 February 2007 (hereinafter: Decision on Request for Review), § 13.
[200] The qualifications which counsel should have are examined *infra* in paragraph 2.4.
[201] ICTY Tr. Ch., Decision on Request by Accused Mucić for Assignment of New Counsel, *Delalić et al.* (Case No. IT-96-21), 24 June 1996.
[202] See ICTY Dep. Reg., Decision, *Bala* (Case No. IT-03-66-PT), 12 March 2004.

limited number of investigators and consultants.[203] In addition, the Registry reviews the necessity and reasonableness of the expenses made by counsel.[204] Depending on the intensity of such reviewing of defence counsel's activities, this could unduly interfere with counsel's work.

Compensation for defence counsel has fluctuated throughout the existence of the legal aid system. In *Tadić*, defence counsel initially received a daily fee of $200 ($26 per hour). After negotiations with the Registry, this was increased to $825 a day.[205] Defence counsel appearing before the ICTY received a fixed rate for initial consultations and to familiarize themselves with the case, [206] a daily allowance, provided they had to travel to The Hague and, most importantly, a fixed daily rate. This daily rate became an hourly rate, which varied depending on the number of years of experience of counsel.[207] Counsel were required to indicate in detail the hours spent and the tasks performed.[208] To limit the costs of legal aid, from September 1996 onwards counsel could bill a maximum number of 175 hours (including hearing hours) per month.[209] In 1998, the same maximum applied to legal assistants and defence investigators. For them this was reduced to 125 hours per person per month only a year later.[210] At the ICTR, legal assistants and investigators may only bill 100 hours a month.[211] Considering the pressure that defence counsel are under while conducting an international criminal trial, it is likely that most defence counsel and their assistants made more hours in practice. The ICTR makes a significant difference between legal aid provided during the appeal stage and during trial stages. During the appeal stage co-counsel will only be assigned in exceptional cases and may bill a total number of 350 hours all-in.[212] Nonetheless, according to Ellis, in the most advantageous situation, an experienced counsel[213] could earn $230.000 a year at the ICTY.[214]

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[203] There would be a limited budget for them. See ICTY Fourth Annual Report (UN Doc. A/52/375-S/1997/729), 7 August 1997, par. 87 and ICTR Ninth Annual Report (UN Doc. A/59/183), 27 July 2004, pars. 69 and 70.

[204] Cf. Article 23(A) ICTY Directive (Rev. 11); Article 17(A) ICTR Directive (2004); Regulation 83(1) ICC Regulations of the Court.

[205] See Ellis, Mark S., 'Achieving Justice before the International War Crimes Tribunal: Challenges for the Defense Counsel', *Duke Journal of Comparative and International Law* (1997), Spring 1997, pp. 519-537, p. 531.

[206] This fixed rate was initially $400, but was increased to $2000 in 2000 (Directive, IT/73/Rev. 8, 15 December 2000). For duty counsel, assigned pursuant to Rule 62 (B) of the Rules, this fixed rate includes the accused's initial appearance. Article 24, Directive (IT/73/Rev. 10), 28 July 2004.

[207] From the annex of the Directive rev. 6 on, the rate varied for lead counsel from $80 to $110, for co-counsel the fixed amount of $80, for legal assistants and investigators from 30 to 50 DM. See Directive, IT/73/Rev. 6, 10 July 1998, Annex vi. From 2002 (Directive IT/73/Rev. 9, 12 July 2002), investigators' and legal assistants' hourly rates were €15 to €25 an hour.

[208] Cf. Comprehensive Report on Legal Aid System ICTY, *supra* note 148, par. 7.

[209] Again, counsel had to submit time sheets and request prior approval of the Registrar. See Comprehensive Report on Legal Aid System ICTY, *supra* note 148, par. 8.

[210] Cf. *ibid.*, par. 9.

[211] See ICTR Remuneration Guidelines, *supra* note 103, par. 3.2; ICTR Remuneration Manual for Practitioners, *supra* note 111, par. 12.

[212] See ICTR Remuneration Manual for Practitioners, *supra* note 111, par. 17.

[213] The more years of experience, the higher the hourly rate counsel will receive.

[214] Ellis made a rough estimation and this will include office costs. See Ellis (2003), *supra* note 113, p. 953.

In addition to the ceilings on billable hours, the Registry limited the scope of defence tasks to be compensated to reduce costs. Defence counsel's travelling would be compensated only for client visits, witness' examinations and hearings. As for investigators, only field trips would be compensated. Legal assistants could receive travel compensation for doing legal research, drafting and, in limited cases, for reviewing case files in The Hague.[215] The fixed rate covered the initial consultations with the client, the initial appearance and plea before the Tribunal and its preparations, and also the 'refreshing of knowledge of rules and regulations and other general reading.'[216] In 2004 it simply covered the initial consultations and familiarization with the case.[217] In 2007, 'to make the most efficient use of public funds at the lowest possible cost to the Tribunal', the ICTY Registry issued a Defence Travel and Daily Subsistence Allowance (DSA)[218] Policy that meticulously prescribes the purposes for which travel may be undertaken and with what frequency. A trip for co-counsel and lead counsel to meet each other is compensated once every two months for each counsel.[219] Prescribing the scope of professional activities of defence counsel in such detail inevitably restricts his freedom in conducting a defence. On the other hand, it enhances clarity and transparency as to which activities will be reimbursed under the legal aid scheme and which will not. Counsel will have a better concept of that which the Registry deems reasonably necessary. Out of one ICTR defence team, only a total of four members can receive a daily allowance at the same time. Plainly, this discourages a five member team from gathering as a whole at the seat of the Tribunal.

When concerns arose about potential over-billing by counsel, the ICTR started to drastically review the time sheets of defence counsel. The Registry trained its staff in "taxing defence costs" and hired a financial investigator to deal with legal aid issues.[220] According to defence counsel, the Registry suddenly disallowed roughly a third of the hours spent on a case and reported in their time sheets, as a standard practice.[221] Some counsel protested against these measures through organizing a strike in January 2004.[222] Aside from the frustration it caused for defence counsel, it is obvious that this measure to save costs may be counterproductive. Even though the fee-cutting practice may have lost its edge by now,[223] it is time-consuming for defence counsel to have to justify each and every particular activity for the representation of their client with administrative staff of the Tribunal, and it is a similar burden for the Registry staff to scrutinize the time sheets of counsel so meticulously. Moreover, if it is standard practice for their fees to be cut, counsel may be more tempted to overstate

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[215] See Comprehensive Report on Legal Aid System ICTY, *supra* note 148, par. 10.
[216] See Article 24 ICTY Directive (IT/73/Rev. 9), 12 July 2002.
[217] See Article 24 ICTY Directive (IT/73/Rev. 10), 28 July 2004.
[218] DSA should cover the extra expenses involved in being temporarily abroad.
[219] See Defence Travel and DSA Policy, 1 January 2007, available from the ICTY website, p. 3.
[220] ICTR Ninth Annual Report, *supra* note 203, pars. 69 and 70.
[221] This was reported to the author by different defence counsel during her research stay in Arusha, October 2004. Notes on file with the author.
[222] See ICTR Ninth Annual Report, *supra* note 203, par. 69.
[223] One defence counsel engaged in an ICTR case since November 2003, assured the author in August that 'it is a long time since I have had as much as one third of my fees disallowed. By and large in the last couple of years I have got what I asked for, with the reservation, of course, that the maximum number of hours which will be paid is 175 per month irrespective of the actual time put in.'

the scope of their professional activities, to be adequately compensated for the hours actually worked.

To save defence costs and ease of administration, the ICTY reformed its legal aid system by introducing a bulk system.[224] When a case is permanently assigned to a defence counsel, an estimation of its level of complexity and of its duration is made in advance. Depending on the Registrar's estimation, defence counsel will either receive a lump sum of the first (difficult), second (very difficult) or third (extremely difficult/ leadership) level.[225] As for the Pre-Trial phase, the Registrar determines the complexity level of the case on the basis of a "Work Plan" proposed by the defence and consultations with the Chamber seized of the case.[226] According to the ICTY Trial Chamber in *Mrkšić et al*, the following factors determine the level of complexity of a case:

> 'the number and nature of counts of the indictment, the possible amendments of the indictment, the nature of preliminary motions and challenges to the Tribunal's jurisdiction, the number of accused joined in the same case, the number of witnesses and documents involved, the geographical territory covered in the indictment, the previous ranking of the accused within the military or political hierarchy (where appropriate) and the legal issues expected to arise in the course of the trial.'[227]

To determine the duration of the trial proceedings, the Registrar relies on the time allocated for this phase to the parties by the Trial Chamber.[228]

The lump sum system was introduced to provide 'maximum flexibility in the use of resources and to allow Lead Counsel [..] to hire members of the Defence Team as he sees fit.'[229] Each level provides for one lead counsel to be paid on UN P5 level and one co-counsel paid on UN P4 level. It is calculated that a level 1 team has a budget for 2 support staff, level 2 for three and level 3 for 5 support staff and that level 2 needs three times more time than level 1 and level 3 needs three times more time than level one.[230] The lump sum covers all aspects of representation, but excludes travel expenses and DSA.[231] The ICTY has put limits on the amount of travel expenses and DSA to be paid to counsel and co-counsel. Defence support staff (legal

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[224] See ICTY Ninth Annual Report (UN Doc. A/59/215), 13 August 2004, par. 356. Interestingly, the ICTR also created the conditions for using a lump sum system, but does not seem to make use of this system yet. Cf. ICTR Tenth Annual Report *supra* note 186, par. 73. Duty counsel at the ICTY still receive a fixed rate under the new lump sum system. See Article 25 ICTY Directive (Rev. 11).

[225] See ICTY, Defence Counsel Payment Scheme for the Pre-Trial Stage, 1 May 2006, par. 2. Exact figures are included in this Scheme and also in the Defence Counsel Payment Scheme for the Trial Stage, 1 May 2006, available from the ICTY website.

[226] Factors such as the position of the accused (leader or subordinate), the number and nature of counts in the indictment are taken into account. See Payment Scheme for the Pre-Trial Stage, *supra* note 225, par. 22.

[227] ICTY Tr. Ch. II, Decision on Defence Request for Review of the Registrar's Decision on the Level of the Case, *Mrkšić et al.* (Case No. IT-95-13/1-PT), 3 March 2005 (hereinafter: Decision on the Level of the Case).

[228] Cf. Payment Scheme for the Trial Stage, *supra* note 225, pars. 16-18.

[229] Payment Scheme for the Pre-Trial Stage, *supra* note 225, par. 1.

[230] Payment Scheme for the Pre-Trial Stage, *supra* note 225, par. 29.

[231] See Payment Scheme for the Pre-Trial Stage, *supra* note 225, par. 3.

assistants, investigators or a defence case manager) will receive DSA in few cases.[232] All levels receive an equal maximum monthly fee for translation and interpretation costs.[233] This system gives counsel more certainty on their budget and has allowed defence teams to assign case managers.

However, once the budget is consumed, it can be very difficult or even impossible to obtain additional funds. Even though the Rules and the Directive do not grant the defence judicial review of decisions of the Registrar regarding the level of complexity of a case, the Trial Chamber deems itself 'competent to review the Registrar's decision in the light of its effect upon the fairness of the trial'.[234] Without this being stipulated in the Directive, the Chamber can also review the Registrar's decisions concerning remuneration of counsel. However, such judicial review mainly concerns 'the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it'.[235] If counsel deems that the Registrar has misclassified his case, he should demonstrate exceptional circumstances to move the trial Chamber to review the Registrar's decision.[236] However, as an alternative to upgrading the level of a case, 'the Registrar may, at its discretion, compensate for cases that require additional legal assistance without changing the level of complexity of the case'.[237] That could be particularly helpful for counsel who are in the dilemma that they need substantive resources, but do not want to present their case as a "leadership" case, to which the highest level of resources applies. A consequence may be that their clients would risk being labelled as leaders of the criminal enterprise that is held responsible for the crimes committed, whilst the object of their defence is to emphasize the insignificance of their position.

With its lump sum system the ICTY also sought to eliminate the incentive for defence counsel to overstate their work. Furthermore, it was no longer necessary to inspect counsel's invoices.[238] A danger of the ICTY's lump sum system, however, is that it may induce some counsel to minimize their work. When a case takes "a little longer" than expected, the total of the lump sum will not be adjusted. But when a case finishes ahead of the estimated schedule, the defence will receive the whole lump sum regardless.[239] This undoubtedly makes the legal aid system more efficient, but it has the potential to reduce the quality of legal assistance. Although the lump sum system may prevent abuse of the Tribunal's resources,[240] in the worst case scenario, it may encourage less consideration for the client and thus may impair the quality of justice and the fairness of the proceedings.

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[232] Cf. ICTY, Defence Travel and DSA Policy, *supra* note 219.

[233] Payment Scheme for the Pre-Trial Stage, *supra* note 225, par. 5; Payment Scheme for the Trial Stage, *supra* note 225, par. 26.

[234] Decision on the Level of the Case, *Mrkšić et al.*, *supra* note 227.

[235] *Idem*.

[236] Cf., for instance, ICTY Tr. Ch., Decision of Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits, *Strugar* (Case No. IT-01-42-PT), 19 August 2003.

[237] Decision on the Level of the Case, *Mrkšić et al.*, *supra* note 227.

[238] See Comprehensive Report on Legal Aid System ICTY, *supra* note 148, par. 27.

[239] One third of the lump sum is withheld by the Registry, two thirds are paid during the proceedings in monthly instalments. The final third will be used to continue the instalments where the trial continues "a little longer" than expected, or will be granted when the trial ends. See Comprehensive Report on Legal Aid System ICTY, *supra* note 148, par. 25.

[240] Cf. *ibid.*, par. 24(d).

