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Defence counsel in international criminal law

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III

ORGANISATIONAL STRUCTURES FOR THE DEFENCE

3.1 INTRODUCTION

According to the ECHR, courts should respect ‘the basic principle of the independence of the Bar’.¹ The independence of the legal profession is a widely acknowledged principle applicable to all legal systems.² The independence of defence counsel vis-à-vis judges, prosecutors and national authorities is an important condition for their clients to confide in them and to freely communicate with them.³ Defence counsel appearing before the *ad hoc* Tribunals are independent of the organisation of the Tribunal and are not employed by it.⁴ When representing an accused under the legal aid system, defence counsel are remunerated for their services by the court.⁵

To ensure an effective defence, at the least, the independence of defence counsel, equality of arms between the prosecution and the defence and the quality and integrity of defence counsel should be guaranteed. An effective functioning of the defence requires an adequate legal aid system, which strikes a proper balance between resources and quality of assistance; a system of admission; efficient information and communication channels between the defence and the court, and; fair, but not over-intrusive, mechanisms to monitor defence counsel’s professional conduct. All of this needs to be properly administrated and should be addressed within a finite budget.

The Statutes of the *ad hoc* Tribunals and of the ICC do not stipulate how the defence should be organized to achieve this. Compared to national courts, the organisation of the defence at international criminal courts is generally more complex. Obviously, it is difficult or even impossible to meet the expectations of defence

¹ ECHR, *Goddi v. Italy* (Appl. no. 8966/80), 9 April 1984, § 31.

² The Council of Europe deems ‘[t]he independence of the judiciary and of lawyers [...] essential elements of any system of justice.’ They are necessary for a ‘fair and equitable system of administration of justice and the effective protection of human rights’. Council of Europe, Explanatory Memorandum on Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000 at the 727th meeting of the Ministers’ Deputies, available from [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)21&Sector=secCM&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)21&Sector=secCM&Language=lanEnglish), lastly visited 1 March 2007, § 21. ‘[E]ffective access to legal services provided by an independent legal profession’ is a prerequisite of adequate human rights protection. See UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at www.unhchr.ch/html/menu3/b/h_comp44.htm, lastly visited 24 August 2007 (hereinafter: UN Basic Principles on the Role of Lawyers), Preamble.

³ Cf. Davis, Evan A., ‘The Meaning of Professional Independence’, 103 *Columbia Law Review* (2003), June 2003, pp. 1281-1292, p. 1281.

⁴ Cf., for instance, Morrison, Howard, ‘Practice at the *ad hoc* Tribunals for the former Yugoslavia and Rwanda’, in Martine Hallers (ed), *The position of the defence at the International Criminal Court and the role of the Netherlands as the host state* (Amsterdam: Rozenberg, 2002), pp. 43-48, p. 43.

⁵ See *supra* Chapter II, paragraph 2.3.

counsel from all legal systems of the world. Additionally, from a practical perspective, the geographical distance between the seat of the court, the *locus delicti* and the home state of counsel could cause logistical problems.

The defence could be organized in varying ways. One option is to make the defence a separate organ of the court. The Special Tribunal for Lebanon is the first international court to include a Defence Office as a separate organ in its Statute.⁶ Secondly, power over defence issues could be vested in an existing court organ, such as the Registry. Thirdly, an independent body outside the organisational framework of the court, such as a lawyers' or Bar association, could be endowed with this power. Finally, a hybrid combination of these three options could be envisaged. This Chapter examines how international criminal courts have organized the defence so far and the desirability of each of these options.

3.2 ORGANIZING THE DEFENCE WITHIN THE COURT'S ORGANISATIONAL STRUCTURE

3.2.1 Organisational Structure of International Criminal Courts

The *ad hoc* Tribunals were established by the UN Security Council.⁷ Their jurisdiction is confined to crimes committed in particular conflicts in the former Yugoslavia and Rwanda. A "Completion Strategy" has been formulated to ensure the *ad hoc* Tribunals will fulfil their mandate within a limited time frame.⁸ The ICC is a permanent court that was constituted through the Treaty of Rome.⁹ It has jurisdiction over many territories, as over a hundred states are parties to the Rome Treaty. This Treaty, which is also the Statute of the ICC, grants important budgetary, management and regulatory powers to the Assembly of States Parties (ASP) that was also established by the Treaty

⁶ See Articles 7(d) and 13 Statute of the Special Tribunal for Lebanon. The Statute is included as an annex in UN SC Resolution 1757 (UN Doc. S/RES/1757 (2007)), 30 May 2007 (hereinafter: STL Statute).

⁷ It relied on its powers under Chapter VII, especially Article 39 of the United Nations Charter. See UN SC Resolution 827, (UN Doc. S/RES/827 (1993)), 25 May 1993; UN SC Resolution 955 (UN Doc. S/RES/955 (1994)), 8 November 1994; UN SC Resolution 808 (UN Doc. S/RES/808 (1993)), 22 February 1993.

⁸ According to the UN Security Council, all the work of the *ad hoc* Tribunals must be completed by 2010. See UN SC Resolution 1329 (UN Doc. S/RES/1329 (2000)), 30 November 2000; UN SC Resolution 1503 (UN Doc. S/RES/1503 (2003)), 28 August 2003; UN SC Resolution 1534 (UN Doc. S/RES/1534 (2004)), 26 March 2004. For a thorough analysis of the Completion Strategy, see Dominic Raab, *Evaluating the ICTY and its Completion Strategy. Efforts to Achieve Accountability for War Crimes and their Tribunals*, 3 *JICJ* (2005), pp. 82-102. Raab deems the completion strategy 'a reasonable compromise between the competing interests and values at stake.' (p. 97).

⁹ It has a unique "complementarity" regime. Cf. Article 17 Rome Statute. In a nutshell, this principle entails that the ICC may only exercise jurisdiction over crimes enumerated in its Statute on the condition that states are themselves unable or unwilling to prosecute an individual under their national law. See for a critical study of this principle, for instance, Jann K. Kleffner, 'Complementarity in the Rome Statute and National Criminal Jurisdictions', Oxford University Press, forthcoming in 2008.

of Rome.¹⁰ Since the creation of these international criminal courts, numerous hybrid international courts¹¹ have been established. These include the Special Court for Sierra Leone,¹² the Extraordinary Chambers in the Courts of Cambodia,¹³ the Special Panels for Serious Crimes in East Timor¹⁴ and the Special Tribunal for Lebanon (STL).¹⁵

The organs envisaged in the Statutes of the *ad hoc* Tribunals are the Trial and Appeal Chambers, the Prosecutor and the Registry.¹⁶ Each Tribunal has three Trial Chambers. They share one Appeals Chamber. The official organs of the ICC are the Presidency,¹⁷ Chambers (an Appeals Division, a Trial Division and a Pre-Trial Division), the Office of the Prosecutor (OTP) and the Registry.¹⁸ The prosecution is the opposing party of the defence in criminal proceedings and an independent organ of the court.¹⁹ The Judges, who constitute the Chambers, should be impartial and independent.²⁰ The Registry is the administrative organ of the court. It is responsible for servicing the Chambers and the Prosecution and serving as their channel of communication.²¹ When accommodating the organisation of the defence within the organisational structure of international criminal courts, to safeguard the independence of the defence, either a separate defence body or the Registry would be the most viable option.

3.2.2 Responsibilities of the Registry and the President

The Rules of Procedure and Evidence of the *ad hoc* Tribunals vest a myriad of responsibilities over defence issues in the Registrar, the head of the Registry.²² At the ICTR, the “Lawyers and Detention Facilities Management Section” (LDFMS) is the

¹⁰ See Article 112 ICC Statute. It also appoints the judges and the Prosecutor and can have them removed. See Article 46(2) of the Rome Statute.

¹¹ These are treaty-based, quasi-international tribunals, supported by the UN Security Council and the UN General Assembly upon the request of the nation involved.

¹² See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

¹³ See Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003; General Assembly Resolution 57/228 (2003) (UN Doc. A/RES/57/228 B), 22 May 2003.

¹⁴ See UN SC Resolution 1272 (UN Doc. S/RES/1272 (1999)), 25 October 1999.

¹⁵ Cf. UN SC Resolution 1757, *supra* note 6, that includes as annexes the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, and its Statute; UN SC Resolution 1644 (UN Doc. S/RES/1644 (2005)), 15 December 2005, particularly par. 6. Although the STL deals primarily with the murder of Prime Minister Rafik Hariri, it is possible that it will enlarge its mandate to try other acts of violence connected to the murder of Hariri and his entourage.

¹⁶ See Article 11 ICTY Statute; Article 10 ICTR Statute.

¹⁷ This organ consists of three judges. Cf. Article 38 ICC Statute.

¹⁸ See Article 34 ICC Statute.

¹⁹ See Article 15(2) ICTR Statute; Article 16(2) ICTY Statute; Article 42(1) ICC Statute.

²⁰ See Articles 11(1) and 12 ICTR Statute; Articles 12(1) and 13 ICTY Statute; Article 40 ICC Statute.

²¹ Cf. Article 43(1) ICC Rome Statute, Rule 13(1) ICC RPE; Article 17 ICTY Statute, Rule 33(A) ICTY RPE; Article 16 ICTR Statute, Rule 33(A) ICTR RPE.

