

Bringing fairness to international justice

A handbook on the
International Criminal Court
for defence lawyers in Africa

Jolyon Ford



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Acronyms

AU	African Union
ANU	Australian National University
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of the Congo
ECHR	European Court of Human Rights
HRW	Human Rights Watch
IBA	International Bar Association
ICAP	International Crime in Africa Programme
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ISS	Institute for Security Studies
LRA	Lords Resistance Army
OPCD	Office of the Public Counsel for the Defence
OPCV	Office of the Public Counsel for the Victims
OTP	Office of the Prosecutor
OSISA	Open Society Initiative for Southern Africa
SCSL	Special Court for Sierra Leone

Foreword

XAVIER-JEAN KEÏTA, PRINCIPAL COUNSEL,
OFFICE OF PUBLIC COUNSEL FOR THE DEFENCE (OPCD)
OF THE INTERNATIONAL CRIMINAL COURT¹

This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.

Judge David Hunt, the Milosevic case, 21 October 2003

This initiative of the International Crime in Africa Programme (ICAP) at the Institute for Security Studies (ISS) is an excellent and timely publication that will serve as a practical guide for African lawyers on the role of defence counsel in the International Criminal Court (ICC).

'Bringing fairness to international justice' is a theme that is central to the role of defence counsel participating in international criminal proceedings. This handbook fills a gap and will, without doubt, be a useful and necessary tool, similar to the regular reports of the International Bar Association and Human Rights Watch, which critically and constructively monitor the ICC proceedings. I am therefore honoured to provide the foreword, particularly because this handbook is destined for African legal practitioners who are invited to contribute their skills to help construct a fair and independent justice system.

The handbook interrogates the popular myths and prejudices that are often levelled against the ICC with regard to its work in Africa, especially following the issuance of an arrest warrant against a serving head of state.

Far from being an exclusive creation of western countries, the ICC is a truly international court, desired by African states: 30 of the 110 States Parties that are signatories to the Rome Statute are from the African continent. Furthermore, five of the 18 elected judges are African nationals (from Botswana, Ghana, Kenya, Uganda and Mali), while of the 288 counsel appearing on the list held by the Registry, 78 are African. In addition, the Court boasts at least six Africans among its higher levels of staff.

Although the four situations currently before the ICC are all African (DRC, Uganda, Central African Republic and Darfur-Sudan), as are all the accused persons and suspects, it is important to remember that – except for Darfur-Sudan which was referred by the UN Security Council – all these cases were referred to the Court by the concerned African states themselves. The Prosecutor of the ICC has never initiated investigations *proprio motu*. Also it should not be forgotten that the victims seeking justice in all four situations are Africans!

It is therefore fitting that the International Crime in Africa Programme at the ISS has identified the defence, equality of arms, and fair trial, as being fundamental to international criminal justice.

Some of the challenges that African defence lawyers, in particular those seeking to practice at the ICC may face include:

- The need to gain knowledge of a *sui generis* and emerging law – as long as their continent is involved, African lawyers have a duty to play a key role.
- The challenge of engaging states to sign and ratify the Rome Statute and to implement the fair trial principles in their national law.
- The challenge of complementarity, which imposes a primary obligation on states with territorial jurisdiction to investigate, instruct, prosecute and try the most serious international crimes. African lawyers must therefore be ready to assist, defend and advise at a national level. This would harmonise the interests of society, including victims, with those of their leaders, who are supposed to guarantee their security, their development and their peace.

Far from being perfect, we must acknowledge that the drafters of the Rome Statute paid attention to past errors and through the Statute and the Rules of Procedure and Evidence, produced a strong legal framework in which the presumption of innocence, equality of arms, the rights of the defence, and the right to a fair trial, are central. The participation of victims is conditioned by the respect for these principles.

While it is true that the defence has not been established as an organ of the ICC in contrast to the Office of the Prosecutor, Chambers and the Registry, (and unlike the statute establishing the Special Tribunal for Lebanon), it nonetheless operates independently. In fact, two independent offices have been established by the ICC Registrar:

- The Office of the Public Counsel for the Victims (OPCV) responsible for the assistance and representation of victims, and
- The Office of the Public Counsel for the Defence (OPCD) responsible for assisting counsel, suspects and accused persons.

The latter also represents and protects the rights of the defence during the initial stages of the investigation. These two offices are wholly independent, but fall within the remit of the Registry solely for administrative purposes.