Instead of using a "lump sum" system, the ICC intends to save resources by implementing a monthly fee for defence counsel, which would be reviewed every three months.[241] It is argued that the ICTY's lump sum system could lead to 'erroneous assessment of time sheets, overbilling, disputes over case-ranking levels, dilatory measures delaying the proceedings and increased costs'.[242] The fees of defence team members of the ICC are based on the salaries of the OTP staff of the ICC and the ad hoc Tribunals.[243] In addition, counsel are compensated "for the increment in professional charges" by increasing their fees with an additional 40%.[244] At the most counsel will earn a monthly fee which corresponds to the salary of a senior prosecutor[245] enhanced by the incremental compensation up to a maximum of 40% of the salary.[246]

Overall, it is axiomatic that the defence receives adequate compensation and that there must be some control over the legal aid budget. The ICC's system, in particular the compensation for increment in professional charges, illustrates a particular understanding for the special position of defence counsel as an independent professional having to leave their domestic practice for an uncertain duration while working on an international case. The ICTY's approach is less time and resource consuming both for defence counsel and for the Registry than that of the ICTR. The intensive scrutinization of defence hours by Registry officers at the ICTR involves more bureaucracy and creates more resentment than the ICTY and ICC compensation systems. It seems that this degree of reviewing the necessity of counsel's work and his efficiency could actually conflict to an unacceptable extent with counsel's professional independence.

2.4 GUARANTEEING COMPETENT COUNSEL

2.4.1 Introduction

When a replacement counsel was sought for Charles Taylor at the Special Court for Sierra Leone, the Office of the Principal Defender advanced that the list of the SCSL did not contain counsel who were competent to represent the accused in this complex case. Arguably, the limited defence budget did not attract adequately competent counsel.[247] In a domestic legal system assessing counsel's competence is not unduly difficult. Defence counsel's tasks and the boundaries of his responsibilities are fairly clear. Before lawyers start practising in their domestic jurisdiction, they generally share a background in terms of legal education, and most have passed a Bar exam before entering the legal profession, or, at least, have worked as a kind of apprentice for

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[241] Report to the Assembly of States Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons (ICC-ASP/3/16), 17 August 2004 (hereinafter: Report to the Assembly of States Parties), par. 15.
[242] *Ibid.*, par. 15.
[243] *Ibid.*, par. 16.
[244] *Idem.*
[245] This is UN standard P5 level.
[246] See Report to the Assembly of States Parties, *supra* note 241, Annex 2.
[247] See SCSL, Transcript, *Taylor* (Case No. SCSL-2003-01-T), 25 June 2007, pp. 13-15. The judges strongly rejected this argument. See *ibid.*, p. 29.

several years. Experienced counsel are likely to be familiar with both substantive and procedural criminal law. In addition, standards as to what constitutes 'effective representation' have been established in domestic jurisdictions.[248] In the context of international criminal justice, it is more difficult to predict in advance whether or not counsel will be competent once appointed to a case. What precisely constitutes an effective defence in this relatively new system remains an inexact science.

Article 6(3)(c) of the ECHR 'guarantees the right to an adequate defence'.[249] In *Imbrioscia v. Switzerland*, the ECHR established that 'assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused'.[250] In *Öcalan v Turkey,* the ECHR argued that '*skilled* legal assistance *equal to the complex nature of the case'*[251] is necessary for the accused to prepare his defence.[252] Under the Statute of the *ad hoc* Tribunals, each accused, including an indigent accused, is entitled to representation by a competent counsel.[253] In this connection, 'the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defence, in particular the principle of equality of arms.'[254]

International criminal courts endeavour to ensure counsel's competence through demanding a number of qualifications. It has been argued that qualifications for counsel of the ICTY are 'relatively low'.[255] Ensuring that counsel is competent to conduct the defence in international criminal cases is axiomatic to the guarantee of an effective defence to the accused. An ICTR Trial Chamber asserted that 'to ensure assignment of counsel with relevant and extensive expertise at a high level who can mount an effective defence of the accused', counsel should meet a number of qualification requirements.[256] In 1995, the *ad hoc* Tribunals only required defence counsel privately engaged by the accused to be admitted to the practice of law in a

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[248] For instance, in the case law of the USA, actual ineffectiveness of legal assistance is established if 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' *Strickland v. Washington*, *supra* note 43, at 686. Legal assistance should be effective to ensure a fair trial. See *idem*. To reverse a conviction on the basis of ineffective legal assistance, the accused must show that his counsel's performance was deficient and that this prejudiced his defence as to deprive him of a fair trial, 'a trial whose result is reliable.' See *ibid*., at 687. In instances of an actual conflict of interest, prejudice is being presumed. See *ibid*., at 692. Cf. also *United States v. Cronic*, 466 U.S. 648 (1984), at 658-662. In *Cronic*, the Court also included the situation where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'. See *idem*, at 659. In his dissenting opinion, Judge Marshall criticized the defendant's obligation of showing prejudice. See *Strickland v. Washington*, *supra* note 43, at 710-711.

[249] *Artico*, *supra* note 13, § 33.

[250] ECHR, Judgement, *Imbrioscia v. Switzerland* (Appl. No. 13972/88), 24 November 1993, § 37. Cf. *Öcalan v. Turkey* [2003], *supra* note 68, § 153.

[251] Emphases added, JTT.

[252] *Öcalan v. Turkey* [2003]*, supra* note 68, § 154.

[253] See App. Ch. Judgement, *Akayesu*, *supra* note 125, § 78. Cf. also Decision on the Application, *Nyiramasuhuko* & *Ntahobali*, *supra* note 108, § 8.

[254] App. Ch. Judgement, *Akayesu*, *supra* note 125, § 76. Cf. also ICTR App. Ch., Judgment, *Kambanda* (Case No. ICTR 97-23-A), 19 October 2000, § 34.

[255] See McMorrow, Judith A., 'Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY', 30 *Boston College International and Comparative Law Review* (2007), 13 March 2007, pp. 139-173, p. 154.

[256] Decision on the Motion of the Defence, *Ntakirutimana & Ntakirutimana*, *supra* note 189, § 17.

state, or, alternatively, to be a university professor of law.[257] This gave wealthy accused a considerable amount of choice. However, it is doubtful whether these qualifications ensure that defence counsel can adequately conduct a defence in international criminal cases. In 1999, a UN Expert group reviewed the qualification requirements for defence counsel before the *ad hoc* Tribunals and found them to be inadequate. It concluded that '[t]he extent to which inadequate qualifications have had a negative impact upon operations in both Tribunals is difficult to quantify, but it seems certain that they have.'[258] The ICTY in particular was encouraged to elevate its qualification requirements.[259] The ICTY had attracted defence counsel with 'a wide variety of legal and professional ethical education and experience' [260] and their competence to effectively represent an accused in international criminal cases varied accordingly. According to the ICTY Registry, after the requirements had been adjusted, the benefits soon became apparent.[261]

Whether or not these requirements sufficiently promote counsel's competence is discussed below.

2.4.2 Qualification Requirements of Counsel

Experience

International criminal courts generally require counsel to have a number of years of experience. The ICTY did not require any specific number of years of relevant experience until 2004.[262] In practice, five was generally deemed sufficient.[263] Due to the criticism, particularly of the expert group,[264] the ICTY now requires seven years of relevant experience in criminal proceedings as a judge, prosecutor, attorney or in another function[265] and established competence in criminal, international criminal, international humanitarian or international human rights law.[266] At the ICTR, assigned counsel should have at least ten years of "relevant experience",[267] which is not further specified in the Rules of Procedure and Evidence, nor in the Directive. In *Ntakirutimana,* it was advanced that relevant experience is not limited to practice as a

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[257] See Rule 44 ICTY PRE (Rev. 6), 6 October 1995; Rule 44 ICTR RPE, 29 June 1995. It has been established in *Ntakirutimana* that 'the mere fact that a person teaches at a University or similar institution […] is not in itself sufficient to qualify'. Decision on the Motion of the Defence, *Ntakirutimana & Ntakirutimana*, *supra* note 189, § 17.

[258] See Expert Report, *supra* note 105, par. 210.

[259] See *idem*.

[260] See Dixon and Khan (2005), *supra* note 161, p. 942.

[261] ICTY Thirteenth Annual Report 2006 (UN Doc. A/61/271), 15 August 2006, pp. 23, 24.

[262] Rule 45 was amended 28 July 2004, and these amendments were included in ICTY RPE Rev. 32, 12 August 2004.

[263] A former ICTY Registry staff member, Laurent Wastelain, informed the author of this in an interview on 18 October 2004. Notes on file with the author.

[264] The UN expert group recommended to demand 'at least five years of criminal trial experience'. See Expert Report, *supra* note 105, p. 69, par. 202.

[265] See Rule 45(B)(iii) ICTY RPE and Article 14(A)(iv) ICTY Directive No. 1/94, IT/73/REV. 11.

[266] See Rule 45(B)(ii) ICTY RPE and Article 14(A)(iii) ICTY Directive No. 1/94, IT/73/REV. 11.

[267] This is a requirement before the ICTR since 1998. See Rule 45(A) ICTR RPE (8 June 1998 *et seq.*). See also Article 13 ICTR Directive (2004).

lawyer.[268] Other "valuable experience in criminal proceedings" may be useful,[269] on the condition that counsel is admitted to the practice of law or is a university professor. At the ICC, counsel should have established competence in international or criminal law and procedure and have gained more than ten years of 'the necessary relevant experience' practising criminal law as a judge, prosecutor, advocate or in a similar function.[270]

Before the ICTY in *Djukić* it was argued that defence rights should be respected "in accordance with the highest standards".[271] The *ad hoc* Tribunals and the ICC do not require previous experience as a *defence* counsel in criminal proceedings. To set a high standard, such experience should at least be required of lead counsel. The SCSL does require seven years of experience as counsel as a requirement to be put on the list of assigned counsel.[272]

Substantial experience in criminal proceedings enhances the probability that counsel will provide an accused with an effective defence. If not assigned under the legal aid program of the *ad hoc* Tribunals, it seems that any law professor can become defence counsel. It must be more difficult for an international law professor without any experience in criminal practice to conduct the defence of an accused before an international criminal court than for a defence counsel having criminal practice experience in his domestic jurisdiction.[273] In *Boškoski,* it was held that the Registrar did not regard every law professor to be qualified to represent an accused under Rule 44(A) of the ICTY RPE. Co-counsel whose appointment to privately be retained by the accused was scrutinized in this case was a visiting professor. He had gained experience in international criminal law as a defence counsel. He was also as an editorial board member of different leading journals on international criminal law and had published extensively in this field. He was therefore admitted as co-counsel.[274]

Under Rule 22(1) of the ICC RPE, a law professor is only allowed to *assist* defence counsel. Nonetheless, in *Nzirorera*, the accused asserted that his 'Counsel's 20 years experience practising Common Law is no guarantee of his ability to conduct a defence in line with "his wishes and his instructions".' [275] Substantial practice experience in a domestic legal system does not of itself guarantee counsel's competence in an international criminal setting.

International criminal law, both substantive and procedural, may involve various new concepts for all participants. The Dutch lawyers of Tadić, who were highly experienced defence counsel in the Netherlands, soon required the assistance of an English barrister, [276] for instance, for cross-examining the witnesses of the prosecution. This is a trial technique that lawyers in a civil law system are not as

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[268] See Decision on the Motion of the Defence, *Ntakirutimana & Ntakirutimana*, *supra* note 189, § 17.
[269] See *ibid.*, § 19.
[270] See Rule 22 ICC RPE and Regulation 67 ICC Regulations of the Court.
[271] See Transcript, *Djukić* (case No. IT-96-20), 4 March 1996, p. 3.
[272] See Article 13(B)(iii) SCSL Directive on the Assignment of Counsel, adopted 1 October 2003; Rule 45(C) SCSL RPE (2007).
[273] Cf. Expert Report, *supra* note 105, par. 210.
[274] See ICTY Dep. Registrar, Decision, *Boškoski* (Case No. IT-04-82-PT), 31 January 2007, pp. 3 and 4.
[275] Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 121, § 8.
[276] Cf. *supra*, paragraph 2.3.3.

familiar with as common law lawyers. For civil lawyers, it may also be unusual to conduct their own investigations and to prepare witnesses for testifying in court. For a civil lawyer to adjust his domestically cultivated professional customs to the adversarial legal environment of an *ad hoc* Tribunal[277] may be even more difficult where some of the judges handling the case will be equally at odds with this system.[278] A majority of defence counsel appearing before the ICTY are from the Former Yugoslavia,[279] which has a civil law system. Therefore, they may encounter difficulties when working in the predominantly adversarial legal environment of this Tribunal. It has been argued that due to a lack of experience on the part of some defence counsel with adversarial common law style proceedings such as those of the ICTY, and, in addition, because of a lack of knowledge of the law and practice of that Tribunal, trials before the ICTY have been longer than they otherwise might have been.[280] Few lawyers wil have experience in both common law systems and civil law systems. To obviate this drawback, lawyers appearing before international criminal courts should be trained in both the theoretical aspects as well as the practical aspects of conducting a defence in international criminal cases.

If having more than 5 years of practice experience is an absolute requirement, that will exclude young lawyers who have recently been educated in international criminal law at university but have only a few years of practice experience. This may be an undesirable consequence and this requirement may thus be too restricting since there is no empirical evidence that a lawyer with more than 10 years experience in practice is a better lawyer than someone with five years experience.

Language

In a domestic legal context, counsel almost inevitably shares a commmon language with his client, the judges and the prosecution. That is not the case in international criminal proceedings. At the ICTR in *Nzirorera*, for instance, lead counsel had trouble communicating with the accused, because he spoke poor French and his client spoke poor English.[281] In *Nikolić* the erroneous translation of defence counsel's closing argument led the Trial Chamber to impose a heavy sentence on the accused. Whereas the defence had stated that "around 7.000 men were killed", this had been translated as "*only* 7.000 persons were killed", which is a disturbing statement. Even the prosecution agreed that this translation error could have affected the assessment of the facts and the sentence.[282] Therefore, the Appeals Chamber revised the sentence.[283]

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[277] Chapter IV will analyze the character of the proceedings of the *ad hoc* Tribunals. For now, let us assume that these are predominantly adversarial.

[278] For instance, it has not been exceptional for judges to interrupt a defence counsel's meticulously prepared cross-examination. See, for an example where judges repeatedly interrupt both prosecution counsel and defence counsel in their cross-examinations, Transcript, *Delalić et al.* (Case No. IT-96-21), 30 June 1998. Cf. also *infra*, Ch. IV, paragraphs 4.2.1 and 4.3.4.