²² See Rules 44-46 ICTY RPE; Rules 44-46 ICTR RPE.

specialized Registry section regarding defence matters.²³ It is ‘the channel of communication between the Tribunal and Counsel’²⁴ and manages and organizes the assignment of counsel.²⁵ At the ICTY, this Registry section is called the Office for Legal Aid and Detention Matters (OLAD).²⁶ It reports to the Deputy Registrar.²⁷

The Registry administers the assignment of legal aid to the accused and issued the Directive on the Assignment of Defence Counsel;²⁸ establishes whether or not lawyers or other defence team members fulfil the necessary qualification requirements;²⁹ provides resources to the defence; drafted a Code of Professional Conduct for Defence Counsel;³⁰ and, monitors defence counsel’s professional behaviour.³¹ Notwithstanding, or, as a result of the Registrar’s responsibilities over defence issues, some defence counsel consider the Registry as their worst enemy. More worrying is that even a judge suggested that the Registry at the ICTY misunderstands the legal aid system that it is supposed to administer.³² The responsibilities of the Registry vexating counsel the most are his power to determine whether or not they qualify; to appoint and withdraw them³³ and other defence team members under the legal aid system;³⁴ to draft a code of conduct and to monitor their conduct; and to administer their payment.³⁵

One disadvantage of the Registries being accorded substantial power over these issues is that Registry staff members are neither required to have a background as defence counsel, nor to be legally trained. Judge Hunt described the Registry staff dealing with defence matters as ‘junior legal officers with no apparent experience in

²³ This section is also referred to as the Defence Management Section. See Directive for the Registry of the International Criminal Tribunal for Rwanda, 31 May 2001 (Hereinafter: ICTR Registry Directive), Article 4(3). It was set up in 1997. Cf. 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. 403.

²⁴ Article 8(3)(c) ICTR Registry Directive.

²⁵ *Idem*.

²⁶ Cf. for instance, Articles 17 and 31 ICTY Directive (Rev.11).

²⁷ Cf., for instance, Mettraux, G. and Čengić, A. (2007), *supra* note 23, p. 400.

²⁸ The Directive needs to be approved by the permanent Judges Cf. Rule 44(C) and 45(A) ICTY RPE; Preamble ICTR Directive on the Assignment of Defence Counsel (Directive No. 1/96).

²⁹ Defence counsel should prove to the Registrar that he qualifies. See Rule 44 ICTY; Rule 44 ICTR RPE.

³⁰ See Rule 46(D) ICTR RPE. The ICTY prescribes that the Registrar shall publish the code and oversee its implementation under supervision of the President. See Rule 46(C) ICTY RPE.

³¹ See *infra* Chapter VI, paragraph 6.4.2.

³² See ICTY App. Ch., Decision on Interlocutory Appeal on Motion for Additional Funds, Dissenting Opinion of Judge David Hunt, *Milutinović, Ojdanić and Šainović* (Case No. IT-05-87), 13 November 2003, §§ 37, 40.

³³ Cf. Rule 45(B), 45(C) ICTY RPE; Rule 45(A) ICTR RPE.

³⁴ ‘The 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.’ 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. Cf. also ICTR Tr. Ch. II, Decision on Nzirorera’s Motion for Withdrawal of Counsel, *Nzirorera* (Case No. ICTR-98-44-T), 3 October 2001, § 17.

³⁵ Rule 45(D). This will be in consultation with the permanent Judges. Cf. also *supra*, Chapter II, paragraph 2.3.

trials or as counsel'.³⁶ It has also been suggested that the defence has not always received sufficient support to be an equal counterpart to the Office of the Prosecutor and that this could undermine the principle of equality of arms.³⁷

The Registrar's severe monitoring of time sheets for reimbursement of defence costs led to a strike among ICTR defence counsel.³⁸ A related complaint was that a three-month delay in reimbursement of these costs was not exceptional.³⁹ In *Ntakirutimana* the ICTR Registrar refused to assign a lawyer as co-counsel, his three years experience as a prosecutor and sixteen years experience as a presiding judge of an appeals court notwithstanding. The lead counsel requesting the appointment had ignored the three-names procedure and omitted proof of this lawyer's ten years experience as a visiting professor. Upon judicial review,⁴⁰ Judge Møse deemed that counsel's experience should lead to the conclusion 'that he has valuable experience in criminal proceedings which may be useful for the Defence'⁴¹ and directed the Registrar to assign him as soon as evidence of his professorship was submitted. It was repudiated that the Registry had allowed its bureaucratic purposes to override the rights of the defence by refusing to appoint counsel simply because the "three-names" procedure was not followed.⁴²

In *Martić*, the Registrar refused to appoint counsel of the accused's choice, because a conflict of interest could arise. The accused and suspect involved had confirmed their agreement to the appointment to the Registrar in writing. The Registrar, however, deemed that this consent was not informed, which was required under the Directive. According to the Chamber, 'a consent provided by a potentially affected client [...] to remove a conflict of interest upon consultation with the Counsel should generally be regarded as fully informed in the absence of indication to the contrary'.⁴³ Therefore, the Chamber remitted the case to the Registrar⁴⁴ and counsel was subsequently appointed. These case examples illustrate how the Registrar may apparently abuse his discretionary powers as to the assignment of legal aid, but also that any such abuse may be addressed by the Chamber. It would be preferable to incorporate a procedure containing sufficient safeguards to prevent abuse in the Directives.

³⁶ Cf. ICTY App. Ch., Decision on Interlocutory Appeal on Motion for Additional Funds, *Milutinović, Ojdanić and Šainović* (Case No. IT-05-87), 13 November 2003, § 41.

³⁷ See Annual Report 2004 ADC-ICTY, available from www.adcicty.org. What the principle of equality of arms entails is examined *infra*, in Chapter V.

³⁸ See ICTR Ninth Annual Report (UN Doc. A/59/183), 27 July 2004, par. 69. See also *supra* Chapter II, paragraph 2.3.6.

³⁹ Such views were expressed to the author by several defence counsel and Registry personnel during her research stay in Arusha at the ICTR, October 2004. This point however, has much improved.

⁴⁰ The legal basis for this judicial review was the Chamber's ability to rule on parties' motions after the accused's initial appearance. See Rule 73(A) ICTR RPE.

⁴¹ 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, § 19.

⁴² Cf. *supra*, Chapter II, paragraph 2.3.5.

⁴³ ICTY Tr. Ch., Decision on Appeal against Decision of Registry, *Martić* (Case No. IT-95-11-PT), 2 August 2002.

⁴⁴ See *idem*.

The President of the court, who is a Judge, supervises the activities of the Registrar⁴⁵ and can review most of his decisions.⁴⁶ The decision to permit counsel to withdraw from a case can only be reviewed – not appealed or reheard. The President has the inherent power to review administrative decisions of the Registrar, where they may affect the rights of the accused, unless this power is expressly conferred elsewhere.⁴⁷ However, the President's review is confined to determining whether or not the Registrar has come to a *reasonable* conclusion given the law on the issue involved.⁴⁸ According to the ICTY President in *Krajišnik*: 'Given that the Registrar has "principal responsibility for overseeing the assignment of defence counsel", he enjoys a certain degree of deference or margin of appreciation in reaching a decision on assignment of counsel.'⁴⁹ To request the President's review, the suspect or accused should demonstrate 'that the Registrar has erred and that such error has "significantly affected the Registrar's decision to his detriment."⁵⁰ The President only quashes the Registrar's decision upon a failure 'to comply with the legal requirements of the Directive at issue'; 'to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision'; to take into account relevant material or upon his consideration of irrelevant material; 'or [...] if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).'⁵¹

The Registrar's decisions concerning the standards of qualifications for defence team members can also be reviewed by the President.⁵² Additionally, on the basis of its inherent powers to ensure a fair trial, the Chamber may find a way to become influential, but generally after the President has reviewed the Registrar's decision.⁵³ Trial Chambers occasionally address defence issues that otherwise belong to the Registrar and the President of the Tribunal.

The ICC, although it established a separate 'Office of Public Counsel for the Defence' (OPCD),⁵⁴ the ICC Registry also has a specialized department dealing with

⁴⁵ See Rule 19 ICTR RPE; Rule 19 ICTY RPE; and Articles 38 (3) and 43(2) ICC Statute.

⁴⁶ Article 12 ICTR Directive, Article 13 ICTY Directive (decision not to assign counsel on the request of the accused). See Article 20(E) ICTR Directive; Article 20(A) ICTY Directive (decision not to withdraw counsel); Article 20(B) ICTY Directive (his decision to suspend counsel); Article 20(C) ICTY Directive (his decision to withdraw counsel); 15(C) ICTY Directive (decision not to put counsel on the list); Article 14(D) ICTY Directive (decision to remove counsel from the list). As to the ICC, cf. Regulation 72(1) ICC Regulations of the Court, 26 May 2004 (ICC-BD/01-01-04) (decision not to put counsel on the list); Regulation 85(3) ICC Regulations of the Court (his decision regarding the accused's indigence).

⁴⁷ See, for instance, 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), § 9.

⁴⁸ Cf., for instance, ICTY Pres., Decision Affirming the Registrar's Denial of Assigned Counsel's Application to Withdraw, *Milošević* (Case No. IT-02-54), 7 February 2005, §§ 4 and 6.

⁴⁹ Footnotes omitted, JTT. Decision on Request for Review, *Krajišnik*, *supra* note 47, § 11.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* Cf. also ICTY Pres., Decision on Review of the Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, *Kvočka et al.* (Case No. IT-98-30/1-A), 7 February 2003, §§ 12-14.

⁵² See Rule 44(A) and (B) and Rule 45 (B) ICTY RPE.

⁵³ Cf., for instance, ICTY App. Ch., Decision on "Motion seeking review of the decisions of the Registry in relation to assignment of Counsel", *Krajišnik* (Case No IT-00-39-A), 29 January 2007, p. 3.

⁵⁴ Regulation 77 ICC Regulations of the Court.

defence matters, the Registrar's Division of Victims and Counsel. The Registrar bears important responsibilities regarding the defence. According to the ICC's Rules of Procedure and Evidence, he should help suspects and accused obtain legal assistance; support and assist defence teams, and advise the Prosecutor and Chambers on defence-related matters. One positive example is that he must also facilitate the protection of confidentiality and cooperate with national Bar associations or other independent lawyers' associations to promote the specialization and training of lawyers in the law of the ICC.⁵⁵ A further positive example is that Rule 20 of the ICC RPE stipulates that the Registrar should organize its staff in a way that promotes the rights of the defence and which is consistent with the fair trial principle. Furthermore, the Registrar should perform his functions 'in such a manner as to ensure the professional independence of counsel.' For purposes such as the management of legal assistance and the development of a Code of Professional Conduct, he must consult with independent representative bodies of counsel. The Registrar is thus encouraged to take the rights of the defence positively into account when taking a decision that concerns the defence. Moreover, were defence counsel or an accused to allege that the staff of the Registry are uncooperative, these provisions could be invoked to address such issues.