The OPCD acts as the 'institutional memory' of the defence, and enables counsel and defence teams appearing before the Court to face, with almost equal arms, the powerful Office of the Prosecutor (OTP). The OTP will always have the advantage of an early start, knowledge of the files and of the field. The OTP also acts as a single unified organ, and enjoys the almost unlimited resources of the international community.

Being placed on the list of counsel is not an end in itself, even if the requisite competencies and experience are met. It is the professional and ethical duty of counsel to continuously train and be versed in the laws and jurisprudence of the Court, as well as international criminal law. The African lawyer therefore has a great opportunity to explore new fields of knowledge and expertise, by practicing not only at the ICC but also at the national level when their governments exercise their primary obligation to investigate and prosecute international crimes through the principle of complementarity.

In the recent past, the ICC has issued several landmark decisions demonstrating the Court's commitment to guaranteeing the rights of accused persons. In its first case, that of *Lubanga*, the ICC demonstrated that the concept of a fair trial was not an empty vessel when the Trial Chamber ordered a stay of the proceedings and decided to release the accused because the prosecution had failed to disclose exculpatory materials to the defence. The Trial Chamber reckoned that without that disclosure it could not guarantee a fair trial to the accused.

In a March 2009 decision, the Presidency held that a positive obligation existed to ensure and fund family visits to indigent detainees. More recently in the *Bemba* case, the Pre-Trial Chamber, issuing its decision to confirm the charges in English, held that the deadline to appeal would only start running as of the date of notification of the French translation of the decision to the defence. The right of the accused to be informed of the charges against him in French, the language of his choice, was considered crucial to a fair trial.

Currently, States Parties are extremely reluctant to accept or host suspects released on bail pending trial. The ICC and the States Parties must take up the challenge of provisional release of suspects by determining in advance a shortlist of States Parties ready to host accused who have been granted provisional release by the Court, thereby respecting the presumption of innocence.

It is proper that victims have the right to participate in trials before the ICC. However, the participation of victims should not infringe upon the fair trial rights of accused persons, especially the right to a transparent and public trial. Justice must not just be done, but must also be seen to be done. The Court needs to ensure that victims remain participants and do not attain rights equal to those of the parties – the defence and Office of the Prosecutor. To do otherwise could jeopardise the coherence of the ICC system.

With a review of the Rome Statute due to take place in Kampala, Uganda, in May 2010, it may well be time to consider renaming the 'confirmation of charges' to the 'examination of charges' in accordance with the presumption of innocence.

Through translation into the two other languages of the ICC – French and Arabic – I trust that this very useful handbook will reach African lawyers across the continent, and thereby fully attain its noble objectives. I have no doubt that it will inspire many African lawyers to engage constructively with the ICC.

... In the determination of any charge, the accused shall be entitled to ... a fair hearing conducted impartially, and to ... minimum guarantees, in full equality [including] ... 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...

Article 67, Rome Statute of the International Criminal Court, 1998

... the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial ... [and] necessary for the efficient and effective conduct of the defence... [and] shall carry out [these] functions in such a manner as to ensure the professional independence of defence counsel.

Rule 20(1) and (2), ICC Rules of Procedure and Evidence, 2002

... I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously...

Article 5 ICC, Code of Professional Conduct for Counsel, 2005

Trials before the ICC must be fair to be credible.

Human Rights Watch, *The Landmark ICC's First Years*, 2008

There is little doubt that the issue of equality of arms for defence counsel ... will continue to be a contentious issue in future international criminal trials.

Wilson, Emaciated Defence?, *Human Rights Brief*, 2008

CHAPTER ONE

Introduction

Consider the following six brief and related statements:

- Impunity and inaction in response to the most serious crimes of concern to the international community represent a failure to meet human rights principles, to respect victims, and to deal with issues affecting future peace.
- A global consensus exists on the need to provide an acceptable, principled international criminal justice system as a means to deal with perpetrators of international crimes: that consensus is reflected in the Rome Statute of the ICC.
- The ICC is only likely to be perceived as just, effective, legitimate and sustainable to the extent that it is fair in its treatment of those brought before it.
- Representation by a competent independent legal defence counsel is, in turn, considered indispensable to fair investigations and trials in the ICC and other international criminal tribunals.
- The role of the defence lawyer in ensuring systematic fairness in international justice deserves more attention generally.
- There is, in particular, an ongoing need for more awareness raising and capacity building in order to enable African lawyers to engage in the work of the ICC in general and in Africa, including by acting as defence counsel or assistants.