[279] According to Ellis, end 2002, this amounted to 66% of all defence counsel. See Ellis (2003), *supra* note 113, p. 955.

[280] See, for instance, Ackerman, John E., 'Assignment of Defence Counsel at the ICTY', in Richard May *et al.* (ed), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp. 167-176, p. 170.

[281] Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 121, § 3.3.

[282] See ICTY App. Ch., Judgement on Sentencing Appeal, *Momir Nikolić* (Case No. IT-02-60/1-A), 8 March 2006, § 71.

This example illustrates how important language is for just outcomes in international criminal proceedings.

Working in international criminal justice requires a high level of flexibility and formidable communication skills. An effective defence may hinge upon counsel's communication skills in the working languages since motions ought to be written, and negotiations with the prosecution and the Registry should be conducted, in one of these languages.[284] Therefore, it is vital that international criminal courts demand that counsel speak one of the working languages. Counsel's ability to work in the court's working languages also helps keeping trials at a reasonable length and within reasonable cost.

The Rules of Procedure and Evidence require particular levels of proficiency in the working languages.[285] The ICC, which requires excellent knowledge and fluency, has already experienced difficulties with finding suitable *ad hoc* counsel for the *Situation in Darfur*, speaking both Arabic and English. Only three candidates on the list seemed to meet these requirements, and only two of them could be contacted. In the end, one could prove that he had a 'good command' of English, and was fluent in Arabic and French.[286]

If counsel speaks the accused's language, this helps facilitate smooth communication between them. At the ICTR, accused generally prefer French speaking counsel.[287] At the ICTY Serbian, Bosnian or Croatian speaking counsel are sought after.[288] Many counsel from the former Yugoslavia however were not sufficiently articulate in French or English, the ICTY's working languages. This resulted in many assignment refusals.[289] In *Erdemović*, an exception was made to the working languages requirement in favour of the accused, so that he could have counsel who spoke his language.[290] This exception was later introduced in the RPE. Rule 44(B) of the ICTY RPE now provides:

> 'At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to

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283 See *ibid.*, § 72 and p. 48. As a result, and on the basis of two more grounds of appeal, the sentence was brought back from 27 years to 20 years of imprisonment. The accused in this case pleaded guilty.
284 See Dixon and Khan (2005), *supra* note 161, p. 945.
285 Rule 22(1) ICC RPE requires excellent knowledge and fluency; Rule 44(A)(ii) ICTY RPE requires written and oral proficiency; Rule 45(A) ICTR RPE (2006) requires that assigned counsel speaks a working language; Rule 45(C)(i) SCSL RPE requires fluency in English of assigned counsel.
286 See ICC Registrar, Decision of the Registrar Appointing Mr. Hadi Shalluf as ad hoc Counsel for the Defence, *Situation in Darfur* (Case No. ICC-02/05-12), 25 August 2006. Chapter VI, paragraph 6.6 will discuss how half a year later this counsel was removed from the case.
287 Cf. Expert Report, *supra* note 105, par. 204.
288 Cf. *idem*.
289 See Rohde, Christian, Defence related issues at the Registry of the ICTY, in Hallers, Joubert and Sjöcrona (ed), *The Position of the Defence at the International Criminal Court and the Role of the Netherlands as the Host State* (Amsterdam: Rozenberg Publishers 2002), pp. 121-125.
290 ICTY Tr. Ch., Order on the Appointment of Defence Counsel. Order, *Erdemović* (Case No. IT-96-22-T), 28 May 1996.

> meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages.'

However, counsel who solely speaks the accused's language may only be assigned as co-counsel.[291] Moreover, because 'every court requires attorneys practising before it, and especially those paid by it, to be able to function in the court's working language',[292] an exception under Rule 44(B) can only be made in the interests of justice.[293] If counsel wants to use a language other than the working languages or the mother tongue of the accused, he should request leave to do so.[294]

For the smooth administration of international justice, a lawyer's ability to function in a working language of the court is indispensable. Ease of communication between counsel and his client is equally of vital importance. Co-counsel speaking the accused's language, but none of the court's working languages, can become a problem if lead counsel withdraws from the case or is temporarily unavailable. If an accused does not speak any of the working languages, it is desirable that a defence team consists of counsel with knowledge of one of the working languages and the accused's language. In addition, knowledge of the language of the state authorities of the *locus delicti* can help counsel to effectively conduct his own investigations. If an international criminal court has difficulty in finding qualified counsel due to a lack of knowledge of the appropriate languages, it may be worthwhile, as a practical solution, to set up a language programme for individuals that otherwise qualify.

Integrity

In *Kunarac et al.*, the ICTY prevented an accused from engaging counsel *pro bono* because counsel had previously been found in contempt of the Tribunal.[295] Relying on its inherent power to address conduct that interferes with its administration of justice,[296] and to protect the interests of the accused, the Trial Chamber refused audience to counsel.[297] Although – at that time –[298] he qualified under Rule 44(A) of the ICTY RPE, he was deemed 'not a fit and proper person to appear before the Tribunal'.[299] His misconduct revealed 'an underlying attitude of utter disrespect for his

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[291] See Articles 14(C) and 16(D) ICTY Directive (Rev. 11).

[292] ICTY Pres., Decision on Assignment of Defence Counsel, *Šljivančanin* (Case No. IT-95-13/1-PT), 20 August 2003, § 20.

[293] See *idem*.

[294] See Rule 3(D) ICTY RPE (Rev. 39).

[295] ICTY Tr. Ch., Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono, *Kunarac et al.* (Case No. IT-96-23&23/1), 14 March 2000 (hereinafter: Decision on the Request of the Accused Radomir Kovac), §§ 13 and 14. On contempt procedures in international criminal justice, see *infra*, Chapter VI, paragraph 6.4.4.

[296] See *ibid.*, §§ 10-13; ICTY Tr. Ch. II, Separate opinion of Judge David Hunt on request by Radomir Kovac to allow Milan Vujin to appear as counsel acting without payment by the Tribunal, *Kunarac, Kovac and Vuković* (Case No. IT-96-23&23/1), 24 March 2000, § 8.

[297] See Decision on the Request of the Accused Radomir Kovac, *Kunarac et al., supra* note 295, § 18.

[298] At that time, good standing was not required of counsel who did not fall under the legal aid program of the Tribunal.

[299] *Ibid*, § 13.

professional duties towards his clients and the Tribunal.'[300] Moreover, it had undermined the truth-finding process.[301] Whether this is justifiable or not, by behaving unprofessionally in the past, such behaviour may cast doubt on whether or not counsel will properly observe his professional obligations in the future. As a consequence of this case, the formal requirement was introduced that counsel appearing before an international criminal court should be of good standing, *i.e.*, he should not have been found guilty in disciplinary proceedings, criminal proceedings or otherwise have engaged in dishonest conduct or conduct otherwise discreditable to a counsel that would be prejudicial to the administration of justice.[302]

Even where the ICTY has merely *initiated* contempt proceedings, disciplinary proceedings or misconduct proceedings against counsel, the Registrar may refuse to assign counsel.[303] In *Šljivančanin*, preferred counsel was reputed in the press as handling a criminal case against ethnic Albanians as a judge. The press coverage reflected negatively on his character.[304] Because of his dubious reputation, the ICTY President deemed his appointment against the interests of justice, as it could jeopardize the reputation of the Tribunal.[305] An allegation of professional misconduct should not preclude counsel's appointment by the Registrar. Arguably, only a finding of guilt of grossly unprofessional behaviour such as fraud or intentionally influencing witnesses should automatically preclude counsel's assignment under the legal aid system.[306] In order to conduct a vigorous defence on the accused's behalf, counsel may have to act on the boundaries of what is professionally acceptable.

In *Bagosora et al*, the ICTR Trial Chamber argued that were the Registrar to bar counsel from participating in the legal aid system due to fraudulent behaviour, an accused may still privately engage the same counsel.[307] However, the Chamber did not allow him to carry on the defence as "lead counsel", because that would leave him in charge of the legal aid received by the accused.[308] To preserve "the cohesiveness of the Defence team", the counsel in question could assist the team at the request of and under lead counsel's responsibility.[309]

In *Krajišnik*, a lawyer was only willing to represent the accused on the condition that his brother would be appointed as his co-counsel. However, the ICTY

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[300] *Ibid*, § 14.

[301] See *ibid*, § 14. The pending appeal in the contempt proceedings formed no obstacle for this decision. The Trial Chamber's duty to protect the interests of the accused prevailed over other considerations. *Ibid*,, §§ 17 and 18.

[302] See Rule 44(A) ICTY RPE (Rev. 39); Regulation 67(2) ICC Regulations of the Court; Article 13(B)(vi) SCSL Directive on the Assignment of Counsel.

[303] See Article 14(F) ICTY Directive (Rev. 11). Cf. also ICTY Pres., Decision on Assignment of Defence Counsel, *Rašević* (Case No. IT-97-25/1-PT), 16 October 2003, § 6.

[304] Decision on Assignment of Defence Counsel, *Šljivančanin, supra* note 292, § 27.

[305] *Ibid.*, § 3.

[306] It should also be considered that in some jurisdictions, the actual functioning as a human rights advocate, representing persons in cases that are politically delicate, may result in lawyers being falsely accused and convicted for undermining the state. Therefore, even criminal convictions may not necessarily evidence a lack of integrity on the part of a lawyer.

[307] See ICTR Tr. Ch. I, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, *Bagosora et al.* (Case No. ICTR-98-41-T), 19 January 2005, § 42.

[308] See Decision on Request for Private Representation, *Bagosora et al*, *supra* note 122, § 9.

[309] See *ibid.*, § 10.

Directive forbids family members of the accused *and* counsel to be assigned to a defence team.[310] Before a final decision was taken on his request, counsel informed the Registry that he was unwilling to be assigned even if his conditions would be met.[311] It is arguable that this restriction is unjustifiable. There is no sound reason to presume that counsel's integrity would be at stake simply by working together with a close relative who meets all the necessary requirements.

A requirement related to counsel's good standing which only applies at the ICTY, is membership of an association of counsel practising at the ICTY recognized by the Registrar, *i.e.* the Association of Defence Counsel practising before the ICTY (ADC-ICTY).[312] Membership of a domestic Bar association is not required by any international criminal court.

2.4.3 Distinctions in Requirements

The ICC makes no distinction in qualifications between counsel privately engaged by the accused and counsel assigned by the court. Counsel assigned under the legal aid programme of the *ad hoc* Tribunals and the SCSL have to meet more stringent requirements than those engaged by the accused.[313] The SCSL requires counsel engaged by the accused to have five years and court assigned counsel to have seven years of experience.[314] An additional requirement for counsel to be on the list is to be available and willing to represent any accused under the terms of the Directive on the Assignment of Counsel.[315]

Whereas the ICTR has not adjusted the requirements for counsel engaged by the accused, the ICTY has significantly increased its demands in this respect.[316] This inevitably diminishes the scope of the right of the accused to counsel of his own choosing.

At the ICTY and the ICC, duty counsel are required to meet the same qualifications as other assigned counsel.[317] Duty counsel at the ICTR should meet the requirements of counsel privately engaged by the accused, speak one of the ICTR's

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[310] See Article 16(F) ICTY Directive (Rev. 11): 'Members of the family or close friends of suspects, accused and counsel are not eligible for assignment under the Directive as counsel, expert, legal assistant, investigator, translator or interpreter, unless the Registrar determines that the assignment is in the interests of justice.'

[311] Cf. Decision on Request for Review, *Krajišnik*, *supra* note 199, §§ 5 and 12.

[312] See Rule 44 of the ICTY RPE (Rev. 39). International criminal Bar associations will be further discussed in Chapter III, paragraph 3.3.

[313] See Rule 45(B) ICTY RPE (Rev. 39); Article 14 ICTY Directive Rev. 11; Rule 45(A) ICTR RPE (2006); Article 13 ICTR Directive (2004); Rule 44(A) and 45(C) SCSL RPE and Article 13(B) SCSL Directive on the Assignment of Counsel.

[314] Cf. Rule 44(A) and 45(C) SCSL RPE and Article 13(B) SCSL Directive on the Assignment of Counsel.

[315] See Rule 45(B)(iv) of the ICTY RPE and Article 14(A)(ix) ICTY Directive Rev. 11; Rule 45(A) ICTR RPE (2006), Article 13 ICTR Directive (2004). When called upon to appear, pursuant to Rule 45 *ter* ICTR RPE, all counsel should confirm their ability to appear before the Tribunal on short notice.

[316] See Rule 44 of the ICTY RPE (Rev. 39).

[317] Rule 45(C) ICTY RPE; Regulation 73 ICC Regulations of the Court.

working languages and should live reasonably close to the Tribunal and its detention facility.[318]

2.4.4 Qualification Requirements for Other Defence Team Members

In *Bagosora et al.*, the ICTR considered that counsel must rely on a legal team 'to provide a competent defence.'[319] At the *ad hoc* Tribunals, the only formal qualification requirement for investigators, legal assistants and other members of the defence team is that they may neither be close friends nor relatives of the suspect or accused, nor of counsel. This requirement that presumably relates to integrity rather than to actual competence is incorporated in the Directive of the ICTY.[320] The ICTR has established this requirement in its case law.[321] The *ad hoc* Tribunals have not formulated any other mandatory requirements for defence team members other than counsel. At the ICTY, defence investigators generally have a legal, criminological or police or social sciences academic background, or have experience in police or military investigations.[322] There is no requirement at the ICTR for defence investigators to be trained as detectives.[323] In *Nyiramasuhuko & Ntahobali*, the ICTR President confirmed that the Registrar has *full discretion* to determine the criteria a defence investigator should meet.[324] The Registrar had withdrawn an investigator who had allegedly been involved in crimes falling under the jurisdiction of the Tribunal.[325] It follows that the integrity of defence team members is deemed to be most important at the *ad hoc* Tribunals. The absence of formal requirements leaves considerable discretion to the Registrar with regard to the appointment of legal assistants and investigators. This affects transparency and accountability. If the Registrar refuses to appoint a defence team member who meets the requirements, this decision is difficult to appeal without any formal requirements having been stipulated. On the other hand, it also leaves a considerable amount of choice to lead counsel.