Another improvement is the ICC's Legal Aid Commission. The Registrar should appoint three commissioners to advise him on the allocation of funds for assigned legal assistance.⁵⁶ Lawyers' associations may propose members.⁵⁷ However, in a payment dispute between an *ad hoc* Counsel and the Registrar, none of the parties resorted to this Commission.⁵⁸ When not consulted where legal aid issues are at stake, this commission remains a notional improvement.

The Registries of international criminal courts have a myriad of responsibilities, not just over defence issues. It must serve the Prosecution, Chambers, and the defence and that may result in insufficient focus on defence issues. Without legal training or experience, Registry staff may not equip the defence in a sufficient manner that is in line with the principle of equality of arms. This may be reason in itself to confer some of the Registries' responsibilities to a separate defence body,⁵⁹ or a Bar association.

⁵⁵ See Rule 20(1) ICC RPE.

⁵⁶ Its members will be renewed every three years. See Regulation 136 ICC Registry Regulations (ICC-BD_03-01-06-Rev.1).

⁵⁷ This commission comprises two members of the International Criminal Bar.

⁵⁸ See International Criminal Bar Newsletter, April 2007, available at <http://85.17.104.100/bpi-icb/files/icb%20newsletter%20april%202007%20english.pdf>, p. 2.

⁵⁹ Elise Groulx pleads for an independent Office of the Defence at the International Criminal Court. See Groulx, Elise, 'The Role of Defence Lawyers and the Interface between the Prosecution and the Defence before International Criminal Courts', 2000, www.iap.nl.com/speeches/groulx.html, retrieved 12 January 2005. Cf. also Plachta, Michael, 'Concerns About the Independence of Defense Counsel Before the (Permanent) International Criminal Court', 16 *International Enforcement Law Reporter* (2000), January 2000, pp. 576 *et seq.*

3.2.3 Independent Defence Offices

Although the *ad hoc* Tribunals did not provide for a separate defence office, such offices are being created by international criminal courts to an ever increasing extent. The only international tribunal actually providing for a Defence Office as a separate organ in its Statute is the Special Tribunal for Lebanon (STL). An independent Head of the Defence Office should appoint its staff and draw a list of defence counsel.⁶⁰ It may include public defenders. In addition to its duty to protect the rights of the defence and to provide the defence with support and assistance, it may also appear before the Pre-Trial Judge or a Chamber relating to specific issues.⁶¹

Even though its Statutes do not provide for a separate defence organ, the Regulations of the Court of the ICC provide for an “Office of Public Counsel for the Defence” (OPCD).⁶² OPCD is part of the Registry for administrative purposes but will otherwise function independently.⁶³ It performs a number of the duties that the ICC RPE accord to the Registrar.⁶⁴ It should represent and protect the rights of the defence during the early investigative stage and provide defence counsel, suspects and accused with support and assistance. It may also provide legal research or advice and appear before a Chamber to address particular issues.⁶⁵ Nevertheless, the range of activities of the OPCD has its limits. One limitation is that the Registry, not the OPCD has responsibility for legal aid. The OPCD ‘will neither be involved in the administrative and financial management of the legal aid programme, nor be responsible for the logistic or administrative support to defence and victims’ representatives teams.⁶⁶ In addition, defence counsel privately retained by the accused should file a power of attorney with the Registrar, not with the OPCD.⁶⁷ Defence issues which are primarily the responsibility of the Office of Public Counsel include the training of lawyers. In addition, the Office organizes yearly meetings for all counsel (for victims and accused) that are on the Registrar’s list of counsel, to inform them of the developments at the court.⁶⁸ When attending one of these meetings however, I was surprised that neither time, nor the assistance of an interpreter, had been made available to counsel to discuss any issues between themselves.⁶⁹ The ICC alone organizes yearly meetings for all counsel on the list. That at least creates an opportunity for them to discuss common initiatives.

⁶⁰ Article 13(1) STL Statute.

⁶¹ Article 13(2) STL Statute.

⁶² Regulation 77 ICC Regulations of the Court.

⁶³ See Regulation 77(2) ICC Regulations of the Court.

⁶⁴ Regulation 77 ICC Regulations of the Court.

⁶⁵ Cf. Regulation 77(4) and (5) ICC Regulations of the Court.

⁶⁶ Report to the Assembly of States Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons (ICC-ASP/3/16), 17 August 2004, par. 12.

⁶⁷ See Rule 22(2) ICC RPE.

⁶⁸ See for instance, www.icc-cpi.int/defence/defconsultations.html.

⁶⁹ The author attended one of these meetings in The Hague on 28 and 29 march 2007. A full programme of this meeting is available at www.icc-cpi.int/library/defence/Defense_Seminar_2007_Program_En.pdf (lastly visited 26 December 2007).

During the early investigative stage, the OPCD may submit observations on victims' applications to participate in the proceedings.⁷⁰ The scope of the OPCD's activities with regard to the representation of defence rights was put to the test in *Thomas Lubanga Dyilo*. A judge requested the OPCD to temporarily replace a defence counsel and to modify a defence application for leave to appeal and to file its redacted version.⁷¹ The request seemed solely motivated to prevent the costs and trouble of having counsel come to the seat of the court only to make a few changes to his application. The OPCD considered this to be outside the proper scope of its activities. The legal provisions of the ICC do not allow the OPCD to function as "defence counsel" for an accused who is already provided with one, or to replace him or become part of a defence team.⁷²

Similarly, the Special Court for Sierra Leone (SCSL) created an independent "Office of the Principal Defender" (OPD). OPD was created by the Registrar and is headed by the "Special Court Principal Defender", a "distinguished counsel".⁷³ Although it is not designated an organ under the Statute, it is intended that it will become as independent as the Office of the Prosecutor.⁷⁴ The Registrar should assist the Principal Defender as well as the Defence.⁷⁵ OPD should provide "a counterbalance" to the prosecution. It seeks 'to attract only experienced, competent and honest counsel', to promote "equality of arms" and to establish a 'reasonable equivalence in ability and resources of Prosecution and Defence'.⁷⁶ In addition, it seeks to engage in outreach activities in order to "educate the community" about the defence.⁷⁷ The choice for the office was also inspired by budgetary constraints.⁷⁸ Logic suggests that it is also limited by those same constraints.

An unusual review procedure applies. Counsel should engage in an arbitration procedure before he may complain to the Chamber about a decision of this Office.⁷⁹ The Principal Defender and the Sierra Leone Bar Association can propose amendments to the Rules of Procedure and Evidence.⁸⁰ The Rules stipulate that OPD

⁷⁰ See, for instance, ICC Pre-Tr. Ch. I, Decision Authorising the Filing of Observations on Applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for Participation in the Proceedings, *Situation in Darfur, Sudan* (Case No. ICC-02/05-85), 23 July 2007, p. 3.

⁷¹ See ICC Pre-Tr. Ch. I, Decision on the Defence Request for Extension of Time Limit, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-815), 8 February 2007.

⁷² See Observations of the Office of Public Counsel for the Defence on the Decision of Pre-Trial Chamber I entitled "Decision on the defence request for extension of time", *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-823), 12 February 2007 (hereinafter: Observations of the Office of Public Counsel), § 17.

⁷³ Cf., First Annual Report of the Special Court for Sierra Leone for the Period December 2, 2002, to December 1, 2003, available from www.sc-sl.org (hereinafter: SCSL First Annual Report), p. 5.

⁷⁴ See *ibid.*, p. 16.

⁷⁵ Rule 33 SCSL RPE.

⁷⁶ SCSL First Annual Report, p. 16. Chapter V of this study examines the principle of equality of arms.

⁷⁷ *Ibid.*, p. 17.

⁷⁸ Cf. *ibid.*, for instance at pp. 16 and 17.

⁷⁹ See Article 22 SCSL Directive on the Assignment of Counsel, Adopted on 1 October 2003. Cf. also, SCSL Tr. Ch. I, Decision on Defence Application II, *Sesay, Kallon and Gbao* (Case No. SCSL-04-15-T-715), 28 February 2007, §§ 19 and 26.

⁸⁰ Rule 6 SCSL RPE (as amended on 29 May 2004).

should provide advice, assistance and representation to suspects and accused.⁸¹ According to the SCSL's first annual report: 'The Office monitors trials and provides advice and substantive assistance to all teams in the preparation of their cases, from research on legal issues, to arguments on matters of common interest, to vetting the provision of expert witnesses, consultants and investigators, and liaising with various governments and other entities on matters of judicial cooperation.'⁸² To provide representation in the initial stage of proceedings, three duty counsel are permanently employed by OPD.⁸³ According to Cassese, the SCSL Defence Office has been successful in 'giving the various defence teams an institutional voice that is not present at the ICTY and ICTR.'⁸⁴ However, it has limited resources at its disposal and no budgetary independence. Therefore, more often than not, it had to financially restrain defence teams rather than to provide them with substantive legal support, logistical resources, administrative assistance, or sufficient remuneration.⁸⁵ It was 'caught between the administration and the demands of the accused and defence counsel'.⁸⁶ This created tensions between the Office and defence teams.⁸⁷

There have also been tensions between this office and the Registry. In *Brima, Kamara and Kanu*, the SCSL Appeals Chamber addressed the division of powers between OPD and the Registrar. Essentially, OPD provides representation to suspects and accused and administers the list of counsel, counsel's assignment and his withdrawal. The Registry services the court, established OPD and assists it.⁸⁸ The Appeals Chamber considered that 'by creating the Defence Office, the Registrar delegated part of his power and responsibility in the enforcement of the rights of the Defence to it, [...] the Registrar did not divest himself of his power and can therefore act *concurrently*⁸⁹ with the Principal Defender'.⁹⁰ This is obviously a problematic issue.