This handbook explores some of the issues raised in these statements with a view to increasing African lawyers' understanding of, and engagement, with the ICC

and its processes and in particular the role of defence counsel, in order to help bring fairness to international justice.

As an introduction to the issues covered in this handbook, the statements below require further discussion.

The impunity problem

Impunity for the most serious crimes against humankind is a human rights failure and an affront to victims of mass crimes. Inaction by the international community can seriously undermine the legitimacy of an international order founded upon laws of universal application. It is unsurprising that an explicit concern of international organisations – including the African Union – is to combat impunity for international criminal acts.

Bringing perpetrators to justice is not, however, just about 'looking backwards'. Although the link between international prosecutions and conflict resolution is complex and much debated, patterns of impunity and inaction against particular perpetrators of mass crimes can also represent a source of ongoing grievance and a threat to future peace and security.

Thus for many potential participants in peacebuilding, there may be a perception that there can be 'no peace without justice'. The ICC is primarily an institution for dispensing justice impartially according to laws of equal application. The Court is not a blunt instrument and has been carefully designed by states so that, while giving effect to international law, it also represents one possible tool in resolving conflict and bringing about acceptable and sustainable peace.

A global consensus creates legitimacy

The quest by victims – and the international community – for an end to impunity for the worst crimes requires a system that is beyond politics, and represents a legitimate community wide response to a common problem. There exists a substantial global consensus on the need to provide acceptable and principled means to deal with perpetrators of international crimes.

A core concern of all responsible members of the international community is to ensure that a credible, capable institution exists for administering and affording justice by law and within the rule of law, to those suspected and accused of the

most serious crimes. That institution is the ICC and the Rome Statute that founded and guides it.

Legitimacy also requires fairness

Those who come before the ICC are suspected or accused of the most serious crimes. However, it makes no sense to deal with such persons without due process of law. Those accused of breaking international law must be adjudged by international law's own standards. Such persons are entitled to a fair trial by an independent tribunal. The very grave nature of the allegations requires effective representation to prevent a perception of unfair targeting of individuals, influenced by political concerns.

Both principle (fundamental human rights protections) and political practice require fairness in administering justice in forums like the ICC. In many conflicts, all parties might maintain that their cause or actions were beyond question or were justified. Experience shows that one-sided attempts to prosecute war criminals and others can undermine efforts to satisfactorily resolve conflicts.

Often, bringing the rule of law to post-conflict areas requires a public example of rule by laws, rather than emotions, vengeance and settling of scores. International criminal justice is only likely to be just, effective, legitimate and sustainable to the extent that it is fair. Amongst other things, this means that core human rights, such as the right to a fair trial, must demonstrably and publicly be respected and fulfilled in international criminal forums such as the ICC.

What is the utility to the international community in reaching a guilty verdict for an accused person, if in the process the system is made to look, in some respects, no fairer than the alleged conduct of the persons on trial? At the Nuremberg trials of Nazi Party members after World War II, there was an opinion that the accused who were alleged to have sent millions to their deaths with no regard for 'fairness' and 'due process', were not entitled to receive fairness in relation to their own fates. However, it was recognised then – as it is now – that the interests of justice, peace, the rule of law and respect for human rights required that the rule of law applied to all uniformly, and that formal law was adequate to the task of satisfying demands for tangible justice. This means that despite the political universe they inhabit, international courts should ensure that they are held accountable to the highest standard of morality.

There is a pressing and profound need to ensure fairness in the administration of international criminal justice. Moreover, equal to the need for justice to be done is the need for justice to be seen to be done. That is, however technically fair the structure and process, there is a need to ensure that international justice operates systematically in a way that gives priority to issues of fairness, alongside legitimate concerns about efficiency, time and cost. Creating this legitimacy of operation is not a matter of public relations by a court in its own interests: it is a matter of ensuring that all elements of international justice operate on principles of equality as well as effectiveness and efficiency.

Fairness requires effective defence counsel

A competent and capacitated defence team is indispensable to fair, proper and efficient investigations and trials. This is true both in terms of the perceptions of fairness discussed above, and in terms of attaining individualised justice that is fair in substance (not just in form).