The ICC does demand substantial qualification requirements of defence assistants and professional defence investigators. Assistants must have five years of relevant experience in criminal proceedings; investigators must have ten years of experience in investigations in criminal proceedings, be fluent in one of the working languages and preferably speak the language spoken at the investigation site. An exception to the experience requirement may be made provided that the investigator is not related to the accused or counsel.[326] This exception covers a considerable number of potential investigators.

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[318] Rule 44*bis* ICTR RPE (2006).

[319] Decision on Request for Private Representation, *Bagosora et al*, *supra* note 122, § 7.

[320] See *supra,* note 310.

[321] Cf. Decision on the Application, *Nyiramasuhuko* & *Ntahobali*, *supra* note 108, §§ 9-11.

[322] See the website of the officially recognized Bar association of the ICTY, the ADC-ICTY: www.adcicty.org, under "Opportunities", lastly visited 10 August 2007.

[323] This was communicated to the author in an interview with an ICTR investigator for the defence in October 2004, Arusha. Notes on file with the author.

[324] See Decision on the Application, *Nyiramasuhuko* & *Ntahobali*, *supra* note 108, §§ 11 and 13.

[325] See *ibid.*, § 2.

[326] See Regulation 68 ICC Regulations of the Court, Regulations 124, 137(2) and 139(2) ICC Regulations of the Registry.

2.4.5 Promoting Competent Representation

To ensure the right of an indigent accused to competent counsel, international criminal courts demand that defence counsel meet a considerable number of qualification requirements. These affect the right of an accused to choose his counsel. Substantial qualification requirements will diminish the number of counsel the accused can choose between. When the standard of qualifications at the ICTY was low, an accused had a broad choice.[327] But the ICTY was criticized for not requiring any specific number of years of relevant experience. The question arises as to whether the setting of substantial requirements or qualifications to act as defence counsel should, *per se,* be regarded as more important than the autonomy of the accused's freedom of choice.

Qualification requirements cannot alone guarantee counsel's competence and expertise. To improve and maintain counsel's professional competence, training should be provided to defence counsel throughout their assignment. The ICC prescribes that the Registry should organize training for defence counsel, especially for counsel from the region where a situation has been referred to the ICC.[328] Lawyers' associations have jointly organized training sessions for lawyers interested in practising before an international criminal court.[329]

Relatively few lawyers have so far been able to gain experience in the field of international criminal law. Defence counsel should have a thorough knowledge of the legal environment they work in. This should include the background of the conflict underlying the crimes their clients are charged with.[330] To ensure that counsel meeting the necessary qualification requirements have also familiarized themselves with the field of international criminal law, it may be that an official entrance Bar Exam should be introduced. Testing counsel's knowledge in advance guarantees that he is abreast of the legal issues involved in international criminal cases upon his assignment to any particular case. It would also fall to be considered for prosecution counsel and judges as it must be equally desirable for them to be well acquainted with the field of international criminal justice before being appointed. For defence counsel, this exam could be organized by the Registry, a Bar association, a defence body or a specialized legal training organisation.[331]

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[327] Cf. Tolbert, David, 'The ICTY and Defense Counsel: A Troubled Relationship', 37 *New England Law Review* (2003), pp. 975-986, p. 978; McMorrow, *supra* note 255, p. 154.

[328] See Regulations 140-142 ICC Regulations of the Registry.

[329] The International Criminal Defence Attorneys in Partnership with the International Criminal Bar, the Inter-American Bar Association, and the National Association of Criminal Defense Lawyers, Criminal Defence in International Criminal Law – a Training Session for Practitioners, December 11th – 14th, 2006, Montreal. Seven similar training sessions had previously been presented in Senegal, The Hague, Montreal, and Victoria B.C. The subjects covered included substantive law and procedure, case management and ethical problems. See www.er.uqam.ca/nobel/ieim/IMG/pdf/Montreal_training_workshop_2006_draft_06_bio.pdf, lastly visited 10 April 2007.

[330] At the ICTR, lead counsel and co-counsel may bill 50 hours for background reading on the history and politics of Rwanda and the Great Lakes region in the relevant period. See ICTR Remuneration Guidelines, *supra* note 103, par. 1.4; Manual for Practitioners, par. 9.

[331] See *infra,* Chapter III, which will discuss how to organize the defence.

2.4.6 Addressing Incompetent Representation

As a safeguard against incompetent counsel, the ICC Code of Professional Conduct demands that counsel refuses to represent an accused if he believes to lack "the requisite expertise".[332] It is doubtful whether or not counsel could establish in advance that he possessed the requisite expertise to work in a legal environment with which he is unfamiliar. When an accused requests representation by an unqualified counsel, the Registry can simply refuse to appoint him.[333] But even if counsel meets the necessary minimum requirements, this does not guarantee his competence in conducting an international criminal case. How to address counsel's incompetence once he is appointed to a particular case and whether measures can be implemented as a remedy is explored below.

It is difficult before any criminal court to establish a violation of the right of an accused to competent counsel let alone to obtain a remedy once counsel's incompetence is established. For instance, in the USA, to obtain the ultimate remedy for ineffective legal assistance, *i.e.*, to reverse a conviction, the accused must show that his counsel's performance was deficient and that this prejudiced his defence and deprived him of a fair trial, 'a trial whose result is reliable.'[334] Ineffective legal assistance is also established where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'.[335] Competence of counsel is presumed.[336] According to the ECHR, under Article 6(3)(c) of the Convention 'national authorities are required […] to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.'[337] The ECHR distinguishes between the establishment of a violation of the right to adequate and effective legal assistance and whether or not this causes prejudice warranting a remedy. According to the ECHR in *Artico v. Italy,* 'the existence of a violation [of Article 6(3)(c) of the ECHR] is conceivable even in the absence of prejudice'.[338] To obtain a remedy, prejudice needs to be established.[339] If a lawyer is appointed under a legal aid system, 'a State cannot be held responsible for every shortcoming on the part of a lawyer.'[340] Nonetheless, it can be warranted for authorities to undertake positive action to ensure that an accused effectively enjoys his right to free legal assistance. If counsel is clearly incompetent, he should either be replaced, or be made to fulfil his obligations.[341]

The ICTR in *Ndindiliyimana et al.* deemed that lead counsel's qualifications and experience, together with the help of a legal assistant, could make up for a co-counsel

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[332] See ICC Code of Professional Conduct for Counsel (ICC-ASP/4/Res.1), Article 13(2)(c). As to this Code, cf. *infra*, Chapter VI.

[333] Cf. for instance, ICTY Dep. Reg., Decision, *Musliu* (Case No. IT-03-66-PT), 27 May 2004, p. 1.

[334] See *Strickland v. Washington*, *supra* note 43, at 687. In his dissenting opinion, Judge Marshall criticized the obligation on the defendant of showing prejudice. See *idem*, at 710-711.

[335] See *United States v. Cronic*, *supra* note 248, at 659.

[336] Cf., for instance, *Strickland v. Washington*, *supra* note 43, at 688 and 689.

[337] ECHR, *Kamasinski v. Austria* (Appl. No. 9783/82), 19 December 1989, § 65. See also *Imbrioscia v. Switzerland*, *supra* note 250, § 41 and *Artico*, *supra* note 13, §§ 33 and 36.

[338] *Artico*, *supra* note 13, § 35.

[339] See *idem*.

[340] *Idem*. See also ECHR, *Lagerblom v. Sweden* (Appl. No. 26891/95), 14 January 2003, § 56.

[341] See *idem*.

that had resigned because of his ill health.[342] Lead counsel's contention that without co-counsel he could not do a proper job, especially considering his old age, actually amounted to an admission of his incompetence. Nevertheless, it did not convince the Chamber to appoint an additional counsel.[343] Even where a counsel is highly qualified and experienced, international criminal courts should not underestimate the amount of pressure on defence counsel in what are generally very complicated and time consuming international criminal cases. The fulfilment of all the necessary experience requirements, in addition to the support of a legal assistant, may not automatically compensate for a missing co-counsel, especially in joint trials that are of considerable length at the *ad hoc* Tribunals.

Where an accused alleges incompetence, the accused must show this incompetence 'on the basis of solid arguments and relevant facts.' In *Kambanda,* the accused's complaints about 'the insufficient number of meetings with his counsel and the latter's lack of interest in and knowledge of the case file'[344] were not corroborated by evidence. On the contrary, documents could substantiate that counsel carried out his duties in the normal manner.[345] In *Tadić*, the ICTY Appeals Chamber argued that '[i]f counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances […], the latter must be taken to have acquiesced, even if he did so reluctantly. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross professional incompetence.'[346] Unless gross negligence on the part of counsel can be established, due diligence will be presumed.[347]

Similarly, the ICTR Appeals Chamber in *Akayesu* argued that defence counsel 'is presumed to be competent and such a presumption of competence can only be rebutted by evidence to the contrary.' [348] A defendant accusing his counsel of incompetence needs to show "gross incompetence" and should establish reasonable doubt as to whether this incompetence resulted into a miscarriage of justice.[349] The accused's assertion that counsel failed to raise important matters does not of itself constitute evidence. Because this could also be a matter of defence strategy agreed upon by the accused, 'Counsel's failure to raise any issues or to raise objections is not

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[342] See ICTR Reg., Decision of Withdrawal of Mr. Antoine Beraud as Co-Conseil for Mr. François-Xavier Nzuwonemey, *Ndindiliyimana et al* (Case No. ICTR-00-56-T), 12 October 2004. Lead counsel from his co-accused Bizimungu had resigned somewhat later because of being ill. As a result, the *Ndindiliyimana et al.* trial was postponed. Cf., for instance, ICTR Tr. Ch. II, Minutes of Proceedings, Status Conference, *Ndindiliyimana et al.* (Case No: ICTR-00-56-I), 11 October 2004 and ICTR Reg., Décision de retrait de la commission d'office de maître Michel Croisier Conseil Principal de M. Augustin Bizimungu, *Ndindiliyimana et al* (Case No. ICTR-00-56-T), 7 October 2004. The fragile health of lead counsel amounted to exceptional circumstances, allowing his request for withdrawal to be honoured by the Registrar.

[343] See Decision on Defence Oral Motion, *Ndindiliyimana et al.*, *supra* note 129, § 7.

[344] Appeals Chamber Judgment, *Kambanda*, *supra* note 254, § 28.

[345] *Idem*.

[346] ICTY App. Ch., Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, *Tadić* (Case No. IT-94-1), 15 October 1998, § 65.

[347] See *ibid.*, §§ 48-50.

[348]App. Ch. Judgement, *Akayesu*, *supra* note 125, § 78.

[349] Cf. *ibid.*, § 77.

proof of incompetence.'[350] Generally, when an accused can demonstrate prejudice, and proof is provided, his statutory right is violated.[351] Nevertheless, 'even if such prejudice is not proven the question remains, as to whether the proven incompetence constitutes a violation of the statutory right of the accused to assistance by competent counsel and would consequently warrant a remedy.'[352]

For the accused to be able to prove his counsel's incompetence and to obtain a remedy requires that he produces evidence of counsel's gross professional incompetence. Bearing in mind that the general assumption is that counsel is competent, international criminal courts may be more reluctant than national courts to find that counsel is incompetent, simply because international criminal courts demand strict qualification requirements.

2.5 THE RIGHT OF AN ACCUSED TO LEGAL ASSISTANCE OF HIS OWN CHOOSING

2.5.1 Introduction

It has been argued that by granting each indigent accused the right to choose a particular lawyer, the most brilliant lawyers would go bankrupt.[353] In 2002, for budgetary reasons, a United Nations Committee recommended to put a full stop to granting indigent accused at the *ad hoc* Tribunals the right to counsel of their own choosing. Counsel on the Registrar's list should randomly be designated to a case.[354] Furthermore, ICTY judges advised the Preparatory Commission of the ICC against letting indigent accused select counsel from the Registrar's list. Instead, the Registrar should decide which counsel to assign. The judges considered that indigent accused are entitled to competent counsel; they do not have an unfettered right to a counsel of their choice.[355] This illustrates that the right of an accused to choose his counsel is not self-evident at international criminal courts, even though it is incorporated in the Statutes and is an important fair trial requirement incorporated in various human rights treaties.[356]

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[350] *Ibid.,* § 83.
[351] See *ibid.*, § 78.
[352] *Idem.*
[353] This concerned the USA. See Fellman, David, The Defendant's Rights, *supra* note 1, p. 124.
[354] See General Assembly, Official Records, 57th Session, Suppl. No. 5L**,** International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2001 and Report of the Board of Auditors (UN Doc. A/57/5/Add.12), 3 July 2002, par. 62. Apparently, the Registrar would propose this to the judges in the plenary. However, it seems that the proposal has been rejected, as it was never included in the *ad hoc* Tribunals' RPE or Directives.
[355] See Contributions of the Chambers of the International Criminal Tribunal for the Former Yugoslavia Submitted to the 26 July - 13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court, Prepared by the ICC Liaison Committee of the Committee of the Chambers of the ICTY, 19990726_IGO_ICTY(E) (2.4 Mb), 26 July 1999, available at www.icc-cpi.int/legaltools, lastly visited 26 February 2007, p. 5, par. 25.
[356] See Article 14(3)(d) of the ICCPR; Article 7(1)(c) of the African Charter on Human and People's Rights and Article 6(3)(c) of the ECHR.

Denying a person the assistance of a lawyer of his choice can have serious implications. According to the ECHR in *Goddi v. Italy*, it may be 'instrumental in depriving […] [him] of a "practical and effective" defence'.[357] The European Commission of Human Rights in a previous procedural phase considered that '[i]n most cases a lawyer chosen by the accused himself is better equipped to undertake the defence.'[358] Therefore, any recommendation to withhold this right from indigent accused altogether is worrying. It should be determined to which degree an accused receiving free legal assistance under a court's legal aid system should have a right to legal assistance of his choosing.