In *Taylor*, despite the Chamber's orders, the Registry had not provided money for a ticket to the Netherlands to the Principal Defender of OPD to enable him to visit the accused.⁹¹ At a later court session, the trouble between OPD and the Registry

⁸¹ See Rule 45 SCSL RPE.

⁸² SCSL First Annual Report, p. 17.

⁸³ See Rupert Skilbeck, 'Sierra Leone', in Bohlander, Boed and Wilson (ed), *Defense in International Criminal Proceedings. Cases, Materials and Commentary* (Ardley, NY USA: Transnational Publishers, 2006), pp. 730-806, p. 804.

⁸⁴ Report on the Special Court for Sierra Leone, Submitted by the Independent Expert Antonio Cassese, 12 December 2006, available at www.sc-sl.org/documents/independentexpertreport.pdf, lastly visited 26 December 2007 (hereinafter: Cassese Report), p. 14.

⁸⁵ *Ibid*, p. 14.

⁸⁶ *Ibid*, p. 32.

⁸⁷ *Ibid*, p. 14.

⁸⁸ SCSL App. Ch., Decision on Brima-Kamara Defence appeal motion against Trial Chamber II majority decision on extremely urgent confidential joint motion for the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel for Alex Tamba Brima and Brima Bazzy Kamara, *Brima, Kamara and Kanu* (Case No. SCSL-04-16-AR73-441), 8 December 2005 (hereinafter: Decision on Brima-Kamara Defence appeal motion), §§ 80-81.

⁸⁹ Emphasis added, JTT.

⁹⁰ Decision on Brima-Kamara Defence appeal motion, *Brima, Kamara and Kanu*, *supra* note 88.

⁹¹ See SCSL Tr. Ch. II, Transcript, *Taylor* (Case No. SCSL-2003-01-I), 4 June 2007, p. 99. As to arranging for replacement, the OPD in *Taylor* argued that no counsel on the list of counsel were qualified enough to represent the accused. Cf. *supra* Chapter II, paragraph 2.4.1. This could indicate that the OPD may not be the most appropriate organ to provide accused with legal aid. On the other

resurfaced. OPD refused to take up Taylor's representation, after his counsel had been withdrawn. The Rules of the SCSL prescribe that upon counsel's withdrawal 'the Principal Defender shall assign another Counsel, *who may be a member of the Defence Office*,⁹² to the indigent accused'.⁹³ But OPD argued that doing so in this stage could lead to a conflict of interests because it should also service other accused. Furthermore, OPD contended to lack proper resources to appoint replacement counsel.⁹⁴ '[A]s the Defence Office, though part of the Registry, we function in a manner that enables us to facilitate a case of an accused almost independently of the Registry, but we have no resources of our own to just go ahead and begin to get lawyers to court. The issue is the need for a higher budget, the need for the Registry [...] to see that there is indeed an issue of resources and possibly address it [...] to enable an adequate Defence to be provided to the accused'.⁹⁵

These case examples illustrate that OPD still depends on the Registrar to a considerable degree, particularly where financial resources are concerned. Possibly, fully independent defence offices are not sufficiently trusted with too much responsibility. Even though OPD may have remained 'a subordinate office of the Registry',⁹⁶ it has more important responsibilities than the ICC's OPCD, as it may perform representational activities.⁹⁷

One issue is to what extent these offices genuinely act independently of the court. Certain accused have had difficulty in regarding defence counsel before international criminal courts as being genuinely independent, especially where the court appointed a lawyer to them against their will.⁹⁸ This may be even more so were counsel to act under the guidance of a defence office. If the defence becomes an official organ of the court it might appear to be simply an extension of the court, unless its independence was fully understood and guaranteed.

A disadvantage of any defence office is that its success greatly depends on the individual who actually functions as its head.⁹⁹ When defence counsel are in large measure reliant on one person – and this equally applies to the Registrar –, a successful cooperation scheme is dependent on his individual personality. This individual should be able to handle the continuous pressure from defence teams particularly to obtain more resources and be able to cooperate effectively with the Registry and other court organs.¹⁰⁰ If too much power over defence issues is concentrated in one person, the result may be abuse or arbitrary decision making, or at least the perception of it.

hand, this office was not responsible for formulating the qualification requirements of counsel. Therefore, it may be justified to be alarmed by the quality of available counsel. The SCSL now uses a separate list for counsel in appellate proceedings.

⁹² Emphasis added, JTT.

⁹³ Rule 44(E) SCSL RPE.

⁹⁴ See SCSL Tr. Ch. II, Transcript *Taylor*, 25 June 2007, pp. 21, 22.

⁹⁵ *Ibid.*, pp. 18, 19.

⁹⁶ Cassese Report, p. 32.

⁹⁷ Cf. also Observations of the Office of Public Counsel, *Thomas Lubanga Dyilo supra* note 72, § 9.

⁹⁸ See, for instance, *supra*, Chapter VII on self-representation.

⁹⁹ As regards the Principal Defender, cf. Sylvia de Bertodano, Report on Defence for the Special Court for Sierra Leone, 28 February 2003, available from www.specialcourt.org (hereinafter: Bertodano Report), pp. 15 and 16.

¹⁰⁰ In 2003, the following competencies and skills were required of the individual to create the SCSL OPD and to become the first Public Defender: 'University degree in Law. Admission to practice in

As part of these defence offices, it may also be questioned as to whether a public defender system, where a few experienced counsel would represent different accused before a court simultaneously, would be a viable option for international criminal courts. A disadvantage is that it would significantly limit the accused's right to legal assistance of his choice. More importantly, since the crimes under the jurisdiction of international criminal courts are often interconnected, having only a limited panel of lawyers represent many different accused at the same time may result in conflicts of interest.¹⁰¹ This alone suggests that a public defender system may be inherently unsuitable for a wideranging and complex international tribunal.

3.2.4 Advisory Panels

A typical feature of the *ad hoc* Tribunals is that they both provide for an "Advisory Panel" consisting of defence lawyers. At the ICTR, the President and the Registrar can consult this Panel as to the assignment of counsel. In addition, the Panel may advise them on this issue on its own initiative.¹⁰² Furthermore, the Registrar may consult the Panel upon disagreement regarding the level of remuneration or the reimbursement of expenses of counsel.¹⁰³ The ICTY Advisory Panel may assist in *all matters* concerning defence counsel.¹⁰⁴ The Panel may also advise, or be consulted by, associations of defence counsel.¹⁰⁵ This renders the ICTY Panel an "all round" defence issues advisory body. However, no formal arrangement exists by which Chambers or the Prosecution *must* seek advice from this body in respect of certain defence matters.

Each Panel consists of seven defence counsel¹⁰⁶ and its composition can regularly be renewed.¹⁰⁷ The President of the Tribunal chooses two members from the Registrar's list of counsel.¹⁰⁸ The International Bar Association and the Union Internationale des Avocats may each propose two more. The Panel will be headed by the President of the local Bar association at the seat of the Tribunal or his

law in any State, common law jurisdiction an asset. Fifteen years of relevant criminal advocacy experience, including high profile criminal defence. Knowledge of International Criminal Tribunal procedures, comparative common law / civil law procedures an asset. Experience of international human rights defence (asylum, extradition, war crimes, etc.). Excellent drafting skills, management skills, interpersonal skills and communication skills, preferably including experience in a multi-cultural setting. See Special Court for Sierra Leone Vacancy Announcements, available at www.nacdl.org/public.nsf/ENews/2003e22?opendocument (lastly visited 14 May 2008).

¹⁰¹ Cf. Bertodano Report, pp. 6 and 7. On conflicts of interest, see *infra*, Chapter VI, paragraph 6.3.3.

¹⁰² See Article 29(C) and (D) ICTR Directive 2007.

¹⁰³ See Article 30 ICTR Directive 2007.

¹⁰⁴ See Rule 44(D) ICTY RPE. This provision was included in the ICTY RPE since its 18th revision (2000). Initially, its functions accorded by the Directive equaled those of the ICTR Panel. See, for instance, Articles 32 and 33 ICTY Directive (IT/73/REV. 2), 1995.

¹⁰⁵ See Article 33 ICTY Directive (IT/73/REV. 11), 2006.

¹⁰⁶ See Rule 44(D) ICTY RPE; Article 33 ICTY Directive (Rev. 11); Article 29 ICTR Directive.

¹⁰⁷ Its membership will come up for appointment every two years. See Article 29 ICTR Directive (2007); Article 32(B) ICTY Directive (2006).

¹⁰⁸ The ICTY requires the President to consult the Registrar and the association of defence counsel on this, at the ICTR, the President should choose by ballot. See Article 32 ICTY Directive (2007); Article 29 ICTR Directive (2006).

representative.¹⁰⁹ The ICTY Directive stipulates that the Panel will meet at least yearly¹¹⁰ and may invite the President of the Tribunal, the Registrar, or the Presidents of associations of counsel to attend its meetings.¹¹¹

No attendance or inclusion of defence counsel from the region where the crimes were committed is required on these panels. The ICTY Panel's composition should be *representative* of the various legal systems.¹¹² In addition, the ICTY requires the two members chosen from the list by the President to have appeared before the Tribunal, in other words, to have gained experience in its justice system. Moreover, each member must have more than ten years professional legal experience.¹¹³ This may enhance the quality of the advice it provides.

