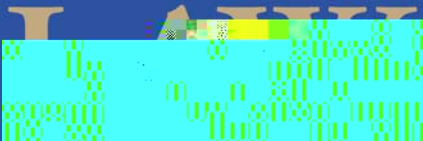


PROTECTING THE RIGHTS OF FUTURE ACCUSED DURING THE INVESTIGATION STAGE OF INTERNATIONAL CRIMINAL COURT OPERATIONS



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



ACKNOWLEDGMENTS

**PROTECTING THE RIGHTS OF
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INTERNATIONAL CRIMINAL
COURT OPERATIONS**

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EXECUTIVE SUMMARY

The Rome Statute of the International Criminal Court (ICC), together with the Rules of Procedure and Evidence (ICC Rules) and the Regulations of the Court, contain a variety of provisions aimed at securing a fair trial for the accused and achieving an “equality of arms” between the Prosecution and the defense. Among these are provisions that protect the rights of accused during the investigative stage of the Court’s operations by allowing the appointment of counsel to represent the interests of the defense even where no suspect has been identified or charged by the Court. Such provisions are necessary because of the unique manner in which the ICC simultaneously possesses jurisdiction over a “situation,”

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

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

Textual Analysis and *Travaux Préparatoires*

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

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

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

ad hoc

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

In the DRC and the Darfur situations, OPCD has filed numerous submissions requesting access to various files which it believes are necessary to adequately respond on behalf of future accused to the victims' participation applications. It has been unsuccessful with respect to virtually all of these requests. Among the most recent decisions by Pre-Trial Chamber I in the DRC situation was its refusal of a request by OPCD to contact the outside attorney who had served as _____ defense counsel for purposes of responding to victims' applications in the same situation for well over one year before OPCD was assigned to the task.

In the context of the Darfur situation, OPCD made yet another attempt to challenge the jurisdiction of the Court at the situation stage of proceedings. However, the request was denied on the same grounds that PTC I had denied previous requests to challenge jurisdiction, namely, that the _____ counsel – whether that was an individual not otherwise affiliated with Court or OPCD – had no standing under Article 19 to lodge such a challenge at the situation stage.

Finally, although OPCD has not been appointed as _____ defense counsel in the Uganda situation, the Office has filed observations in the context of the situation in Uganda on behalf of the general interests of future accused.

Analysis and Recommendations

While it is clear that the Pre-Trial Chambers of the ICC – and indeed

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

Second, even if no conflicts of interest were to arise from the appointment of OPCD as ad hoc defense counsel during the situation phase of proceedings, the limited resources of the Office – which is staffed with a total of just six individuals and operates on a tight budget – suggest that its members should focus on supporting independent defense counsel and serving as a voice for the general interests of defense at the ICC, rather than engaging in the representation of potential or kn

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

Assuming that _____ defense counsel is appointed from the Registrar's list of independent attorneys not otherwise affiliated with the Court, it would be ideal if the same attorney could serve as

ad hoc

Regardless of whether ad hoc counsel is appointed from within OPCD or from a list of independent counsel unaffiliated with the ICC, it is

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

I. INTRODUCTION

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

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

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

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

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

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

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

constitutive documents of the ICC⁶ recognize that, under certain circumstances, special measures are required to protect the rights of accused during the investigative stage of the Court's operations.⁷ Thus, the Pre-Trial Chambers of the ICC may appoint counsel to represent the interests of the defense in proceedings even before any suspect is identified or individual is charged. Such provisions are necessary because of the unique manner in which the ICC simultaneously possesses jurisdiction over a "situation," an entire country or region of a country in which a vast array of atrocities may have occurred, and individual "cases," a particular accused charged with a particular crime or set of crimes.⁸ For example, the ICC is currently operating in the Democratic Republic of Congo (DRC), which is one of the four "situations" before the Court at this time. Within that situation, three cases

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

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

⁹ This model is "heavily influenced by the civil law tradition of judicial supervision of criminal investigations," in which an investigating judge "supervises the prosecutor closely in determining when counsel should be appointed to protect the interests of the defense or other measures should be taken." Kenneth S. Gallant,

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

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

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or

¹³ Guariglia,

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

B. ICC RULES OF PROCEDURE AND EVIDENCE

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

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

¹⁷ (emphasis added).