2.5.2 The Scope of the Right to Counsel of the Accused's Choice

Where the initial appointment of counsel is concerned, international criminal courts generally allow indigent accused to indicate counsel of their preference on the list of available lawyers kept by the Registrar.[359] The Statutes of international criminal courts entitle the accused 'to defend himself in person or through legal assistance of his own choosing'.[360] Suspects are also entitled to be assisted by counsel of their own choice while they are being questioned.[361] Furthermore, suspects and accused are entitled 'to have legal assistance assigned […], in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'. Nonetheless, the ICTY Directive on the Assignment of Defence Counsel does not stipulate that an indigent accused is entitled to be represented by counsel of his own choice. The ICTR Directive provides that a person is considered indigent if he lacks the resources 'to engage Counsel of his choice and to have himself legally represented or assisted by Counsel of his choice.'[362] This phrasing seems to be tailored to deny the right to a counsel of his own choosing to an indigent accused. In *Ntakirutimana*, where the accused sought replacement of his assigned counsel, the ICTR Trial Chamber argued that the Statute outlines two situations: 1) If the accused can privately finance his counsel, he may choose whom he wishes; 2) Where an indigent accused whose counsel is remunerated by the Tribunal is concerned, the Registrar will assign counsel to him pursuant to Rule 45 of the ICTR RPE and Article 13 of the Directive on the Assignment of Counsel.[363] The final decision and choice of a particular counsel rests with the Registrar. But, 'to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial […]an indigent accused should be offered the possibility of designating the counsel of his or her

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[357] *Goddi*, *supra* note 11, § 30. This was even more so since the lawyer appointed on the spot had not been given any opportunity to get acquainted with the case file of his absent client.

[358] EComHR , *Goddi v. Italy* (Appl. No. 8966/80), 14 July 1982, B 61, p. 25.

[359] See *supra*, paragraph 2.3.

[360] See Article 21(4)(d) ICTY Statute, Article 20(4)(d) ICTR Statute and Article 67(1)(d) ICC Statute. For the right of a suspect to legal assistance of his own choosing, cf. Article 18(3) ICTY Statute; Article 17(3) ICTR Statute; Article 55(2)(c) ICC Statute.

[361] See Article 17(3) ICTR Statute; Article 18(3) ICTY Statute; Article 55(2)(c) ICC Statute.

[362] Article 4 ICTR Directive (2004).

[363] See ICTR Tr. Ch. I, Decision on the Motions of the Accused for Replacement of Assigned Counsel, *Ntakirutimana and Ntakirutimana* (Case Nos. ICTR-96-10-T and ICTR-96-17-T), 11 June 1997 (hereinafter: Decision on the Motions).

choice from the list drawn up by the Registrar for this purpose.'[364] Only if the Registrar has reasonable and valid grounds not to grant the request of the accused, may he override the accused's wishes.[365]

Rule 22(2) of the ICC RPE provides: 'Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.' Under Rule 121(2)(a) ICC RPE, on his initial appearance, an accused 'may be assisted or represented by the counsel of his or her choice *or*[366] by a counsel assigned to him or her'. Thus, the right to counsel of the accused's choosing at least applies to a person who privately finances counsel. Rule 21, governing the assignment of counsel, stipulates that a person entitled to legal assistance '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.' Under the ICC Regulations of the Court, where a person who is entitled to legal aid chooses a counsel from the list, and this counsel is 'willing and ready to represent the person', the Registrar *must* appoint him. When choosing a counsel who is not on the list yet, but who is willing to be put on the list and ready and willing to represent the person in need of his assistance, if he is qualified, he should also be assigned and put on the list.[367] Thus, the ICC distinguishes the least between indigent accused and those with financial means to engage counsel and promotes the choice as to the initial appointment of counsel for all persons appearing before it.

Article 6(3)(c) of the ECHR does not require that an indigent accused may choose the counsel to be assigned to him, nor need the court consult the accused on this matter.[368] Thus, under the European Human Rights Convention, the right to choose legal assistance is limited where counsel is assigned by the court.[369] Moreover, the ECHR in *Croissant v. Germany*[370] ruled that the free choice of counsel may even be limited when the defendant pays for his representation.[371] The defendant's wishes may not be disregarded, but national courts may override these wishes 'when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.'[372] If an accused is not satisfied with his court assigned lawyer, the ECHR jurisprudence examines whether counsel provided an effective defence.[373] When

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[364] *Ibid.*

[365] See *Ibid.*

[366] Emphasis added, JTT.

[367] See Regulation 75 ICC Regulations of the Court.

[368] See EComHR, *F. v. Switzerland* (Appl. No. 12152/86), Decision of 9 May 1989: « *La Commission rappelle d'abord sa jurisprudence selon laquelle l'article 6 par. 3 c) (art. 6-3-c) ne garantit pas le droit de choisir le défenseur qui sera commis par le tribunal, pas plus qu'il ne garantit le droit d'être consulté à propos du choix d'un défenseur commis d'office*».

[369] Cf., e.g., *Lagerblom*, *supra* note 340, § 54.

[370] ECHR, *Croissant v. Germany* (Appl. No. 13611/88), 25 September 1992.

[371] It might have played a significant role that Croissant was at least represented by two counsel of his choice. According to the court, as these three counsel's fees were not excessive, it was not unfair that these had to be borne by the accused. See *Croissant*, *supra* note 370, § 36. Cf. T.N.M.B. Spronken, oratie 'A place of greater safety', 10 October 2003, p. 17, footnote 41.

[372] *Croissant*, *supra* note 370, § 29.

[373] See *Croissant*, *supra* note 370; *Kamasinski supra* note 337, §§ 63-71.

counsel fulfils his basic obligations, even though problems between him and his client are evident, a violation of Article 6(3)(c) will not be established.[374]

When an accused is given a lawyer of his choice, he is more likely to trust him. Although the ECHR deems a relationship of confidence between a lawyer and his client to be important,[375] no accused has an absolute right to choose his own counsel.[376] Nonetheless, one dissenting judge in *Croissant* argued that even though Article 6 was not violated by the appointment of this lawyer, efforts should have been made to appoint a lawyer in whom the accused had confidence.[377]

In *Setelich v. Uruguay* the Human Rights Committee (HRC) held that Article 14(3)(b) was violated because the accused could not choose his counsel.[378] In *Berry v. Jamaica*[379] and *Wright and Harvey v. Jamaica*,[380] the HRC argued an *indigent* accused is not entitled to choose the counsel that is provided to him.[381] In *Saidova v. Tajikistan*, the HRC added that 'steps must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice.'[382]

At the ICTR in *Ntakirutimana*, one dissenting judge argued that cooperation between the Registrar and the accused with regard to the appointment of counsel is essential for establishing mutual confidence between the accused and his counsel. This will endorse an effective defence.[383] Forcing a lawyer on an accused who is unable or unwilling to fully cooperate with him could ultimately result in an unfair trial.[384]

2.5.3 Limitations to the Right to Choose Defence Counsel

A court may – for valid reasons – refuse to appoint the lawyer preferred by the accused. For example, if he fails to meet the qualification requirements. The importance of communication and trust between an accused and his counsel in

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374 *Kamasinski*, *supra* note 337, §§ 69 and 70.

375 Cf. *Croissant*, *supra* note 370, § 29.

376 *Idem*.

377 Dissenting Opinion of Judge de Meyer, in *Croissant*, *supra* note 370. *Croissant* was a politically influenced case and the main reason for Croissant to oppose his third lawyer's appointment, was because their political views conflicted.

378 Article 14(3)(b) was also violated because the accused had not been able to communicate with his assigned lawyer. HRC, *Setelich v. Uruguay*, CCPR/C/14/D/63/1979 (28 October 1981), § 20.

379 HRC, *Berry v. Jamaica,* CCPR/C/50/D330/1988 (26 April 1994), § 11.6.

380 HRC, *Wright and Harvey v. Jamaica,* CCPR/C/55/D/459/1991 (8 November 1995), § 10.5.

381 See also *Price v. Jamaica* where the HRC reiterated its position, adding that national courts should ensure that the counsel's conducting of the appeal squares with the interests of justice. When assigned on appeal in a capital case, where counsel does not consult with this client nor inform him of his intention not to argue any grounds of appeal, he is neither effectively representing his client, nor acting in the interests of justice and thus violates Article 14(3)(d). HRC, *Price v. Jamaica,* CCPR/C/58/D/572/1994 (20 November 1996), § 9.2. See also HRC, *Brown and Parish v. Jamaica*, CCPR/C/66/D/665/1995 (5 August 1999).

382 *Saidova v. Tajikistan*, *supra* note 158, § 6.8.

383 ICTR Tr. Ch. I, Separate and Dissenting Opinion of Judge Yakov Ostrovsky on the Request of the Accused for Change of Assigned Counsel, *Ntakirutimana and Ntakirutimana* (Case No. ICTR-96-10-T and ICTR-96-17-T), 11 June 1997 (hereinafter: Separate and Dissenting Opinion of Judge Yakov Ostrovsky), § 5.

384 Cf. Ntanda Nsereko, Daniel D., 'Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client', 12 *Criminal Law Forum* (2001), pp. 487-507.

international criminal proceedings is further discussed in paragraph 2.6, but it is also illustrated by the preferences of the accused at the *ad hoc* Tribunals. As mentioned, the majority of the accused at the ICTY preferred counsel speaking their native language. This resulted in many refusals to assign preferred counsel because of their failure to fulfil the language requirement.[385]

The ICTR's remuneration guidelines provide that '[t]he preference for a Co-counsel should reflect the need to form a team with experience in the tradition of both common and civil law and knowledge of the two working languages of the Tribunal.'[386] Since accused at the ICTR preferred French speaking counsel, lawyers from Cameroon and Canada became popular choices. As an additional advantage, these counsel often speak both working languages of the court and are generally familiar with both the common law and civil law system.[387] However, the large number of Canadian defence counsel assigned to accused at the ICTR led the Registrar to propose a stop to hiring more Canadian lawyers and make room for lawyers with other nationalities.[388] In *Nyiramasuhuko and Ntahobali*, the ICTR Trial Chamber condoned this. When appointing counsel, the Registrar must consider 'the resources of the Tribunal, competence and recognized experience of counsel, *geographical distribution*, [and] a *balance of the principal legal systems of the world*'.[389] This reasoning allows the Registrar to use his discretionary power to promote what may be thought to be international politics rather than the rights of the defence. Whether an international court should promote the goal of assigning counsel from as many regions as possible at the expense of the right of an accused to choose his counsel is at least doubtful. Balancing the principal legal systems of the world within a defence team could enhance the chances to an effective defence. As is explained in Chapter IV of this study, the procedural system of the *ad hoc* Tribunals is predominantly of a common law nature. The majority of the accused at the ICTY preferred defence counsel from the Former Yugoslavia, which has a legal system falling under the civil law tradition. These counsel were mostly unfamiliar with the adversarial procedural system.[390] For this reason, in *Delalić et al*, an accused requested that an attorney experienced in common law should become involved in his defence, alongside his counsel from the Former Yugoslavia.[391]

Whether courts should determine the composition of a defence team or whether this should be left to lead counsel and the accused depends on a more fundamental question. To what degree are international criminal courts willing to grant

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[385] See Rohde, *supra* note 289.

[386] See ICTR Remuneration Guidelines, *supra* note 103, par. 1.5.1.

[387] Cf. Expert Report, *supra* note 105, par. 204.

[388] See Greaves, Michael, The Right to Counsel before the ICTY and the ICTR for Indigent Suspects: An Unfettered Right?, in May (ed), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp. 177-185, at 183; cf. also Tolbert (2003), *supra* note 327, p. 981.

[389] My italics, JTT. Decision on a Preliminary Motion, *Nyiramasuhuko & Ntahobali, supra* note 153, § 16.

[390] See, for instance, Expert Report, *supra* note 105, par. 204.

[391] According to the Chamber, lead counsel had 'so structured his conduct of the Defence' that a delay was unlikely. See ICTY Tr. Ch., Order on the Request by Defence Counsel for Zdravko Mucić for Assignment of a New Co-Counsel, *Delalić et al.* (Case No. IT-96-21), 17 March 1997.

autonomy to an accused as to how to conduct his defence or to what degree do they seek to impose their view on him as to what will be most effective for his defence? Where the appointment of lead counsel is concerned, the accused's choice should override a court's arguably "political" goals.

Nonetheless, in *Lagerblom*, where an accused contended that his defence had not been effective as he was assigned a public defence counsel who did not speak his mother tongue as opposed to counsel of his choice, the ECHR did not considere this a violation of Article 6 of the Convention. The Finnish accused had known sufficient "street Swedish" to communicate with his lawyer to some extent and had received adequate interpretation assistance throughout the proceedings.[392] Moreover:

> '[N]otwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned. When appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.[393]

Rule 44(B) of the ICTY RPE *does* allow an accused to choose a lawyer speaking his mother tongue, albeit on the condition that lead defence counsel fulfils the working language requirement.[394] In *Šljivančanin*, the Registrar refused to assign the two lawyers chosen by the accused, who both spoke his native language but none of the working languages. In addition, one counsel allegedly had a past of judicial impropriety. The accused had specific confidence in both counsel, because as local lawyers they would have better access to defence witnesses and military authorities. This would benefit the preparation of the defence. [395] On review, President Meron considered that an accused's preferences should be taken into account. However, because 'every court requires attorneys practicing before it, and especially those paid by it, to be able to function in the court's working language', an exception to the language requirement should solely be made in the interests of justice.[396] The one counsel whose integrity was not doubted was finally assigned to the accused.[397]

A conflict of interests being imminent can also preclude the appointment of counsel of the accused's choice. In *Simić et alia* however, even though a conflict of interest could potentially arise between counsel and client and his co-accused – defence counsel Pisarević could be called as a witness – the ICTY Trial Chamber gave 'due weight' to the accused's right to counsel of his own choosing. Article 9(5)(b)(II) of the ICTY Code of Professional Conduct allowed counsel to continue the representation of his client Zaric only after obtaining his full and informed consent.[398]

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[392] *Lagerblom*, *supra* note 340, §§ 62 and 64.
[393] *Ibid.,* § 54.
[394] See *supra*, paragraph 2.4.2.
[395] Decision on Assignment of Defence Counsel, *Šljivančanin, supra* note 292, § 5.
[396] *Ibid*, § 20.
[397] *Ibid*, § 27.
[398] Cf. *infra,* Chapter VI, paragraph 6.3.3, that will address conflicts of interest.