It may be queried as to the extent these Panels are still necessary, as the *ad hoc* Tribunals have their own Bar associations. It has been noted that the ICTY Panel's role has not been adjusted since the creation of the Association of Defence Counsel practising before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY).¹¹⁴ The ICTR's Bar Association, Association of Defence Advocates before the ICTR (ADAD),¹¹⁵ has felt neglected in comparison to this Panel. It suggested that, in addition to this Panel, ADAD should be consulted under Rule 46(D) of the ICTR RPE in respect of amendments to the Code of Conduct.¹¹⁶ ADAD and the ADC-ICTY consist of counsel appearing before the *ad hoc* Tribunals or being enrolled on the Registrar's list. They will be better informed as to what is involved in actually appearing before these courts than a seven-strong panel of which only two persons must be included on that list. As many years have passed since the establishment of the *ad hoc* Tribunals, and many different international(ized) criminal courts have been established since, the pool of counsel experienced in conducting international criminal cases becomes increasingly substantial. Therefore, these Panels should either be made redundant to make room for Bar associations or should principally be composed of defence counsel experienced in international criminal practice.

¹⁰⁹ *I.e.*, the presidents of the Dutch Bar Association (*Nederlandse Orde van Advocaten*) and the President of the Tanganyika Law Society, the Lawyers' Society of Tanzania.

¹¹⁰ According to an annual report in 2000 for instance, a meeting of this panel was scheduled for the end of the summer of 2000 subsequent to its June 1999 meeting. See ICTY Seventh Annual Report (UN Doc. A/55/273), 26 July 2000, par. 231.

¹¹¹ Article 33(D) ICTY Directive (2006).

¹¹² See Rule 44(D) ICTY RPE.

¹¹³ See Article 33(A) ICTY Directive (2007). Cf. also Rule 44(D) ICTY RPE.

¹¹⁴ Cf. Report on the Situation of Defence Counsels Practising before the International Tribunal, Address by Mr. Stéphane Bourgon, President of the ADC-ICTY, Before the Judges Plenary Session, 28 July 2004, p. 7.

¹¹⁵ See *infra* paragraph 3.3.1.

¹¹⁶ Cf. for instance, ICTR Tr. Ch. I, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratién Kabiligi, *Bagosora et al.* (Case No. ICTR-98-41-I), 19 January 2005 (hereinafter: Decision on the Defence Motions for the Reinstatement), § 14.

3.3 BAR ASSOCIATIONS

3.3.1 Introduction

The UN Basic Principles on the Role of Lawyers stipulate that ‘[l]awyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.’¹¹⁷ Generally, lawyers appearing before international criminal courts have different backgrounds and therefore wide ranging views on the legal profession. When not engaged in trial, defence counsel generally return to their domestic jurisdictions and may be far away from the seat of the Tribunal or each other; in addition, they may not share a common language.¹¹⁸ These factors make it more difficult to form an association than in a national context; but they make it all the more necessary to do so.

When the *ad hoc* Tribunals were established, no lawyers’ associations that were representative of defence counsel practising at these courts existed. Several Bar associations created for these lawyers since have been created. One issue is whether or not defence counsel have organized themselves sufficiently to take up some of the responsibilities that now rest with the Registry. And, whether or not international criminal courts grant such associations enough leeway to assume more responsibilities.

A common feature marking the independence of Bar associations for lawyers appearing before international criminal courts is that these are private associations.¹¹⁹ The ICTR’s Bar association for defence counsel, the ‘Association of Defence Attorneys before the ICTR’ (ADAD),¹²⁰ was set up in August 1997. It was initiated by defence counsel.¹²¹ The ICTR does not officially recognize ADAD and its Rules make no mention of any defence counsel association.

The Association of Defence Counsel practising before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) was created in late 2002. Considering that the Tribunal was set up in 1993, and its first proceedings started in 1994, this was a slow genesis. Its creation was instigated by ICTY judges. Arguably, existing structures, including having the Registrar as a communication channel, were not deemed satisfactory. A working group of four ICTY defence counsel, one Dutch Bar member and one Registry representative drafted its Statute.¹²² The goal of its establishment was to improve defence counsel’s quality and accountability and to keep the Tribunal better informed on defence concerns.¹²³ The ICTY RPE since require that counsel ‘is a member in good standing of an association of counsel practising at

¹¹⁷ Principle 24 UN Basic Principles on the Role of Lawyers.

¹¹⁸ For instance, before the ICTY, speaking one of the Tribunal’s working languages is not a necessary requirement. Cf. *supra* Chapter II, paragraph 2.4.2.

¹¹⁹ For instance, the ADC-ICTY is an association according to Dutch law. See www.adcicty.org.

¹²⁰ This abbreviation is derived from the French name of this association: Association des Avocats de la Défense.

¹²¹ Cf. Ogetto, Kennedy, The Defence Lawyers’ Association at the ICTR (ADAD), in Bohlander, Boed and Wilson (ed), *Defense in International Criminal Proceedings. Cases, Materials and Commentary* (Ardsey, NY USA: Transnational Publishers, 2006), pp. 501-527, p. 505.

¹²² It was adopted at the Plenary in July 2002. See ICTY Ninth Annual Report (2002), par. 299.

¹²³ ICTY Tenth Annual Report (UN Doc. A/58/297-S/2003/829), 20 August 2003, par. 11.

the Tribunal recognised by the Registrar'.¹²⁴ The Registrar officially recognized the ADC-ICTY.¹²⁵ Why defence counsel did not create an association earlier at the ICTY is a matter of conjecture. One obvious point is that the majority of counsel on the Registrar's list are not actually appointed to a case, but are merely potential candidates waiting to be chosen by an accused.¹²⁶ They may not be located anywhere near the seat of the court. Counsel that are of sufficient quality to appear in international courts generally have such a heavy workload, that setting up and running an association may be too time consuming. It has also been suggested that lawyers from various Balkan Bars were reluctant to be together in one association at the ICTY. A more mundane explanation for the late creation of a Bar association at the ICTY is that coping with the NATO bombing of Serbia took priority over a previous endeavour to setting up such an association.¹²⁷

In 1997, long before the ICC was even established, the International Criminal Defence Attorneys Association (ICDAA) was created. Its founding lawyers considered it desirable that defence counsel should have a voice as an NGO in the ICC negotiations to influence their position.¹²⁸ This independent international Bar association has influenced the position of defence counsel at the ICC, for instance, through proposing the creation of an independent defence office.¹²⁹ Considering that the ICC has subsequently created the OPCD, its efforts have been successful in this respect. In addition, it organized training sessions for future ICC lawyers.¹³⁰ The International Criminal Bar (ICB), which originated from the ICDAA, was founded in 2002.¹³¹ The Registrar must consult with 'any independent representative body of counsel or legal associations'¹³² on issues such as managing court assigned legal assistance and drafting a Code of Professional Conduct.¹³³ Thus, the ICB wishes to

¹²⁴ See Rule 44(A)(iii) ICTY RPE. See also ICTY Tenth Annual Report (2003); ICTY Rules of Procedure and Evidence, as amended 11 and 12 July 2002 (IT/32/Rev. 24). Cf. ADC-ICTY Annual Report - Defence Section, available at www.adcicty.org/documents/defence%20annual%20report.pdf, par. 1.

¹²⁵ This happened on 4 October 2002. See ICTY Tenth Annual Report (2003), par. 321.

¹²⁶ Cf. *supra* Chapter II, paragraph 2.3.4.

¹²⁷ This was conveyed to the author by Howard Morrison, former defence counsel at the ICTY and the ICTR. With two other counsel and the support of the late ICTY Judge Sir Richard May, he tried to set up a Bar association. A notice hereof was distributed a few days before the bombing commenced (in 1999).

¹²⁸ Cf. Groulx, Elise, 'Defense Pillar: Making the Defense a Full Partner in the International Criminal Justice System', 20 *Champion* (2001), 25 October 2001, pp. 20-27, p. 21.

¹²⁹ See ICDAA Annual Report 1998-1999, available at www.hri.ca/partners/aiad-icdaa/reports/E-Anual99.htm, lastly visited 24 February 2007.

¹³⁰ See, for instance, ICDAA Annual Report 2005, available at www.aiad-icdaa.org/areport/Annual%20Report%202005%20Final%20version.pdf, lastly visited 24 February 2007, p. 7.

¹³¹ Cf. for instance, Motion and proposed Amicus Brief in relation to the pro se request for review of the Registry decision of 14 May 2007 by Thomas Lubanga Dyilo on behalf of the International Criminal Bar pursuant to Rule 103 of the Rules of Procedure and Evidence, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-918), 4 June 2007 (hereinafter: Motion and proposed Amicus Brief), § 3.

¹³² See Rule 20(3) ICC RPE (ICC-ASP/1/3).

¹³³ See *idem*.

become the ICC Registrar's counterpart in dealing with legal representation matters and seeks recognition by the Assembly of States Parties.¹³⁴

A remarkable feature is that, in line with the general application of the principle of complementarity incorporated in the ICC Statute,¹³⁵ the ICB Constitution also affords a role to national Bar associations. The ICB will promote 'the principle of complementarity in relation to the functions, rights and duties of national, regional and international associations of legal practitioners'.¹³⁶ This seems to imply that the ICB will give way to other professional lawyers' associations, if they could adequately deal with a dispute concerning defence counsel appearing before the ICC. This may involve certain risks. Theoretically speaking, a defence counsel conducting a case at the ICC, while complying with the standards of professional conduct of the ICC, could be disciplined by domestic authorities if his behaviour conflicts with his domestic professional standards. This puts counsel in an untenable position. Nonetheless, when a French defence counsel complained to the ICC about a lack of resources to conduct the defence, after her domestic Bar association requested to be accepted as *amicus curiae*¹³⁷ on this issue,¹³⁸ the ICB filed a similar request several days later.¹³⁹ Thus, the ICB does not necessarily act in accordance with this aspiration.¹⁴⁰

The firstly appointed Public Defender of OPD was to liaise with the Sierra Leone Bar Association or alternatively, to establish a separate association for the SCSL.¹⁴¹ Apparently, the Defender chose to do the first. No specialized bar association has so far been established for SCSL defence counsel.