Competent, independent, professional and committed defence counsel assist any criminal court or tribunal in ensuring that the accused's rights are respected, that the evidence against the accused is fully tested and that the legal principles are appropriate to cover the alleged conduct. While contributing to fairness and accuracy of proceedings, defence counsel can also contribute to more efficient proceedings and thereby help the ICC to achieve verdicts without undue delay – something that is in the interests of all, including the accused and the victims.

Defence counsel in the ICC require more attention

The role of the defence lawyer, being vital to fairness in international justice, has traditionally been relatively neglected in international trials. Although there is now a greater understanding of the importance of good defence counsel to the ICC's objectives, the issue deserves more attention in the ICC.

In particular, attention should be given to procedural and other mechanisms, attitudes and practices, to ensure a greater measure of 'equality of arms' between the prosecution and the defence. Greater substantive equality among legal practitioners in international criminal tribunals is vital to achieving the goal of efficient, fair and legitimate justice.

To date in its decisions, the ICC has revealed conscious efforts by judges to ensure and preserve equality of arms for the defence. The best example is the decision to delay the first major proceedings (the Lubanga case) to allow the defence adequate time to prepare properly, and where there was concern about non-disclosure by the prosecution of certain evidence, which might have impacted on fair trial rights. In addition to Registry support, the ICC has created a separate ICC office for substantively assisting defence counsel. There has been deliberate policy development on defence counsel through a recent comprehensive five year strategy and vision document, along with annual training seminars for counsel, and other efforts.

African lawyers should engage on defence counsel issues – and the ICC in general

There is an ongoing need for African lawyers to engage constructively in public, political and professional debates about the ICC and its role in Africa, and to engage in the actual processes of the ICC at international and national levels, including by acting as defence counsel or assistants.

Developing a higher level of literacy among African law students, practitioners and judges in the procedures, principles, practices and purposes of the ICC is vital to building an African consensus and body of expertise on criminal justice issues relevant to the continent and its people. It is also crucial to sustain momentum within and outside of governments in Africa to ensure domestic implementation of the Rome Statute. Defence lawyers in Africa who understand the ICC's record of safeguarding defence rights are able to knowledgeably defend the Court when it is unfairly criticised in Africa. Because the ICC system is premised upon giving preference to national measures to investigate and try international crimes, any increased capacity on ICC related issues in Africa is likely to benefit national criminal justice systems generally.

In this regard, there is a need for greater awareness, understanding, capacity building and networking among African lawyers and their professional associations. This point is developed below, in considering the objectives of this handbook.

Finally, it is significant that the foreword to this handbook has been written by Xavier-Jean Keïta, an accomplished African lawyer and Principal Counsel in the Office of Public Counsel for the Defence of the ICC. Although the ICC utilises

primarily an 'adversarial' system in its quest for evidence based justice under international law, what has become clearer is that it is not only prosecutors who are working to make international justice a reality. Indeed, those who act as defence counsel are party to the same enterprise – serving the interests of international justice more generally.

An important message in this handbook is that by contributing to shorter, more transparent and more rigorous trial procedures, defence lawyers are helping to administer justice in a way that is no less important than that performed by prosecutors and judges. That is, in arguing the case of those accused of violating human rights on a massive scale, defence lawyers are 'human rights lawyers' who are as important as the prosecutors who seek to bring perpetrators to justice.

A strong and early defence counsel involvement not only improves the image of a tribunal, but can help in the efficient and expeditious conduct of the proceedings. A professional and competent defence lawyer, whose first duty is always to the court, can assist the court in its functions without compromising the counsel's duty to present as robust a defence as is reasonably possible on the evidence and law available.

PURPOSE OF THE HANDBOOK

- What does it mean to be an international criminal defence lawyer in Africa? Is there any source where one can obtain a practical, easy to read overview of this issue?
- What has been the level of engagement by African legal professionals in the ICC, including in the capacity of defence counsel or assistants? What are the obstacles to greater engagement of this kind?
- What level of understanding is there among the legal profession in Africa (including students, academia and judiciaries) about the role of defence counsel in the ICC, the procedures and measures in place in the ICC to protect and ensure fair trial rights, and how to bring more fairness to international justice?
- How can the composition of defence counsel teams (and other participants) on Africa related ICC cases become more reflective of Africa geographically?
- What are the barriers to education, training and access for African lawyers interested in working as defence counsel in the ICC?