¹⁸ Guariglia, n. 10, at 737.

¹⁹ ICC Rules, n. 6, R. 47(2).

²⁰ Rome Statute, n. 4, Art. 56(2)(d).

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

, 25-OCT Champion 20, 24 (September/October 2001) (noting that France, Germany, Canada and the Netherlands supported the creation of an office for defence under the ICC Rules).

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

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

²⁴ Gerard Dive, , THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 262, 278 (Roy S. Lee ed., 2001).

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

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

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

²⁶ Dive, n. 24, at 278.

²⁷

²⁸ ICC Rules, n. 6, R. 20(1).

²⁹ R. 20(2).

³⁰ Dive, n. 24, at 278-279.

C. REGULATIONS OF THE COURT

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

Ad hoc

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

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

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

³³ Section III. Interestingly, at least one judge who participated in drafting the Regulations of the Court – ICC Judge Hans-Peter Kaul – has written that the purpose of Regulation 76 is “to prevent, where possible, trials from being hijacked by the defendant” by allowing for the “judicial appointment of defense counsel” where necessary. Hans-Peter Kaul,

, 99 Am. J.

of Int’l Law 370, 377 (April 2005) Judge Kaul explains:

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

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

of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.”). As of October 2007, 351 persons had expressed an interest in being included in the Registrar’s list, 221 of which have been admitted and are eligible to act as counsel before the ICC. Int’l Criminal Court,

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

⁴⁰

n. 34

and accompanying text.

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

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

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

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

⁴¹ , Decision on the Prosecutor's Request for Measures under Article 56, ICC-01/04-21 (Pre-Trial Chamber I, 26 April 2005).

⁴² at 2.

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

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

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

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

⁴⁹ Rome Statute, n. 4, Art. 19(2).

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

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

⁵² ICC Rules, n. 6, R. 89(1).

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

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

⁵³ _____, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, _____ n. 51, at 4.

⁵⁴ _____.

⁵⁵ _____.

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

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

⁵⁸ ICC Rules, _____ n. 6, R. 103(1).

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

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

⁵⁹ R. 103(2) (emphasis added).

⁶⁰ [redacted], Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, [redacted] n. 57, at 6.

⁶¹ [redacted], Decision of the Registrar Appointing Mr. Hadi Shalluf as [redacted] Counsel for the Defence, ICC-02-05-12 (Registry, 25 August 2006).

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

⁶³ [redacted] n. 47 and accompanying text.

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

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A few weeks later, on 18 December 2006, Mr. Shalluf filed another request with Pre-Trial Chamber I.⁶⁸ Noting a recent announcement by

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

Mr. Shalluf again sought the leave of PTC I to obtain interlocutory appeal of the decision denying his request.⁷³ In his application, Mr. Shalluf argued that “any restriction or limitation of the role of counsel is inconsistent with the [Rome] Statute and with the principle of the independence of counsel.”

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

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

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

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

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

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

⁸⁴ at 8.

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

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

⁸⁷ ¶ 14.

⁸⁸ ¶ 15.

⁸⁹

⁹⁰ , Solemn Undertaking of Ms. Michelyne C. St-

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

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

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

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

⁹² [Redacted], Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to

B. APPOINTMENT OF OPCD AS DEFENSE COUNSEL

As explained above, on two separate occasions between July 2005 and

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

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

représentant légal des victimes (expurgé), ICC-01/04-361 (Victims’ Representative, 20 July 2007);

, Public Redacted Version of Response to ‘Demande du représentant légal des victimes (expurgé),’ ICC-01/04-364 (Office of Public Counsel for the Defence, 26 July 2007);

, Request for Single Judge to order the Prosecutor to disclose exculpatory materials, ICC-01/04-378 (Office of Public Counsel for the Defence, 28 August 2007);

, Request for access to previous filings, and an extension of the page limit and time limit, ICC-01/04-379, ¶¶ 14-15 (Office of Public Counsel for the Defence, 29 August 2007);

, Prosecution’s observations on the request by the OPCD for access to previous filings and for extension of page and time limits, ICC-01/04-387 (Office of the Prosecutor, 5 September 2007).