3.3.2 Membership

In most domestic jurisdictions, all practising lawyers are member of a Bar or Bar association. This gives lawyers a common framework and supports their

¹³⁴ See Note by the Secretariat on the establishment of an international criminal bar (UN Doc. ICC-ASP/2/L.1), Annex Report of the focal point appointed by the President of the Assembly on issues related to an international criminal bar, 12 September 2003, par. A.1.

¹³⁵ See *supra*, note 9.

¹³⁶ Article 3(1) International Criminal Bar Constitution, Berlin March 2003.

¹³⁷ This concept will be explained in Chapter VII, paragraph 7.4.2.

¹³⁸ See Application for intervention in the proceedings as *amicus curiae* by the Ordre des Avocats de Paris under rule 103 of the Rules of Procedure and Evidence, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-917), 30 May 2007.

¹³⁹ See Motion and proposed Amicus Brief, *Thomas Lubanga Dyilo*, *supra* note 131. This motion was subsequently withdrawn. Not because of the Paris Bar application, but because the issue had been solved between the accused and the Registry. See Motion to withdraw request for leave and proposed Amicus Brief on behalf of the International Criminal Bar, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06-938), 25 July 2007. Finally, as the Registrar had resolved the issue of defence resources in this case, the Chamber considered the *amicus curiae* application of the Ordre des avocats de Paris moot and dismissed it. See ICC Tr. Ch. I., Order on application of the Ordre des avocats de Paris filed on 30 May 2007, *Thomas Lubanga Dyilo* (Case No. ICC-01/04-01/06), 18 October 2007.

¹⁴⁰ Chapter VI on the Regulation of Professional Conduct will address some dilemmas for counsel as to differences between his professional ethics at home and before an international court. See *infra*, Chapter VI, paragraph 6.5.

¹⁴¹ See job description for this position in 2003, Special Court for Sierra Leone Vacancy Announcements, *supra* note 100.

independence.¹⁴² It is axiomatic that if defence counsel appearing before international criminal courts genuinely want their voice to be heard, they should organize themselves accordingly. This paragraph considers whether Bar associations should be joined by lawyers on a voluntary or on a mandatory basis.

Membership of ADAD is voluntary. A substantial number of counsel are members.¹⁴³ Membership of both the ICDA and the ICB¹⁴⁴ is voluntary. Counsel appearing in the ICC's first case, Jean Flamme, duty counsel for the accused Thomas Lubanga Dyilo, was an ICB member. The ICB has an open membership policy and provides individual, collective and associate membership.¹⁴⁵ Membership is not exclusively for counsel who are on the ICC list of counsel.¹⁴⁶ At the ICC, it has been debated whether or not a separate Bar association should be set up to represent all counsel on the list.¹⁴⁷ Membership of the ADC-ICTY alone is mandatory for all defence counsel practising at the ICTY and those enrolled on the Registrar's list. This may not be a mere coincidence, considering that the creation of the ADC-ICTY was encouraged by judges and that it has been officially recognized. Associate membership is open to those supporting its objectives.¹⁴⁸

One of the advantages of mandatory membership is that a Bar association should be in a better position to represent its members' interests and to present its vision as the policy of all practising lawyers in a particular jurisdiction. If its advice is the result of collective discussions between all counsel, it is in a position to properly advise on defence issues. Mandatory membership enhances lawyers' associations' representativeness and accountability. This could be a reason for broadening the scope of its responsibilities to functions beyond advisory functions, such as engaging in disciplinary proceedings. Additionally, it helps persuade international criminal courts to allocate funding to an association. This could improve the proper functioning of the court and it will not be deemed discriminatory as the funding would become available to all defence counsel equally.

It has been argued that mandatory membership of a Bar association is paradoxical or even hypocritical, since lawyers are 'the traditional defenders of

¹⁴² Cf. also Groulx (2001), *supra* note 128, p. 21.

¹⁴³ In 2005, for instance, ADAD had over sixty defence counsel and seven legal assistants as its members. See Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 116, § 13.

¹⁴⁴ See Article 5(1) International Criminal Bar Constitution.

¹⁴⁵ Individual membership is open to those who qualify to practice before the ICC, including counsel for victims (victims play an exceptionally active role in the proceedings of the ICC, see *infra* Chapter V, note 24), Bar associations may become collective member, and associate membership is open to associations 'concerned with the role of counsel' at the ICC, such as NGO's. See Article 5 International Criminal Bar Constitution.

¹⁴⁶ Four hundred persons from over fifty countries attended the ICB's first general assembly. Cf. Motion and proposed Amicus Brief, *Thomas Lubanga Dyilo*, *supra* note 131, § 3.

¹⁴⁷ See for instance, a series of letters in the newsletter of the ICB. See, for instance, International Criminal Bar Newsletter, April 2007, available at <http://85.17.104.100/bpi-icb/files/icb%20newsletter%20april%202007%20english.pdf>, p. 4 and 5; International Criminal Bar Newsletter, June/ July 2007, available at <http://85.17.104.100/bpi-icb/files/icb%20newsletterjune%20and%20july%202007%20eng.pdf>, p. 11 et seq.

¹⁴⁸ Cf. www.adcicty.org.

individual liberties'.¹⁴⁹ Defence counsel are professionally independent. Notwithstanding, most national jurisdictions require them to join the national Bar association.¹⁵⁰ As lawyers appearing before international criminal courts will have usually joined their domestic Bar association, they may not be so keen on joining another. Moreover, mandatory membership is likely to involve financial obligations, such as annual fees.¹⁵¹ This could discourage lawyers from poorer backgrounds to apply to the Registrar's list, which would be an undesirable consequence.

Another objection to mandatory membership is that a Bar association might make public representations on behalf of lawyers who may disagree with viewpoints of their association.¹⁵² If membership is voluntary, lawyers are free to withdraw their membership when they disagree with the policy or activities of their Bar association.¹⁵³ Defence counsel appearing before international criminal courts come from different legal systems and may therefore be divided as to the exact parameters of their roles and aspirations.

As Bar associations can play an important role in advising the court or the *ad hoc* Tribunals on defence issues, it is important to consider how unified the voice of defence counsel associations is. All defence counsel appearing before the ICTY being members of its Bar association does not mean that this association represents a unified defence voice. It may be uncertain what problems defence counsel might share or might not share. The ICB has endeavoured to solve this diversity issue in part by ensuring that its organs consist of members representing different legal systems and geographical areas.¹⁵⁴ Nonetheless, even lawyers with the same background could disagree on how the needs of the defence should be met.

Voluntary membership enables defence counsel to consider his position and his commitment to the position of his colleagues before joining and being represented by a Bar association.¹⁵⁵ ADAD could therefore be better equipped to speak on behalf of its members than the ADC-ICTY. ADAD has advised the Registrar and the Plenary of the ICTR on defence issues. It seems to be taken seriously as a voice of the defence even though it does not represent every defence counsel appearing before the ICTR. The same applies to the ICDA and the ICB where it concerns the ICC.

If no membership of a particular Bar association is required, this could stimulate the establishment of different lawyers associations within one jurisdiction. One effect is that more views may be presented. If there are divergent views between

¹⁴⁹ Smith, Bradley A., 'The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession', 22 *Florida State University Law Review* (1994), Summer, 1994, pp. 35-73, p. 72.

¹⁵⁰ For instance, many State Bar associations in the USA have mandatory membership. See *idem*, every person who is admitted to the Dutch Bar is a member of the Dutch Bar Association. See Dutch Act on Advocates (*Advocatenwet*) of 23 June 1952, lastly amended 13 July 2002, Article 17.

¹⁵¹ For instance, in 2007 the annual fee for ADC-ICTY members was €120. While assigned to a case, counsel should pay an additional monthly fee. See www.adcicty.org.

¹⁵² Cf. Smith (1994), *supra* note 149, for instance, at p. 71.

¹⁵³ Cf. *ibid.*

¹⁵⁴ See Article 3(2) International Criminal Bar Constitution.

¹⁵⁵ Cf. also Smith (1994), *supra* note 149, p. 60. In the USA, voluntary state Bar associations were receiving a higher rate of individual member funding than so-called *unified* Bar associations where membership was obligatory and its members thus regarded their membership dues as a 'tax' of some sort rather than a contribution in their own interest.

different associations of lawyers, some confusion as to the actual needs of the defence in any given case might arise.

Overall, to encourage every counsel appearing before an international criminal court or enrolled on the list of available counsel to promote the position of the defence at these courts, mandatory membership to the same Bar association will be most advantageous. Even though it could give rise to problems of representativeness, it has many practical advantages. It will be easier to achieve goals that individual counsel have in common. In addition, any facility a Bar association would provide, would be beneficial to all counsel.

3.3.3 Functions of Bar Associations

Bar associations generally perform a wide range of functions. They should protect their members' interests, and those of lawyers in general, including their role in society, 'their honour, dignity and integrity'.¹⁵⁶ They could promote counsel's competence and skills through organizing training sessions, establish professional ethical rules and monitor lawyers' professional conduct. Furthermore, according to the UN Basic Principles on the Role of Lawyers, they must assist the government in the organisation and provision of legal aid to indigent persons¹⁵⁷ and inform the public of the role and duties of lawyers.¹⁵⁸ Through their broad range of activities, Bar associations help maintain high standards of performance in the legal profession.