- How does misunderstanding or ignorance of the accommodation of defence interests in the ICC contribute to perceptions that the ICC is not impartial or objective in its prosecution of international crimes? Can greater participation by African professionals in debates about the ICC – or in its proceedings, including its defence capacity – help to counteract myths and misconceptions about the Court?
- How can African legal professionals (and their representative associations) contribute nationally, regionally and internationally to ensuring universal African domestic implementation of the Rome Statute, respect for fair trial rights in ICC and ordinary proceedings, and greater attention to fairness in criminal justice systems in Africa as a whole?

This handbook attempts to respond to some of these questions. There is a clear need to increase awareness and understanding of the ICC among members of the legal profession on our continent, not least on the role of the defence lawyer in ICC proceedings. The struggle against impunity in Africa faces several challenges, including the recent political scepticism and negative sentiment about the ICC as a whole, lack of understanding in the political, media and NGO fields about the ICC, the lack of action to implement ICC measures nationally, and general capacity problems in the criminal justice sector. Allied to these problems (which are not the focus of this publication) is a need to improve understanding of, and engagement in, the Court, including at the national level, by legal professionals, bar associations and others.

The role of the defence – and the fact that the Court is making *bona fide* efforts to afford fairness in international justice – is one issue around which misconceptions exist. For example, the greater the understanding of concepts such as the 'equality of arms', the more likely it will be that this principle is realised; the greater the understanding of the ICC prosecutions, the easier it would be to render political attacks on the ICC's 'motives' in Africa as baseless.

Both these issues are discussed in the handbook. It is hoped that enhanced understanding will not only lead to greater engagement with the ICC itself, but also to advocacy to improve the levels of implementation and capacity building in the national criminal justice system.

In 2009, in the context of heated debates about the ICC in Africa, Mabvuto Hara, president of the SADC Lawyers' Association, said the following in an interview with the IBA:

... It may be safe to say that the majority of lawyers in Southern Africa are not aware of the Rome Statute and how the ICC works. This is [firstly] because the majority are not criminal lawyers or international lawyers, which is to say that in their daily practices they are not engaged in matters related to international criminal justice. Secondly, in most law societies ... the provision of continuing legal education is very limited, with the result that very few practitioners are able to keep abreast of the rapidly developing field of international criminal law. Because there is little awareness of the Statute and the cases before the ICC, the majority of lawyers are not in a position to exercise informed judgement on the matters. Most misperceptions and myths about the ICC are based on misinformation or a lack of information.²

The handbook is neither a 'how to' manual nor an academic text. It is not a procedural guide to appearing before the ICC and does not represent a technical document setting out rules or tactics or lessons on evidence and procedure relevant to defence counsel. The handbook aims to be an accessible, widely distributed guide that might assist in increasing the interest and capacity of African lawyers to engage with the ICC, including in the role of defence counsel. The handbook serves as an introductory primer to the Court, and to issues concerning defence lawyers and their vital role in the system of international justice. It will also be useful to the media and other commentators. A number of links and references to further resources – for example, the ICC website itself, which contains links to the various Codes and Rules referred to below – are included at the end of this handbook.

OUTLINE OF THE HANDBOOK

Chapter 2 provides an overview of the ICC and the Rome Statute that established it. The history of the Court and its structure are briefly covered in order to contextualise the discussion that follows on the various 'myths' that have arisen about the role of the ICC in Africa.

The particular role of defence counsel is covered in chapter 3, first by outlining the framework in international human rights law, and in the Rome Statute, that informs the vital role of defence counsel in ensuring fair, accurate and efficient administration of justice. After that, the chapter looks more closely at the notion of 'equality of arms' and its meaning in international tribunals. The present

procedural mechanisms by which the interests of defence counsel are protected or enabled in the ICC are then covered. Finally, some topical present and future issues around the role of defence counsel are considered.

In chapter 4, the discussion returns to the problems and possibilities for African legal practitioners and professional associations in engaging in the ICC or developing better professional understanding of its processes. A number of recommendations are provided and lawyers in Africa are encouraged to consider these and the ways in which they might be actioned through their respective national, regional and transnational networks and associations. The handbook ends off with further resources for those interested in seeking more information about aspects of this handbook.