As the co-accused also indicated that they did not plan to call Pisarević as a witness, the likelihood of a conflict of interest was minimized.[399]

As mentioned, in *Kunarac et al.*, to protect the accused's interests, the ICTY refused to appoint a co-counsel on a *pro bono* basis on the request of lead counsel, because he had been found guilty of contempt in another ICTY case.[400]

Where the accused is denied the opportunity to choose his defence counsel, it was determined that he should immediately voice his complaint. In *Kambanda*, denial of the accused's right to counsel of his choosing did not constitute a valid ground of appeal, as it should have been raised at an earlier opportunity.[401] The ICTR Appeals Chamber reiterated that 'the right to free legal assistance by counsel does not confer the right to choose one's counsel.'[402] In *Akayesu*, the violation of this right was a ground of appeal as well. According to the Appeals Chamber, two requirements need balancing: 'on the one hand, affording the accused as effective a defence as possible to ensure a fair trial, and on the other hand, proper use of the Tribunal's resources.'[403] 'The right to choose counsel applies only to those accused who can financially bear the costs of counsel.'[404] An indigent accused may indicate his preference from among the Registrar's list and the Registrar should consider this preferrence, but it does not bind him. The Registrar exercises this wide discretion in the interests of justice.[405]

In *Ngeze*, it was held that "[t]he appointment of co-counsel, assistants and investigators are administrative matters falling within the powers and discretion of the Registrar. Lead counsel must initiate requests for such appointments, and he is held responsible for complying with the practice directions of the LDFMS."[406] As regards the appointment of co-counsel and other defence team members under the legal aid system, the accused is afforded little choice. Because of the 'presumption that counsel will act in the best interest of providing an effective defence for his client',[407] lead counsel and not the accused is entitled to appoint co-counsel, investigators and

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[399] ICTY Tr. Ch., Decision on the Prosecution Motion to Resolve Conflict of Interest regarding Attorney Borislav Pisarević, *Simić et al.* (Case No. IT-95-9), 25 March 1999.

[400] See *supra* paragraph 2.4.2.

[401] See Appeals Chamber Judgment, *Kambanda, supra* note 254, § 22. The accused initially waived his right to counsel. When the Registry nonetheless proposed to appoint counsel to defend Kambanda's interests, Kambanda requested the appointment of a particular counsel. Since the Tribunal had imposed disciplinary sanctions on this counsel in an earlier case, the Registry refused the request. Therefore, the assignment of another counsel was proposed to Kambanda and he agreed in writing. Just after being sentenced, he demanded a replacement of his counsel. Kambanda had agreed to his assignment only because he hoped for his preferred counsel to be assigned as co-counsel.

[402] Appeals Chamber Judgment, *Kambanda*, *supra* note 254, § 33. Footnotes in the citation are omitted.

[403] App. Ch. Judgement, *Akayesu*, *supra* note 125, § 60. Counsel had not appeared at a court session. Hereupon, to prevent undue delay, without stating any justifiable reasons or giving any warning beforehand, instead of the counsel Akayesu preferred, he was assigned two counsel whom he did not know.

[404] *Ibid.*, § 61.

[405] See *ibid*, § 62.

[406] Decision on the Accused's Request, *Ngeze*, *supra* note 107. LDFMS stands for Lawyers and Detention Facilities Management Section and forms part of the ICTR's Registry.

[407] *Idem.*

assistants or to terminate their contracts. [408] If an accused disagrees with an appointment, he can turn to the LDFMS or appeal to the Registrar. The President of the Tribunal can review the Registrar's decision.[409]

When counsel takes decisions regarding the appointment or dismissal of other defence team members which are against the wishes of the accused, counsel is not *per se* in a position to explain his actions to the judges. In *Ngeze*, counsel could not inform the court of his precise reasons for dismissing the two investigators, because of his duty of confidentiality.[410] In addition, counsel refused to reveal the number of meetings he had had with the accused. Revealing these details could bring the relation with his client in jeopardy. Judge Gunawardana opposed this reasoning. For the court to determine whether or not counsel had consulted the accused sufficiently, counsel could have disclosed "the extent and the duration" of the consultations with his client rather than its contents. That, argued the Judge, would not violate his duty of confidentiality.[411] Since counsel seemed to imply that he dismissed the investigators because he suspected fraudulent behaviour on their part, the Code of Professional Conduct for Defence Counsel obliges him to reveal confidential information where it may prevent criminal acts.[412] In such cases, it is impossible for the court to know precisely whether or not counsel failed in his duties towards his client. But only counsel can realistically determine whether or not to breach his duty of confidentiality given the circumstances. Especially in respect of the judges conducting his client's trial, counsel must be careful not to risk impairing the defence of his client. How best to resolve such dilemmas is further discussed in Chapter VI.

It remains a complicated issue whether the choice as to defence team members other than lead counsel should be primarily decided by lead counsel as opposed to the accused. The Statutes entitle the accused, not counsel, to "legal assistance" of his choosing. It is vital in facilitating an effective defence that lead counsel and co-counsel work closely together. In addition, because of his leading position in the defence team, lead counsel should have some influence over co-counsel's appointment. In *Croissant*, the ECHR argued that Article 6 of the Convention allowed a court to appoint a third counsel to the accused againts his wishes. Therefore, making lead counsel rather than the accused responsible for appointing other defence team members does not necessarily violate an accused's right to legal assistance of his choosing, or his right to a fair trial. It is preferable that lead counsel decides which additional defence team members to appoint rather than the court or the Registrar. Lead counsel is nevertheless under a professional obligation to take the accused's wishes into account when taking important strategic defence decisions. Therefore, he should involve the accused in any decision to appoint other defence team members.

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[408] See *Ibid.* Cf. Article 19 (A) (ii) of the ICTY Directive on assignment of defence counsel that provides that lead counsel may request the Registrar to withdraw the assignment of co-counsel.

[409] See *Ibid.* The Chamber may also be in a position to scrutinize the Registrar's decisions as to legal aid, because of its duty to ensure a fair trial. See, for instance, *supra*, paragraph 2.3.4.

[410] This duty is further discussed in Chapter VI, paragraph 6.3.4.

[411] See Separate and Dissenting Opinion of Judge Gunawardana on the Accused's Request for Withdrawal of his Counsel, *Ngeze* (Case No. ICTR-97-27-I), Tr. Ch. I, 28 March 2001.

[412] See *ibid.* The duty of confidentiality will receive closer attention in Chapter VI, paragraphs 6.3.4 and 6.3.5.

2.5.4 Replacement of Counsel

An accused who privately finances his counsel may discharge him at any given moment. In that case, to avoid delay, the only "measure" a court can take is to refuse to give any newly appointed counsel sufficient time to prepare. The ICTR RPE provide that assigned counsel is expected to conduct the accused's defence "to finality".[413] Notwithstanding, an accused may request the Registrar to withdraw his assigned counsel "in the interests of justice". The President can *review* the Registrar's decision if the request is turned down.[414] The replacement of a defence counsel will in most cases be costly as new counsel needs time to familiarise himself with the case and needs to establish a defence strategy in cooperation with the accused. This will cause delay and extra expenses on defence counsel's fees.[415] Therefore, only under extraordinary circumstances and where good cause is shown, will the *ad hoc* Tribunals grant a request to replace assigned counsel. The ICTR RPE provide that the request should not aim at delaying the proceedings.[416] The ICC does not provide for a specific procedure where an accused requests a replacement of his assigned counsel during his trial.[417]

In *Lagerblom v. Sweden*, the ECHR held that Article 6(3)(c) does not guarantee 'a right to have public defence counsel replaced'.[418] To limit legal aid costs, national authorities may be reluctant to grant a request to replace a public defence counsel once freely assigned and once he has carried out activities for the defence.[419] In Sweden, replacement of counsel could be granted at the accused's request where he faced a long sentence and had no confidence in his counsel. A replacement for language reasons was not granted.[420] Because of defence counsel's independence, 'the conduct of the defence is essentially a matter between the accused and his counsel'.[421] Intervention is only required where counsel manifestly fails to provide an effective defence and this failure is sufficiently brought to the court's attention.[422] This avoids delay and additional costs, but also protects counsel from being discharged despite his efforts to provide an effective defence.

In particular, where counsel have been assigned in accordance with the wishes of an accused more than once, the Tribunals are reluctant to replace them. For instance, in *Ngeze*, when denying his motion to withdraw his counsel as neither good cause, nor exceptional circumstances were established,[423] the Trial Chamber duly

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[413] See Rule 45(I) ICTR RPE.

[414] See Article 20 ICTY Directive (IT/73/Rev. 11); Article 19 ICTR Directive, 15 June 2007.

[415] Cf. *Lagerblom*, *supra* note 340, § 59.

[416] See Rule 45(H) ICTR RPE; Article 19(D) ICTR Directive;

[417] Rule 21(3) ICC RPE provides that an accused may seek the review of the Presidency of a decision to refuse a request for assignment of counsel. Pursuant to Regulation 78 ICC Regulations of the Court, where counsel seeks to withdraw, he needs leave of the Chamber.

[418] *Lagerblom*, *supra* note 340, § 55.

[419] *Ibid.*, § 59.

[420] See *ibid.*, §§ 34-37.

[421] *Ibid.*, § 56.

[422] See *supra*, paragraph 2.4.5.

[423] The accused argued that without reason and without prior consultation with him, his counsel fired his two investigators and an assistant who knew his case and his witnesses well and whom he trusted. Counsel contended that he had dismissed two investigators. The third one left on his own initiative. The LDFMS, not Ngeze's Counsel, terminated the assistant's contract.

noted that counsel had already been replaced on his request on four earlier occasions.[424]

In *Ntakirutimana*,[425] the accused requested counsel's replacement because of a lack of confidence in him.[426] After a crisis between him and his former counsel, the accused was not consulted as to replacement counsel, and had not received counsel of his choice.[427] According to the Trial Chamber, the replacement lawyer had always tried to provide effective legal representation. It was assumed that the accused requested his replacement only to obtain a particular counsel that was not on the Registrar's list. That this preferred counsel did not appear on the list was deemed a reasonable and valid ground for the Registrar not to consider him as a replacement.[428] Where the choice of an accused is limited to counsel on the list, it saves the Registry time with regard to verifying counsel's qualifications. According to a dissenting judgement, the interests of justice required a replacement, because Article 20(4)(d) of the ICTR Statute does not allow the Registrar to impose his decision concerning assignment of counsel without taking into account the opinion of the accused.[429]

In *Nzirorera* the accused requested his counsel to be replaced on the grounds of incompetence. It was suspected that the accused made this request to obtain counsel of his own choosing. As no exceptional circumstances or good cause to justify the withdrawal of his counsel were established, the request was denied.[430]

In *Nahimana et al*, an appellant argued that the fact that counsel was assigned to him by the Registrar to help him prepare his appeal proceedings 'was against his wishes and illegal'. He refused to cooperate with counsel, repeatedly requested legal assistance on appeal, and filed his own "Notice of Appeal" to substitute his counsel's notice. The President interpreted this conduct 'as a request for withdrawal of counsel pursuant to Article 19(A) of the Directive' as to which the Registrar should take a final decision.[431]

Finally, where an indigent accused declines the counsel assigned to him by the Tribunal, or where any accused declines to engage a lawyer to conduct his defence at all, a Trial Chamber can instruct the Registrar to assign a counsel to represent the interests of the accused, even where the accused protests, if this is considered to be in the interest of justice. In 2002, the ICTR introduced Rule 45*quater* to its RPE which formalizes this power. However, this power is already incorporated in the Statute that

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[424] Decision on the Accused's Request, *Ngeze*, *supra* note 107.

[425] Decision on the Motions, *Ntakirutimana and Ntakirutimana*, *supra* note 363.

[426] The accused resented counsel's Tanzanian nationality, arguing that the United Republic of Tanzania maintained special ties with the present Government of the Republic of Rwanda. Counsel upheld that he was independent of his government and committed to conduct the accused's defence.

[427] See Separate and Dissenting Opinion of Judge Yakov Ostrovsky, *Ntakirutimana and Ntakirutimana*, *supra* note 383, § 7.

[428] What may have influenced the Trial Chamber in this particular case is that it doubted the accused's indigence. Prior to his arrest, he had hired a counsel at his own expense fearing his arrest requested by the Tribunal, and had allegedly paid this counsel a substantial amount of legal fees. See Decision on the Motions, *Ntakirutimana and Ntakirutimana*, *supra* note 363.

[429] See Separate and Dissenting Opinion of Judge Yakov Ostrovsky, *Ntakirutimana and Ntakirutimana*, *supra* note 383, § 9.

[430] Decision on Nzirorera's Motion, *Nzirorera*, *supra* note 121, §§ 22, 23.

[431] See ICTR App. Ch., Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, *Nahimana, Barayagwiza, Ngeze* (Case No. ICTR-99-52-A), 19 May 2004.

provides that legal assistance may be provided free if the interests of justice so require. Chapter VII provides several examples of cases in which this power was employed.

2.5.5 Conclusion

An indigent accused has no absolute right to choose his legal assistance. This is also the case at international criminal courts. To the extent to which he has such choice at these courts, it is confined to his lead counsel. It is up to the discretion of lead counsel to involve the indigent accused in his choice with regard to co-counsel, investigators and legal assistants. At the *ad hoc* Tribunals, the Registrar is not bound by the preferences as indicated by the accused, even where counsel appears on the Registrar's list of available counsel and should therefore, in principle, be eligible to represent any accused. Even though the Registrar retains discretion as to the appointment of counsel and other members of the assigned defence team, whenever possible, he should take the accused's preferences into consideration. Where the preferences of the accused were not honoured at the *ad hoc* Tribunals, this occurred mainly because counsel did not fulfil the necessary requirements. Human rights treaties' monitoring bodies such as the ECHR apply a similarly restrictive interpretation to this right, especially where counsel is freely assigned to an indigent accused. It should be noted however, that these bodies consider domestic legal systems and cases. In that context, it is not feasible to grant each and every accused counsel of his own choosing, mainly because of financial implications and reasons of efficiency. The law of the ICC however stipulates that, whether or not counsel appears on his list, the Registrar is bound by an indigent accused's preference with regard to any counsel who qualifies.