It has been argued that '[t]he usefulness of a defence structure to defence teams and to the tribunal will first and foremost depend on the nature and scope of its mandate'.¹⁵⁹ International criminal Bar associations aspire to assume a number of powers now vested in the Registries. It has been maintained that '[d]espite the commendable role ADAD has attempted to play, defense counsel have nevertheless been exposed and left vulnerable to the discretionary powers of an all-powerful office of the Registrar and an independent and well-endowed prosecutor'.¹⁶⁰ In *Seromba*, ADAD stated that it aimed to promote and defend the rights of the defence in terms of professional interests as well as those of the members of the defence teams.¹⁶¹ In *Bagosora et al*, ADAD sought to engage in the disciplining of defence counsel.¹⁶² The

¹⁵⁶ Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer [Rec(2000)21E], adopted on 25 October 2000, available from [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)21&Sector=secCM&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)21&Sector=secCM&Language=lanEnglish), lastly visited 1 March 2007, Principle V (hereinafter: Council of Europe, Recommendation No. R(2000)21).

¹⁵⁷ Cf. Principle 3 UN Basic Principles on the Role of Lawyers.

¹⁵⁸ Principle 4 UN Basic Principles on the Role of Lawyers. According to Principle 11, associations should also provide opportunities for members of groups 'whose needs for legal services are not met' 'to enter the legal profession'.

¹⁵⁹ Mettraux, G. and Čengić, A. (2007), *supra* note 23, p. 400.

¹⁶⁰ Ogetto (2006), *supra* note 121, p. 526.

¹⁶¹ See ICTR Tr. Ch. III, Décision sur les Requêtes en Annulation de Sanction et en Intervention en Qualité d'Amicus Curiae. Articles 46 et 74 du Règlement de procédure et de preuve, *Seromba* (Case No. ICTR-2001-66-T), 22 October 2004 (hereinafter: Décision sur les Requêtes), § 5.

¹⁶² See Decision on the Defence Motions for the Reinstatement, *Bagosora et al*, *supra* note 116, § 13. This case will be discussed in Chapter VI, paragraph 6.4.2.1.

ICB seeks to be involved in professional ethics and disciplinary proceedings, legal aid, remuneration, the list of counsel eligible for appointment and the drafting and amending of legal instruments.¹⁶³ In addition, the ICB promotes ‘effective communication between’ the ICC’s organs and counsel.¹⁶⁴ The ADC-ICTY aspires to similar functions: supporting defence counsel, promoting their competence and skills as regards substantive international criminal law and how to use available information technology systems, advising the court and its organs on fair trial issues and on legal provisions that are relevant to defence counsel, and watching over counsel’s professional conduct.¹⁶⁵ It seems that there is a gap between the functions which Bar associations aspire to perform and those they are actually allowed to. A valid question is, however, to what extent are lawyers’ associations properly equipped to perform these functions, in particular those which now are primarily within the scope of responsibility of special departments of the Registries of international criminal courts? To function effectively, a Bar association needs active staff members and plentiful resources. It may be difficult for defence counsel members to perform a wide range of activities in addition to conducting a case at an international criminal court.

It is undesirable for individual defence counsel to communicate every single problem separately to the court, not least because individual counsel’s interests may be highly divergent. An effective and efficient communication channel is required. If defence counsel are reliant on the Registrar for vital issues such as their assignment and withdrawal, it would be inefficient for individual counsel to pursue issues or complaints with the Registry. Additionally, the Registry is usually not composed of trained lawyers and its competence to convey the concerns of the defence correctly and effectively may therefore be questionable. Overall, this renders the Registry unsuitable as the channel of communication for defence counsel with the court. The sole concern of a Bar association is to promote the interests of defence counsel. It is generally in a position to appreciate the problems defence counsel encounter and would therefore function as a more appropriate communication channel than the Registry. This is not without problems. A former president of the ADC-ICTY communicated every single defence counsel’s problem to the Registry and was considered a nuisance for this reason.¹⁶⁶ By not setting priorities as to what to communicate to court authorities and uncritically conveying every problem that surfaces, no service is being done to defence counsel. A Bar association needs to consider what may realistically be achieved. Especially if a Bar association has a voluntary membership regime, it is desirable that a defence office performs this function together with the Bar association.

International criminal Bar associations fulfil an important advisory role on defence issues. Even though the ICTR has not officially recognised ADAD, it is

¹⁶³ Article 4 International Criminal Bar Constitution.

¹⁶⁴ Article 3(1) International Criminal Bar Constitution.

¹⁶⁵ See Article 2 Constitution of the Association of Defence Counsel Practising Before the 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, modified 23 October 2004 (hereinafter: ADC-ICTY Constitution).

¹⁶⁶ This was entrusted to the author by a former Registry official of the ICTY in October 2004.

permitted to advise on defence issues on a case-by-case basis.¹⁶⁷ ADAD regularly advises the Registrar and has met with the President of the Tribunal on several occasions. In 2004, it was invited for the first time to present its views and proposals to the Plenary of the ICTR judges. ADAD seized this opportunity to propose a revision of the disciplinary system for defence counsel.¹⁶⁸ This was without success. In *Seromba*, ADAD deemed itself the most appropriate professional body to resolve questions concerning defence counsel at the ICTR.¹⁶⁹ The Trial Chamber recognized that ADAD had an interest in solving the issue that was at stake,¹⁷⁰ but did not authorize it to intervene as *amicus curiae*.¹⁷¹ At the Fourth Session of the Assembly of States Parties Meeting, the ICC authorized the ICB to officially participate in these meetings.¹⁷² Since the creation of the ADC-ICTY, participation of the defence in official ICTY meetings has significantly increased. For instance, its President was allowed to address the Plenary and two ADC-ICTY members were appointed to the ICTY's Rules Committee.¹⁷³ However, like prosecution counsel in this nine-strong committee, they have no power to vote.¹⁷⁴ Upon official recognition by an international criminal court, defence counsel associations should no longer be obligated to file applications to participate as *amicus curiae* where defence issues are at stake. They should be allowed to advise the court on a regular basis.

Bar associations should keep their members informed on relevant practical and procedural issues, in order for counsel to maximize the effectiveness of their performance. Continuing professional development is a common requirement in many established legal systems with obligatory annual "points" awarded for relevant courses and seminars. The ICC Regulations of the Registry provide that the Registrar should provide training materials to counsel and develop a standard for training programmes that assist in acquiring knowledge of the law of the ICC Statute and the Rules.¹⁷⁵ Promoting counsel's knowledge, competence and skills is likewise a common objective of Bar associations.¹⁷⁶ When this function would primarily belong to Bar associations, mandatory membership would ensure that all counsel benefit from this service. Particularly if Bar association membership is voluntary, it is desirable that a defence office and the Bar association and possibly the Registry, jointly organize training

¹⁶⁷ For instance, ADAD has requested to act as *amicus curiae* on several occasions before the ICTR, but has not always been accepted as such. See ICTR Pres., Decision on Prosecution's Request to Withdraw Motion for Trial in Rwanda, *Nzabirinda* (Case No. ICTR-01-77-I), 3 March 2005; Décision sur les Requêtes, *Seromba*, *supra* note 161, §§ 5, 10 and 21. In *Bagosora et al.*, the President of ADAD was invited to be present in the courtroom during oral argument, although no decision had yet been taken on ADAD's application to be granted *amicus curiae* status in relation to the motion. See ICTR Tr. Ch. I, Minutes of Proceedings, *Bagosora et al.* (Case No: ICTR-98-41-T), 20 December 2004.

¹⁶⁸ See Decision on the Defence Motions for the Reinstatement, *Bagosora et al.*, *supra* note 116, § 13.

¹⁶⁹ See ICTR Tr. Ch. III, Décision sur les Requêtes, *Seromba*, *supra* note 161, § 5.

¹⁷⁰ See *ibid.*, § 10.

¹⁷¹ It was argued that the motion did not help to solve the question at issue. See *ibid.*, § 21.

¹⁷² Cf. ICB Press Release, 9 December 2005.

¹⁷³ Cf. ICTY Tenth Annual Report (2003), par. 29.

¹⁷⁴ See *ibid.*, par. 30.

¹⁷⁵ See Regulations 140 and 141 ICC Regulations of the Registry (ICC-BD_03-01-06-Rev.1).

¹⁷⁶ Cf., for instance, Article 3(1) International Criminal Bar Constitution; Article 2 ADC-ICTY Constitution. Principle 9 of the UN Basic Principles on the Role of Lawyers encourages lawyers' associations to make lawyers aware of human rights.

facilities for defence counsel. Since it is in the interest of courts that defence counsel provide an effective defence, it is reasonable that they assist in the financing of such initiatives. A fixed training schedule is more appropriate to keep up the quality standards rather than relying upon *ad hoc* sessions, and it may be effective to make participation in such training mandatory for all counsel that have not yet acquired experience in international criminal cases.

Where more far-reaching tasks are concerned, such as participating in disciplinary proceedings, it has been argued that Bar associations might protect their members' interests to the detriment of the interests of justice and could be too lenient when supervising lawyers' professional behaviour.¹⁷⁷ Bar associations nonetheless require the ability to impose sanctions on their members when their behaviour clearly exceeds the limits of what is professionally acceptable. The UN Basic Principles on the Role of Lawyers promote that lawyers' associations uphold professional standards and ethics, protect lawyers from persecution and improper restrictions and infringements¹⁷⁸ and make lawyers aware of their ethical duties.¹⁷⁹ The Council of Europe recommends that Bar associations set professional standards of competence and that they are responsible for, or at least participate in, disciplinary proceedings against lawyers.¹⁸⁰ Therefore, Bar associations for lawyers appearing before international criminal courts should participate in disciplinary proceedings and set and protect professional standards.¹⁸¹

To realize its objective of participating in disciplinary proceedings, the ADC-ICTY has set up its own Disciplinary Council.¹⁸² As a result, this Council's responsibilities may overlap with those of other bodies monitoring counsel's compliance with the ICTY's Code of Professional Conduct.¹⁸³ Additionally, this Council can suspend a lawyer's membership.¹⁸⁴ ADC-ICTY membership being mandatory, the ADC-ICTY Disciplinary Council, in practice, rules over the admission of lawyers.