⁹⁹ , Request for access to previous filings, and an extension of the page limit and time limit, n. 98, ¶¶ 14-15.

¹⁰⁰

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

The PTC also stated that “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses,” and that therefore OPCD should not contact the former counsel for the defense directly.¹⁰² In response, OPCD filed a “Request for Clarification” in which it asked the PTC to clarify,

, “the scope and correlation between the respective mandates of the counsel for the Defence and the OPCD.”¹⁰³ Pre-Trial Chamber I declined the request, however, claiming that its 11 September 2007 decision was clear.¹⁰⁴ Finally, OPCD requested “leave to communicate with Counsel for the Defence in relation to the public legal and procedural aspects” of the Chamber’s 11 September 2007 decision.¹⁰⁵ The Chamber again rejected OPCD’s request, although it held that the former counsel could contact OPCD if he voluntarily chose to do so.¹⁰⁶

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, Decision on the request

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

¹⁰⁷

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

¹⁰⁸ ¶ 3.

¹⁰⁹ ¶ 43.

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

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

¹¹⁰ ¶ 41.

¹¹¹ . ¶ 4.

¹¹² . ¶ 6.

¹¹³ . ¶¶ 8-9.

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

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

On 23 May 2007, the same day that Pre-Trial Chamber I authorized OPCD to respond to victims' applications to participate in proceedings arising out of the DRC situation, the Chamber took a similar decision regarding victims' applications to participate in the Darfur situation.¹¹⁷ As with its decision in the DRC situation, PTC I gave no explanation as to why it was choosing to designate OPCD for the purposes of responding to the applications rather than appointing

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

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

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

¹²¹ [redacted] n. 46 [redacted] and accompanying text; n. 62 [redacted] and accompanying text.

¹²² [redacted], Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, [redacted] n. 120, ¶ 25.

¹²³ [redacted], [redacted], [redacted], Public Redacted Version of Request for the Single Judge to order thşuPlic RedCou(e)2sel the Sin.4(RarfefencOPC21

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

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

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

¹²⁶ _____ n. 90 _____ and accompanying text.

¹²⁷ The Trust Fund for Victims is an i

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

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

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

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

¹³² ¶ 5.

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

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

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

IV. ANALYSIS AND RECOMMENDATIONS

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

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

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

ad hoc

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

¹³⁶ n. 34 and accompanying text.

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

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

As this hypothetical suggests, a lawyer who represents the interests of

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

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

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

¹⁴⁰ Xavier-Jean Keïta, Principal Counsel of the OPCD, a C75.2(t)h taeas duty

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

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

¹⁴⁵ . Reg. 80(4).

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

¹⁴⁷ ¶ 1.

¹⁴⁸ ¶¶ 2-3.

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

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

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

may emerge between victims represented by the Office, on the one hand, and those to whom the Office should be providing support and

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

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

¹⁵⁷ ¶ 12.

¹⁵⁸ Remarks of Melinda Taylor, Associate Counsel, Office of Public Counsel for Defence at the International Criminal Court,

, at 3, 13 June 2006.

¹⁵⁹ .

¹⁶⁰ at 4.

¹⁶¹

¹⁶² Keita, n. 140, at 7.

¹⁶³ at n. 174, and accompanying text.

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

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

2.

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

¹⁶⁴ John R.W.D. Jones, , The Special Court for Sierra Leone: A Defence

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

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

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

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

Notably, the notion that accused and their counsel should receive institutionalized support in the context of international criminal bodies is a relatively new concept. Wh

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

albeit on a much smaller scale, the support

As mentioned above, the creation of a permanent defense office in the context of the ICC was supported

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

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

access, and library cards.”

¹⁸² Keïta, n. 140, at 7.

¹⁸³ .

¹⁸⁴ n. 15 and accompanying text.

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

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

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

¹⁸⁶ *Id.* n. 97 and accompanying text.

¹⁸⁷ *Id.* n. 98 and accompanying text.

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

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

¹⁸⁹ n. 128, and accompanying text.

¹⁹⁰ Thompson & Staggs, n. 168, at 9.

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

confidential information must remain protected, there may be compelling reasons to permit some level of communication between and among attorneys appointed as counsel in the situation

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

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