When objecting to the assistance of a certain counsel assigned to him, an indigent accused needs to actively, and from an early stage, advance weighty reasons, especially if counsel assigned to him has already performed professional duties for his defence. For reasons of efficiency and budgetary constraints, once assigned, counsel is replaced only under exceptional circumstances.

Nevertheless, it is acknowledged that appointing defence counsel of the accused's choice is preferable to a random appointment of counsel, who may be no better qualified than the accused's own preference. Therefore the accused's preference should be respected as much as is practicable.

In the special context of international criminal courts, dealing with a limited amount of cases and dealing with persons accused of the greatest atrocities standing as individuals opposite an international arbiter in a foreign country, facing long prison sentences, a more liberal approach to the right to an effective defence is necessary to ensure fair trials. The more there is at stake for the accused, the more regard should be had to his right to choose counsel, whether or not he is indigent. As trials before international criminal courts are generally lengthy, the importance of a solid counsel-client relationship, which is enhanced by granting an accused a counsel of his choice, cannot be underestimated.

Throughout the duration of the trial and in the pre-trial stage, defence costs such as office costs, travel costs, translation costs, and the costs of a whole team living abroad need to be compensated. Obviously, few persons can afford to remunerate their defence team for the length of time proceedings before international criminal

courts generally last. Therefore, most accused before the *ad hoc* Tribunals rely on legal aid provided by the court. Refusing all these accused the right to a defence counsel of their choice can have implications for the overall quality of the legal assistance before these courts.

Replacing counsel in the midst of proceedings is costly and may cause considerable delay. Therefore, granting a replacement on the request of an accused only under exceptional circumstances is not unreasonable. However, if there is any way to meet the wishes of the accused without causing considerable delay, international criminal courts should endeavour to accommodate these wishes. At the initial appointment of lead counsel, and where it is decided that counsel will be replaced, as long as counsel meets the necessary requirements, international criminal courts should enable the accused to indicate his choice and honour it whenever possible. There is no compelling reason not to do so. A political or administrative agenda of the Registrar should not override the accused's wishes.

2.6 COMMUNICATION BETWEEN THE ACCUSED AND HIS COUNSEL

2.6.1 Introduction

When in detention, accused before the ICTY do not have unlimited access to their lawyers, either in person, or by mail and phone.[432] Therefore, the degree to which counsel-client consultations are facilitated requires consideration. For counsel to effectively represent the interests of his client, he needs to gain a full understanding of his client's case. Therefore the right of the accused to communicate with his lawyer is inextricably related to his right to prepare his defence. Not surprisingly, the rights of an accused to communicate with counsel of his choice and to prepare for his defence are protected through the same clause of the *ad hoc* Tribunals' and the ICC's Statutes.[433] The ICTY and ICTR Statutes provide that the accused is entitled 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. These terms are identical to those of Article 14(3)(b) of the ICCPR. Article 67(1)(b) of the Rome Statute is more precise as to this right as it entitles the accused to communicate freely with counsel of his choosing *in confidence*.[434] Similarly, the American Convention on Human Rights entitles the accused 'to communicate freely and privately with his counsel.'[435] Nonetheless, as to the accused's right to communicate with his counsel under Article 14(3)(b) of the ICCPR, full respect should be given to the confidentiality of communications between counsel

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[432] Rodney Dixon, Karim A.A. Khan, Richard May (2003), Ch. 20, par. 24. According to Dixon and Khan, 'The delivery of counsel mail or parcels into the [ICTY detention] facility requires an extra 24 hours in addition to the normal post distribution time, as does the sending of mail from detainees to counsel.' *Ibid*, par. 32.

[433] Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 67(1)(b) ICC Statute.

[434] While the wording of the *ad hoc* Tribunals' provision is the same as Article 14(3)(b) of the ICCPR, the ICC provision seems to have been derived from Article 8(2)(d) of the American Convention on Human Rights (ACHR).

[435] See Article 8(2)(d) ACHR.

and the accused.[436] In numerous instances, the HRC has found that the right to communicate with counsel was not adequately protected.[437]

In addition to the provisions in the Statutes of the *ad hoc* Tribunals, the Detention Rules provide further details. Rule 65 of the ICTR Detention Rules entitles the detainee 'to communicate fully and without restraint with his Defence Counsel, with the assistance of an interpreter where necessary.'[438] As Rule 65(A) of the ICTY Detention Rules[439] grants communication with the accused's "legal representative", it falls to be considered whether this expression may have a broader range. Rule 65(B) of the ICTY Detention Rules further provides that all communications between counsel and his client are privileged, unless this privilege is being abused.[440]

Why would an accused need the *right* to communicate with his lawyer? For an accused to communicate all the necessary details of his case to his lawyer, including his views on his defence, requires confidence in his lawyer. To that end, it is vital that he has adequate opportunity to meet with his lawyer. Therefore, the extent to which an accused can communicate freely with his counsel is decisive for the extent to which he can make effective use of his right to legal assistance.[441] To participate effectively in the criminal proceedings against him, an accused should be able effectively to consult and instruct his lawyer during his trial.[442] Moreover, '[i]f a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.'[443] In an international context, where counsel and accused may come from different cultures and may not speak the same language, the importance of ample opportunity for communications is emphasized.

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[436] See Office of the High Commissioner for Human Rights, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), 13 April 1984 (CCPR General Comment No. 13), available from www.unhchr.ch, par. 9. In addition, Article 14(1) of the ICCPR requires that the accused is able to consult a lawyer. See *Aliev v Ukraine, supra* note 79, § 7.2.

[437] See, for instance, *Setelich v. Uruguay*, *supra* note 378, § 20.

[438] Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 5 June 1998 (hereinafter: ICTR Detention Rules).

[439] Rules covering the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal (U.N. Doc. IT/38/Rev. 9, 2005) (hereinafter: ICTY Detention Rules).

[440] Rule 65(B) ICTY Detention Rules. The privilege will be denied if the aim of the abuse is believed to be the arrangement of an escape, the interference with or intimidation of witnesses, the interfering with the administration of justice, or to endanger the security and safety of the Detention Unit otherwise. This provision was implemented in the 9th revision of the Detention Rules.

[441] Cf. for instance, *Brennan, supra* note 68, § 63.

[442] See ECHR, Judgment, *T. v. UK* (Appl. No. 24724/94), 16 December 1999, §§ 86-89.

[443] *Brennan*, *supra* note 68, § 58. Cf. *S. v. Switzerland* (Appl. No. 12849/87), 28 November 1991, § 48 and *Öcalan v. Turkey* [2003], *supra* note 68, § 146.

2.6.2 Safeguarding the Privacy of Communications

In order to safeguard the privacy of communications and guarantee that everything that is communicated between counsel and his detained client remains confidential,[444] the Standard Minimum Rules for the Treatment of Prisoners stipulate that '[i]nterviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.'[445] The same is required under the European Convention of Human Rights.[446] In *Öcalan*,[447] for instance, the ECHR emphasized that where an accused cannot consult his lawyers without authorities listening in, he is inevitably prevented from discussing relevant issues for the preparation of his defence openly with his counsel and that violates his defence rights.[448] At the *ad hoc* Tribunals, third persons are not permitted to hear or read what is being communicated between an accused and his lawyer. However, interviews between counsel and his client, and, possibly, an interpreter, may be conducted in the sight of Detention Unit staff.[449] In practice, the ICTY's Detention Unit enables counsel and his client to meet in a small room, without prison staff attending.[450] At the ICTR, the visiting rooms are located apart from the detainees' cells. Participants can see security staff, other counsel and clients passing by.

At the ICTY, correspondence between counsel and detainee 'shall not be interfered with in any manner unless the Commanding Officer or the Registrar has reasonable grounds for believing that this facility is being abused', for instance, to intimidate a witness.[451] Under Rule 65 of the ICTR Rules of Detention, the privilege also applies to correspondence. In *Mugiraneza* the ICTR Trial Chamber noted that counsel's correspondence may be handed to the accused by investigators, legal assistants, or another defence team member. However, as an important condition for the correspondence to be considered privileged and fall under Rule 65 of the Rules of Detention, it should be 'clearly identified as emanating from Counsel, and secured in

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444 As to counsel's duty of confidentiality, see *infra*, Chapter VI, paragraph 6.3.4.

445 See Article 93 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, approved by the Economic and Social Council, resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

446 Even though the Convention does not expressly provide the right to communicate with a lawyer, this can be derived from Article 6(3)(c) of the Convention. See, for instance, *S. v. Switzerland*, *supra* note 443, § 48. Cf. *Brennan*, *supra* note 68, §§ 58 and 63 and Grand Chamber of the ECHR, *Öcalan v. Turkey* (Appl. No. 46221/99), 12 May 2005 (ECHR 2005, 282), § 133; *Öcalan v. Turkey* [2003], *supra* note 68, § 146.

447 Security forces' members, a judge and prison officers had been within sight and hearing distance of the room where Öcalan received visits from his lawyers. The then applicable domestic law in the Turkish State Security Courts allowed this. One visit was restricted to twenty minutes and its record sent to the State Security Court. The Turkish Government argued that these restrictions were to safeguard the accused's security. See *Öcalan v. Turkey*, *supra* note 68, §§ 144, 145.

448 *Öcalan v. Turkey* [2003], *supra* note 68, §§ 147 and 151.

449 See Rule 65 ICTR Detention Rules; Rule 65(E) ICTY Detention Rules. Cf. also Regulations to Govern the Supervision of Visits to and Communications with Detainees (Rev. 3), 22 July 1999 (hereinafter: ICTY Regulations Governing Visits and Communications).

450 See Mettraux, G. and Čengić, A., The Role of a Defence Office: some Lessons from Recent and not so Recent War Crimes Precedents, in Michael Bohlander (ed), *International criminal justice: a critical analysis of institutions and procedures* (London: Cameron May, 2007), pp. 391-428, p. 393 footnote 9.

451 See Regulation 11(A) ICTY Regulations Governing Visits and Communications.

such a manner as to prevent persons other than the intended recipient from seeing the contents of the communication or correspondence'.[452] Absent a clear indication that the correspondence or communications stem from defence counsel, their contents may be examined or even censored. [453]

2.6.3 Scope of the Right to Communicate with Counsel

The frequency with which the accused should be able to communicate with his counsel depends on the circumstances of a case. Under the *ad hoc* Tribunals' Rules of Detention, the Commanding Officer of the Detention Unit may not refuse a request for a visit from counsel without reasonable grounds.[454] Generally, counsel are able to visit their clients during office hours on weekdays. Outside these hours, for instance during the weekend, permission may be obtained from the authorities. At the ICTR, where counsel had requested to visit their clients in the detention facility on Saturdays, this was granted.[455] Just like any other visitor to the UN Detention Unit at the ICTY, defence counsel can be searched and their belongings X-rayed when visiting a client in the Detention Unit[456] 'and will be denied access if they refuse.'[457] The same applies at the ICTR.[458]

Extreme versions of unjust restriction on the right of an accused to consult his lawyer can be found before the HRC. In *Marais v. Madagascar*, because the accused had only been able to consult his lawyer for two days during his trial, he had not been able to prepare his defence.[459] In *Ramil Rayos v. Philippines*, during his trial the accused was allowed to communicate with his counsel for only a few moments a day, in a case where he was likely to receive a death sentence.[460]

In international criminal proceedings, counsel will be remunerated to stay at the seat of the court no sooner than two weeks before the trial starts. Nonetheless, to keep his client informed on developments throughout the pre-trial phase and appeal phases, he should be able to visit his client on a regular basis. In an international context, this may entail substantial costs for travel, as counsel could, and in practice often does, live thousands of miles away from the court. At the ICTY, the ICTY Defence Travel and DSA Policy prescribes in detail how many trips will be reimbursed

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[452] Tr. Ch. II, Decision on the Defence Urgent Motion for Relief under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice, *Mugiraneza et al.* (Case No. ICTR-99-50-T), 19 September 2001, § 12.

[453] See *idem*.

[454] Rule 65 ICTR Detention Rules. Rule 65(D) ICTY Detention Rules. See also ICTY First Annual Report (1994), par. 109.

[455] See, for instance, Regulation 30 ICTY Regulations Governing Visits and Communications. At the ICTR, for instance, in *Nyiramasuhuko et al.*, the Chamber granted counsel's request to meet with their clients at the detention facility (UNDF) on Saturday mornings. In addition, at the ICTR gives counsel and their clients an opportunity for consultations at the court after adjournment of a court session. Cf. ICTR Tr. Ch. II, Minutes of Proceedings, *Nyiramasuhuko et al.* (Case No: ICTR-98-42-T), 26 0ctober 2001, § 1(f).

[456] See Rule 61(C) and (D) ICTY Detention Rules.

[457] ICTY First Annual Report (1994), par. 112.

[458] See Rule 65 and 61 ICTR Rules of Detention.

[459] HRC, *Marais v. Madagascar*, CCPR/C/18/D/49/1979 (24 March 1983), §§ 17.3 and 19.

[460] HRC, *Ramil Rayos v. Philippines*, CCPR/C/81/D/1167/2003 (7 September 2004), § 7.3.

for defence counsel to visit his detained client at the Tribunal's detention unit during these phases. In the pre-trial phase and during the appeal stage, before the Defence Response or Reply Brief is submitted, lead counsel or co-counsel are allowed one three-day-trip a month. After this Response or Brief is submitted in the appeal phase, one trip is allowed every two months for a maximum of two days for one counsel.[461] On the one hand, these limits diminish the ability of counsel and client to freely determine the frequency of client visits. On the other, at least at the ICTY, counsel is enabled to visit his client on a fairly regular and ascertainable basis.