The responsibilities of the ADC-ICTY thus could also overlap with those of the Registrar over admission. In domestic jurisdictions, the admission of lawyers into practice is not a common function of Bar associations.¹⁸⁵ But since international criminal courts require substantial relevant experience for counsel to qualify, members

¹⁷⁷ See *infra*, Chapter VI, paragraph 6.4.

¹⁷⁸ See Preamble of the UN Basic Principles on the Role of Lawyers.

¹⁷⁹ Principle 9 UN Basic Principles on the Role of Lawyers.

¹⁸⁰ See Principles V & VI Council of Europe, Recommendation No. R(2000)21.

¹⁸¹ Cf. *infra*, Chapter VI, paragraph 6.4.

¹⁸² See Constitution of the Association of Defence Counsel Practising Before the 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, modified 23 October 2004, Artt 15-19.

¹⁸³ Especially the ICTY's Disciplinary Panel and its Disciplinary Board. These bodies will be further elaborated upon in Chapter VI, paragraph 6.4.2.1 of this study.

¹⁸⁴ Cf. Comprehensive Report on Legal Aid System ICTY, *supra* Chapter II note 148, par. 45. According to this report, the disciplinary committee of the ADC-ICTY had so far suspended one counsel.

¹⁸⁵ A USA State Bar, for instance, neither admits persons to the practice of law, nor disbars or suspends lawyers. The State Supreme Court carries out those functions. See *Keller v. State Bar of California*, 496 U.S. 1 (1990) (hereinafter: *Keller*), at 11 and 12.

of a specialized Bar of counsel conducting international criminal cases or an independent defence office are in a better position to determine whether or not a candidate meets the necessary requirements than the Registry.¹⁸⁶

The majority of the specialized Bar associations are not formally recognized by international criminal courts and only participate on a provisional basis in its official decision-making processes. The ICTY alone officially recognizes its Bar association. This could be the result of the fact that the judges of this court actively encouraged its creation. It has been suggested that ADAD could do much more for defence counsel if formally recognized.¹⁸⁷ Without officially recognising the ICDA and the ICB, the ICC has consulted and allowed these associations as NGO's to contribute to the rule making process. Additionally, the ICC formally obliges the Registrar to consult with independent representative bodies of counsel on defence issues thus involving defence associations in the decision making process. Therefore, it is desirable that each international criminal court formally recognizes Bar associations and requires that will be consulted on defence issues on a regular basis, rather than at random.

The Council of Europe recommended that Bar associations should be able to participate in drafting legislation or proposing amendments.¹⁸⁸ The U.S. Supreme Court did not approve that Bar associations would engage in political activities unrelated to the regulation of the legal profession.¹⁸⁹ Only in the past years has the ICTR allowed ADAD to make contributions to the Plenary, where legislative proposals are being discussed.¹⁹⁰ At the *ad hoc* Tribunals, only a Judge, the Prosecutor or the Registrar can propose amendments to the Rules of Procedure and Evidence.¹⁹¹ Defence counsel are dependent on random contributions. As mentioned, the SCSL Principal Defender does have the power to propose amendments to the RPE.¹⁹² The ICTR Code of Conduct can only be amended by the Registrar, in consultation with the judges.¹⁹³ To amend the ICTY Code of Conduct, the Registrar must consult the Association of Counsel and Advisory Panel.¹⁹⁴ Lawyers' associations and individual counsel may propose amendments to the ICC Code of Conduct.¹⁹⁵ The ICC Advisory Committee on Legal Texts (ACLT), reporting on proposals for amendments to the

¹⁸⁶ Cf. *supra*, paragraph 3.2.2.

¹⁸⁷ It would 'prevent undue interference with the independence of counsel'. In addition, it 'would be necessary to facilitate the performance of the duties of counsel, and to instill self-discipline among individual counsel through the principle of self-regulation.' Ogetto (2006), *supra* note 121, p. 526.

¹⁸⁸ See Council of Europe, Recommendation No. R(2000)21, Principle V, par. 4(d).

¹⁸⁹ See *Keller*, *supra* note 185, at 15. For a state Bar association to 'advance a gun control or nuclear weapons freeze initiative' would be outside its scope of legitimate activities. It would be fine to engage in 'activities connected with disciplining members of the Bar or proposing ethical codes for the profession'. *Keller*, at 16. Ultimately, the (in this case California) State Supreme Court establishes ethical codes of conduct, not the State Bar. Bar associations merely advise in matters concerning the regulation of lawyers. See *Keller*, at 11 and 12.

¹⁹⁰ For instance, in 2006 ADAD had the opportunity to attend the Plenary. See '16th Plenary Session of the Tribunal Meets in Arusha', ICTR/INFO-9-2-485.EN, 10 July 2006, ICTR Press Release, available from the ICTR website.

¹⁹¹ See Rule 6 ICTY RPE; Rule 6 ICTR RPE.

¹⁹² Cf. Rule 6 SCSL RPE.

¹⁹³ See Article 23 ICTR Code of Conduct.

¹⁹⁴ See Article 6 ICTY Code of Conduct.

¹⁹⁵ See Article 3(1) ICC Code of Conduct.

Rules, Elements of crimes and Regulations of the Court for the Plenary, has one counsel member.¹⁹⁶ Bar associations should be involved in the drafting and amending of the legal instruments that particularly apply to them.

It is vital that international courts are able to consult independent bodies of counsel on defence issues. Several Bar associations are now being allowed to advise, and advising, the courts on defence issues. The ICC, by requiring the Registrar to cooperate with Bar associations, and the ICTY, by recognizing the ADC-ICTY, have made more obvious efforts to institutionalize and recognize the voice of Bar associations than the ICTR.

3.4 CONCLUSION

To an increasing extent, defence counsel are becoming influential at international criminal courts. Bar associations have been set up, Defence Offices have been created, counsel are being admitted to commissions, such as the Rules Committees at the ICTY and the Legal Aid Commission at the ICC. Thus, much has improved in this respect since the *ad hoc* Tribunals were established.

No matter what approach is taken regarding the organization of the defence at international criminal courts, the fundamental right of the accused to adequate and effective legal assistance as discussed in the previous chapter, the independence of the defence, the integrity of proceedings and the principle of equality of arms should be safeguarded. As courts are under the obligation to guarantee a fair trial to the accused, to protect the integrity of their proceedings and to administer justice in an efficient manner, the following suggestions could help to accomplish this.

Providing the Registry, the court's administrative organ, with important responsibilities over the defence, and substantive discretionary power, in particular regarding the assignment and withdrawal of legal assistance and the monitoring of defence counsel's behaviour, is neither particularly efficient, nor satisfactory in some respects. This organ has been criticized not only by counsel but also by judges for its handling of defence rights. Its staff members have not necessarily been legally trained. They could lack knowledge and insight in what is minimally required to safeguard an effective defence. In addition, because the Registry is servicing the whole court, it may not pay sufficient attention to the position of the defence. At occasions, it has prioritized its bureaucratic purposes to the detriment of defence rights. That is highly undesirable. For these same reasons its serving as the defence's communication channel to the court is inappropriate. Particularly at the *ad hoc* Tribunals, the President's and the Chambers' powers to review the Registrar's decisions are limited. A more elaborate review mechanism would provide for a better control over his decision-making process and may enhance transparency for the defence, but preference may be given to a system whereby he was obliged to consult a defence body prior to determining an issue affecting defence interests. The ICC's Legal Aid Commission in which defence counsel may advise on the allocation of funds to the defence is a positive example in this respect.

¹⁹⁶ This member must be included in the list. See Regulation 4(1)(d) and 4(4) ICC Regulations of the Court.

Having a separate, independent defence office discharge the most vital tasks concerning the defence is more appropriate. A separate defence body could spend more time in providing support to the defence, than the Registry that should also service the entire court or a Bar association that primarily consists of lawyers appearing before the court. Its incorporation in the Statute as a separate organ will provide it with a firm foundation. This will underline its independence from existing court organs, particularly the Registry. A defence office will not only safeguard the independence of the defence, but will also enhance the equality of arms between the prosecution and the defence. With its own budget, the defence will also be on a more equal footing with the prosecution. If its staff members will be experienced lawyers, resources and facilities can be more efficiently divided over different defence teams. The refusal from an independent defence organ to provide resources and facilities will be easier to digest for counsel than this refusal emanating from the Registrar. Courts should however be careful in allowing these offices to perform representational duties, as this could lead to conflicts of interest. This has thus far come up several times before international criminal courts and could harm the integrity of proceedings.

For a “healthy” balance of powers, some tasks should be shared with specialized Bar associations. Courts should recognize these associations and involve them in their decision-making as far as defence-related issues are concerned at least on an advisory level. Membership to these associations should be mandatory, even though this may not be without problems. Their advice should be admitted on a more regular and formal basis. In addition to fulfilling an advisory function, these associations are an effective communication channel, as long as they prioritize their goals. Power over admission, the assignment and withdrawal of legal assistance, should better be vested in an independent defence office than in a Bar association. If a separate defence office is responsible for these issues, Bar associations’ advice regarding the review of such decisions could be desirable to ensure the integrity of the proceedings and to help judges guarantee an effective defence. It will equally be a safeguard against arbitrary use of powers by a defence office. Additionally, these associations’ participation in disciplinary proceedings is vital to enhance the integrity of the profession. For this same purpose, Bar associations should organize training sessions for counsel, possibly in cooperation with a defence office. Both could be made responsible for an entrance Bar exam, the implementation of which was suggested in the previous Chapter.

From a practical point of view, a proper execution of the above duties requires that the budget reserved for the defence is fairly distributed among the appropriate organs.

It is apparent that participation by defence counsel in the regulation of defence issues increased over the years at international criminal courts. Courts should involve defence counsel in the decision-making regarding defence issues and in resolving defence-related problems. Their specific expertise is needed in order to find the most appropriate solutions to those problems. This may benefit the whole trial process and the public perception of the fairness and integrity of the court.