CHAPTER TWO

The Rome Statute and the International Criminal Court

A BRIEF HISTORICAL OVERVIEW³

The ICC is still a relatively young institution. It was founded upon the Rome Statute, adopted after many years of preliminary negotiations, by the UN Diplomatic Conference on 17 July 1998 in Rome. The Conference had been called by the General Assembly, and the Statute passed overwhelmingly (107 votes to 7 against, with 21 states abstaining). The Statute – and in due course the Court – came into force on 1 July 2002 upon the ratification of the required number of states. By mid 2009, there were 110 states party to the Statute – this includes most of Europe, all of Latin America, and more than half of all African countries. Another 40 or so countries have signed but not yet ratified the Statute.

The ICC is the world's first permanent international criminal tribunal. It draws upon the lessons and legacies of globalised criminal justice initiatives set up in response to particular conflicts. There is a longer, more complex history of internationalised, conflict related criminal trials,⁴ but the principal historical influence on the establishment of the ICC has been the experience of the international community since 1945 in trying to devise credible, fair but effective institutional means to deal with alleged perpetrators of mass crimes committed during armed conflicts.

In this sense, the ICC's 'pedigree' can be traced back to the war crimes trials of Axis powers (mainly Germany and Japan) initiated by the Allied powers (mainly France, Russia, the UK and US) at the end of the 1939-1945 World War. Although

the Nuremberg and Tokyo trials were selective in that they were military tribunals by the victorious 'coalition' states (the UN was being born at the same time), they laid the basis for an institutional response to war crimes and equivalent acts by the international community as a whole. In some respects, the Allied powers in 1945 saw themselves acting on behalf of the global community in trying to respond to the enormity of the scale of crimes committed during the Second World War.

In making provision for equality of arms, as chapter 3 of this handbook explains, the ICC attempts to fulfil international human rights obligations and to reflect long-held traditions of the common law adversarial legal system. It also continues the pattern set by the Nuremberg and Tokyo tribunals after the Second World War, in which efforts to provide qualified legal representation to accused persons were part of a genuine attempt to avoid the tribunals becoming forums for 'victor's justice' only. US President Harry S. Truman was particularly concerned that the Nuremberg proceedings should show the world (and Germans themselves) the fairness of the trials and the example they set of a fairer kind of law. Ensuring the provision of counsel to defendants was an essential element of this.

The responsibility for such international trials today would logically, and perhaps legitimately, fall to a body created through or with the approval of the United Nations, acting through the Security Council. In part, this reflects a recognition that goes to the heart of the subject matter of this handbook – that if any body is to credibly and legitimately prosecute and punish persons in the name of the international community, certain procedural safeguards and principles need to be observed, lest the process be abused or otherwise discredit international law itself.

The movement for the creation of the ICC goes back many decades. The drafting of the 1948 United Nations General Assembly Convention on the Prevention and Punishment of the Crime of Genocide both raised the profile of international criminal law and called for the trial of genocide suspects 'by such international penal tribunals as may have jurisdiction'. The UN International Law Commission (ILC) drafted a statute for such a tribunal in the 1950s, but the idea did not receive sufficient support until 1989, when the General Assembly mandated the ILC to take the issue up again.

The experiences of, in particular, the former Yugoslavia and Rwanda in the 1990s revealed to the global community the need for a permanent international court. The General Assembly process gained significant momentum in the mid-

1990s, through a special steering, negotiation and drafting committee, which worked towards the final 1998 Conference. The idea was that a permanent institution, distinct from the political dynamics of conflict or war, was necessary to deal systematically and in a principled way with the international community's attempt to act against impunity for massive crimes and to pursue prosecutions in the interests of justice.

The legacy of Nuremberg informed various ad hoc tribunals that, since the 1990s, have been created by the United Nations in response to serious conflicts, events or conduct in places like the former Yugoslavia, Rwanda, Cambodia, East Timor, Sierra Leone, and now in relation to particular events in Lebanon. There continue to be robust debates about the proper form and venue of judicial mechanisms to deal with serious conflict related crimes. Are the 'hybrid' (part national, part internationalised tribunals such as the Special Court for Sierra Leone) preferable to fully externalised or internationalised forums (such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Netherlands, or the International Criminal Tribunal for Rwanda (ICTR) in Tanzania)?