Where the trial phase is concerned, at the ICTR, counsel have ample opportunity to communicate with their clients during court sessions, as they sit next to them in court. At the ICTY, the accused is located behind his counsel in the courtroom, and is positioned between two security officers, which makes it far more difficult for counsel and client to confer compared to the ICTR. Before the ICC, where the defence team members and the accused sit apart, defence counsel of Thomas Lubanga Dyilo demanded the court to reposition the accused, so that he would sit with his counsel or legal assistants, in order to enhance communication within the courtroom hearings.[462] The Chamber deemed however that proximity (as opposed to adjacency) between the defenders and the accused would be sufficient for the defence to fulfil its tasks and meet its obligations. Moreover, this seating was considered to be similar to the practice in many domestic and international courts.[463] Nonetheless, in *T. v. UK*, the ECHR concluded that even where an accused would sit "within whispering distance" of his skilled and experienced lawyers during his trial, depending on his age or mental state, he could still feel inhibited, especially where a trial attracts much public and media attention that is visible to the accused in a courtroom.[464]

Before the ICTR in *Ngeze*, the accused complained to the court that his counsel did not consult him sufficiently and that a lack of communication had occurred. The Trial Chamber did not take this complaint seriously, as it had observed counsel and client communicate with one another in the courtroom. In addition, the Chamber had granted several requests for time for consultations prior to cross-examination of witnesses. The accused, when present in the court, actively participated in his defence and his counsel appeared to be mounting a vigorous defence on his behalf, leaving no basis for a complaint.[465] In *Ngeze*, the Trial Chamber relied solely on its own in court observations as to the sufficiency of communications between the accused and his lawyer. Given the periods of time between court sessions and the length of detention before a judgement, it is impossible to determine any minimum

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[461] See Part I (A) (1) and (C) (1) ICTY Defence Travel and DSA Policy, *supra* note 219.

[462] See Transcript, Confirmation of charges Hearing, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-T-30), 9 November 2006, p. 14. According to the Registrar, for security reasons the accused should sit between two security officers, but would still sit close enough to his defence team to ensure privileged communication. See *idem*, p. 16.

[463] See *idem,* p. 18.

[464] This case concerned a boy of 11 years old, who was on trial for murder of a toddler. To make sure he would see what would be going on in court, his dock had been lifted. As a result this made him more visible for all the media and public that attended and thus enhanced his discomfort. See *T. v. UK*, *supra* note 442, §§ 86-89.

[465] Decision on the Accused's Request, *Ngeze*, *supra* note 107.

frequency of communication between an accused and his counsel to secure adequate trial preparation and an effective defence. Counsel must fill in his client on the developments in his case and discuss the steps he will undertake in his defence.[466] International criminal cases are complex and involve very serious charges and severe penalties, such as life long imprisonment. Therefore, consultations between counsel and his client in the courtroom alone are insufficient to adequately prepare an effective defence.

2.6.4 The Privilege to Communicate in Private

The right to communicate with one's lawyers belongs to the accused. But, according to Spronken, from the lawyer's perspective, it is a defence counsel's privilege[467] to be able to freely communicate with his detained client.[468] Whether the accused's right to communicate in private with counsel also extends to other defence team members such as legal advisors, assistants or investigators of a defence team, has been subject to debate at the *ad hoc* Tribunals. The ICTR Detention Rules only allow the accused to communicate in private with his *defence counsel*.[469] This has been interpreted to exclude defence investigators and legal assistants. Therefore, they are not allowed to visit the accused in the detention unit in private, unless defence counsel would accompany them.[470]

This could be highly impractical and cause budgetary problems for the defence. In *Nyiramasuhuko*, the defence investigator wanted to report back to the accused after returning from a mission, the work plan of which counsel had approved in advance. Because counsel was temporarily absent,[471] he would be required to fly over only to facilitate, as a pure formality, an otherwise unsupervised meeting between his client and an investigator of his team, a meeting which was likely to be conducted in Kinyarwanda, a language counsel did not master.

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[466] See, for instance, Article 12 ICTY Code of Professional Conduct for Defence Counsel (IT/125 REV. 1). Article 8 (B) of the ICTY Code of Conduct provides that counsel should follow his client's decisions regarding the objectives of his legal representation; consult with him about the means to pursue those objectives and seek and accept his client's instructions. It is stipulated that counsel does not have to follow his client's decisions as to how to reach the objectives of his representation. See further on this duty, Chapter VI, paragraph 6.3.

[467] There may be a terminological difficulty for those familiar with the common law concept of "privilege". Common lawyers interpret a privilege such as to communicate in private to belong to the accused. As a result, counsel has the power to visit him in private. For this reason I have preferred to translate the word privilege used by Spronken as "power" hereafter. I am grateful to Ben Gumpert, defence counsel at the ICTR, for recommending this to me.

[468] See Spronken, T.N.M.B. and Prakken, E., Foundations of the Right to a Defence (Grondslagen van het recht op verdediging), in Brants, Mevis and Prakken (ed), *Legitieme strafvordering. Rechten van de mens als inspiratie in de 21e eeuw* (Antwerpen: Intersentia Rechtswetenschappen, 2001), pp. 57-74, p. 68.

[469] See Rule 65 ICTR Rules of Detention.

[470] See ICTR Tr. Ch. I, Decision on the Defence Motion Requesting Permission for Its Investigator to Visit the Accused in the Detention Facilities, *Rutaganda* (Case No. ICTR-96-3-T), 11 June 1997, p. 3.

[471] See ICTR Tr. Ch. II, Decision on the Defence Motion for Access for Investigators and Assistants to the Accused in the Absence of Counsel, *Nyiramasuhuko* (Case No. ICTR-97-21), 20 November 2002 (hereinafter: Decision on the Defence Motion for Access), §§ 1-3.

In *Bizimungu*, the defence argued that counsel, being the director of the defence team, bears responsibility for it. Should the opportunity to visit the accused in private be abused by an investigator or legal assistant, counsel may be punished.[472] According to the ICTR Trial Chamber, however, 'the obligation of Lead Counsel to supervise the work of the Defence team has [no] bearing on the applicability of this privilege.'[473] Even so, the Chamber deemed that it could further the interests of justice if the Registrar would 'authorise meetings between an accused and [non-counsel] members of the Defence team where *inter alia*, Defence Counsel can demonstrate that he cannot access his client for an essential purpose without an unreasonable delay or expenditure of funds.'[474] Both in *Bizimungu* and in *Nyiramasuhuko*, however, the Chamber believed that the defence was not prejudiced and that no exceptional circumstances were established.[475]

It is an opinion shared by defence counsel at the ICTR that the reluctance to permit defence investigators visiting accused in private could stem from the fact that their majority are Rwanda Hutus.[476] Unsubstantiated allegations of a defence investigator having participated in the killings have been made in *Nyiramasuhuko et al.*[477]

Whereas the initial Rules of Detention of the ICTY equally provided for communication without restraint with *defence counsel*, they now refer to a detainee's "legal representative".[478] This may have been a result of *Milošević*, where the accused chose to represent himself.[479] In support of his right to have adequate facilities for the preparation of his defence,[480] he was allowed to communicate with lawyers specifically

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[472] Cf. ICTR Tr. Ch. II, Decision on the Defence Motion to Protect the Applicant's Right to Full Answer and Defence, *Bizimungu* (Case No. ICTR-99-50-I), 15 November 2002, § 3. The different disciplinary mechanisms that are available to the ICTR will be examined in Chapter VI, especially in paragraph 6.4.

[473] *Ibid.,* § 27.

[474] See, for instance, *ibid.,* § 29. Cf. also Decision on the Defence Motion for Access, *Nyiramasuhuko et al. supra* note 471, § 12.

[475] Decision on the Defence Motion to Protect the Applicant's Right to Full Answer and Defence, *Bizimungu*, *supra* note 472, § 30; Decision on the Defence Motion for Access, *supra* note 471, § 13.

[476] According to Ben Gumpert, lead defence counsel at the ICTR, 'There was, perhaps there still is, a totally unfounded suspicion that the only Rwandan Hutus who would want to help the "genocidaires" who had been arrested and were undergoing trial were people who were also guilty of such crimes. The Tribunal, mindful of the allegation that there had been "planification" (!) was anxious to prevent communication between such people without the supposedly moderating influence of Tribunal lawyers, even despised defence lawyers! For this reason visits to the UNDF by unaccompanied legal assistants and investigators were banned. No-one in a position of authority at the Tribunal will ever admit that this is the case, but no-one informed and honest will ever deny it.' This was communicated to the author through email.

[477] In this case the prosecution made unsubstantiated allegations of a defence investigator being a former member of the militia group "Interahamwe". See ICTR Tr. Ch. II, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, *Nyiramasuhuko et al* (Case No. ICTR -98-42), 10 July 2001. Cf. *infra* Chapter VI, paragraph 6.4.4, note 312 *et seq.*

[478] Compare Article 67(A) ICTY Rules of Detention (Rev. 8), 29 November 1999, and Article 65(A) ICTY Rules of Detention (Rev. 9), 10 October 2005.

[479] See infra, Chapter VII.

[480] See ICTY Tr. Ch., Order, *Milošević* (Case No. IT-02-54-T), 16 April 2002.

mentioned in an order.[481] In the major common law jurisdictions, any official representation of a defence team, even if not the trial advocate, would be allowed as of right to have access to legally privileged client visits. For instance, paralegals working for the law firm of the advocate in the US or, in the UK, the sollicitors who have chosen the barrister to represent their client in court.[482] The question must be asked as to what extent the rigid approach at the ICTR can be justified. Considering the limited resources of the defence, and the frequent trial breaks at the ICTR, during which counsel is not paid to stay at the seat of the Tribunal, it is unreasonable not to allow defence team members other than counsel to visit an accused in private with counsel's approval. Throughout an ajournment, accused generally do not see their counsel for an extended period. In addition, the right to adequate facilities for the preparation of a trial almost certainly entails that such visits should be allowed. The Registrar should determine whether or not there are exceptional circumstances that authorize a private visit. It may conflict with counsel's duty of confidentiality to inform the Registrar of the reason which necessitates a visit.[483]

Therefore, at least while defence counsel are away from the seat of the Tribunal, the right to privileged communication should extend to defence team members other than counsel, such as investigators or legal assistants. Their access to the detained accused must help to keep him informed about his case.

2.7 CONCLUSION

Trials have done without defence counsel for many centruries. Currently, however, the right to adequate and effective legal assistance in criminal proceedings is considered one of the core elements of the right to a fair trial for suspects and accused. If an accused cannot afford to pay for this assistance, courts must appoint counsel free of charge. Denying defence counsel to an accused in criminal proceedings must generally amount to a serious violation of his right to a fair trial.

The legal assistance which should be assigned as a minimum to an indigent accused in international criminal cases had not been sufficiently contemplated by the *ad hoc* Tribunals. One counsel was initially deemed sufficient. It soon became obvious that one counsel alone could not provide an effective defence in an international criminal case. Under their current legal aid systems, international criminal courts allow a team of one or two defence counsel, one or two investigators and one or two legal assistants to assist one accused.

Once defence counsel are appointed, international human rights standards regarding what actually constitutes "effective legal assistance" are fairly minimal. When counsel are appointed under a legal aid system, an accused need not be given counsel

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[481] It was under the premise that these lawyers would satisfy the conditions of Rule 44(A) ICTY RPE - qualifications for defence counsel – and being subject to the Code of Conduct for Defence Counsel. See *ibid.*

[482] In the UK, only barristers may represent persons in higher courts. They are self-employed and independent. Solicitors form the initial contact of an accused and may provide legal advice. Once an accused needs representation in court, his solicitor will choose and instruct a barrister. Cf. *infra* Chapter VI, note 8.

[483] The duty of confidentiality will be examined *infra* in Chapter VI, paragraph 6.3.4.

of his own choosing. Even though it would be preferable, an indigent accused can receive an effective defence without a lawyer of his choice. Counsel's competence will be presumed, unless he manifestly fails to observe his professional obligations or the accused is able to prove gross professional incompetence. In order to prepare the case, counsel and his client should have sufficient opportunity to communicate in private.

In general, international criminal courts have not adopted stricter standards. So far as possible, accused are afforded a choice as to the initial appointment of their lead counsel. This choice is limited by the qualifications required of counsel. To guarantee a degree of quality, counsel must have a substantial numbers of years of relevant experience, they must be of good standing and should have a proper command of one of the working languages of the court. Only the ICC prescribes that *any* counsel meeting the necessary qualifications *must* be appointed by the Registrar on the request of the accused. The Registrar of the *ad hoc* Tribunals has more discretion in this respect. By affording an accused substantial choice, the independence of the defence will be reinforced.

What qualifications are necessary to guarantee that counsel conducts an effective defence in a complex international criminal case is a fundamental question. Given the beneficial effect to the defence of the appointment of a counsel chosen by the accused, they should not be too high. The requirement of having more than 10 years of experience could be over-demanding. It might be more efficient to require 5 years of experience in combination with an entrance Bar exam in the working language in which counsel is proficient. This could include a test of counsel's knowledge of the relevant areas of law. If an accused does not share a common language with his defence counsel, it can be difficult to establish a bond of trust. Counsel speaking the accused's language, but none of the working languages, may be required to follow a course in one of the working languages.

Generally, the *ad hoc* Tribunals give the accused sufficient opportunity to speak to his lawyer in private. However, it is a shortcoming that this does not extend to other defence team members such as investigators or legal assistants, especially when counsel are away from the seat of the Tribunal. This has been a problem at the ICTR in particular, where the Registrar and Trial Chambers rarely consider exceptional circumstances warranting such visits to exist.

As a means of determining whether or not international criminal courts properly guarantee effective legal assistance in individual cases, an external authority, such as a human rights treaty monitoring body may be beneficial.

The Registrar has discretionary powers over the legal representation. He determines whether or not counsel of the accused's choice should be appointed, whether or not on the request of lead counsel co-counsel should be appointed in addition, whether or not, and how many, investigators or legal assistants to appoint, and whether or not to allow defence team members other than counsel to visit the accused in private in the absence of counsel. The Registrar's decisions are not comprehensively reviewed. It appears that his discretionary powers may diminish the transparency of the legal aid system. The bulk system of the ICTY gives the Registrar discretion only at the start of the case as to determine the level of remuneration which will be provided depending on the seriousness accorded to a case. Within the limits of the budget thus provided, counsel has more freedom to decide as to which number and what kind of defence team members he requires and can appoint them

accordingly. The ICTY's lump sum system is more successful in guaranteeing adequate staffing of defence teams and adequate compensation for their work in comparison to the ICTR's legal aid system. Only the requirement that the highest remuneration level should involve a leadership position of the accused raises a dilemma. It may be prejudicial to the defence case to pursue the highest possible lump sum.

The degree to which the Registry is the most appropriate body to deal with issues of legal representation is further discussed in the following Chapter.