Alongside these debates are others which consider the appropriateness, legitimacy, and effectiveness of international criminal justice mechanisms that are prosecutorial and adjudicative in nature. The field of 'transitional justice' has grown and is of political and legal importance. It is in the context of strategies to best achieve both justice for victims and an end to conflicts, that debates continue about how to reconcile peace negotiations on the one hand with ensuring justice on the other.⁵

While partly driven by principled considerations of punitive and deterrent justice and victims' rights, the momentum for a permanent international criminal court was also derived from a more pragmatic recognition that failure to formally 'deal with' serious international crimes was likely to be a source of ongoing grievance which could undermine efforts for sustainable peace. In this regard, it is telling that the ICTY and ICTR were created by the UN Security Council acting under Chapter VII of the United Nations Charter – that is, by reference to a finding that impunity of perpetrators of mass crimes in those conflicts was, along with other factors, likely to undermine peace and security in the region.

These considerations eventually found expression in the Preamble to the Rome Statute which sets out the Court's basis, values and objectives. The Statute recognises that 'grave crimes threaten the peace, security and well-being of the

world' so that 'the most serious crimes of concern to the international community as a whole must not go unpunished.' The Court was therefore intended to help 'put an end to impunity ... and thus contribute to prevention of such crimes' in the future.

The lengthy process of getting sufficient state interest and participation in the idea of an international criminal court involved sustained advocacy and negotiation among UN member states, considerable skill and compromise, patience and perseverance. Civil society groups were vital to the progress of discussions on the Court, and to the shape it took over time.

For a number of states, the concept of an empowered international body – even one negotiated by many different states – was seen as a threatening precedent in terms of inroads into national sovereignty. It remains an unfortunate fact that world powers such as China, Russia and the US are not yet party to the Rome Statute. In some respects, the concerns that several states had with the idea of such a court at all reflect issues relating to the role of defence counsel. This is illustrated by concerns about the independence, fairness, and immunity from political interference or political posturing, that such a court might give rise to.

The court that resulted from the multi-year negotiations is thus an attempt to bring the rule of law to a previously under-regulated aspect of international life, in the same way that we now recognise that agreed rules on trade and commerce, and mechanisms for dispute settlement in those areas, are vital to a rule based international order. The roleplayers in the ICC system – including defence counsel – are therefore contributing, in their own way, to an attempt at a rather profound universal project that has found its expression in the ICC.

By October 2009, the status of the Court's situations and cases were as follows:⁶

- In the situation in Uganda, the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before Pre-Trial Chamber II. In this case, five warrants of arrest have been issued against [the] five top members of the Lords Resistance Army (LRA). Following the confirmation of the death of Mr Lukwiya, the proceedings against him have been terminated. The four remaining suspects are still at large.
- In the situation in the DRC, three cases are being heard before the relevant Chambers: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

Two cases are at the pre-trial stage, while the proceedings against Thomas Lubanga Dyilo are at the trial stage. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large.

- In the situation in Darfur, Sudan, three cases are being heard before Pre-Trial Chamber I: *The Prosecutor v. Ahmad Muhammad Harun* ('Ahmad Harun') and *Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb'); *The Prosecutor v. Omar Hassan Ahmad Al Bashir* and *The Prosecutor v. Bahr Idriss Abu Garda*. The suspect Bahr Idriss Abu Garda appeared voluntarily for the first time before Pre-Trial Chamber I on 18 May 2009. He is not in custody. The three other suspects remain at large.
- In the situation in the Central African Republic, the case *The Prosecutor v. Jean-Pierre Bemba Gombo* is at the pre-trial stage of the proceedings and is currently being heard before Pre-Trial Chamber II.

The ICC is still in its early years, and its practice and procedures are evolving and settling as the Court deals with issues for the first time. As noted in chapter 3, one of the early challenges has been the extent to which the Court gives adequate attention to the needs of accused persons, and the procedural issues facing defence counsel generally. The evolution of this particular issue shows how the Court – and the States Parties to the Rome Statute – have come to realise the importance of bringing fairness to the fore in international justice.

A BRIEF STRUCTURAL OVERVIEW

The Rome Statute simultaneously established the Court, and sets out its jurisdiction, powers and procedures, and mechanisms for its cooperation with national criminal justice systems. It also creates the basis for states to enact criminal laws in their own systems that reflect the crimes over which the ICC has jurisdiction: genocide, crimes against humanity, and war crimes.

Part II of the Rome Statute deals with jurisdiction, admissibility and applicable law (Part III provides for general principles of criminal law to apply in ICC proceedings). Significantly, the Court has limited jurisdiction: it is concerned only with the most serious crimes of concern to the international community, and has no jurisdiction in relation to alleged conduct occurring before 1 July 2002.

Except in exceptional cases when the UN Security Council refers a matter to

the Court on the basis of a finding that continued impunity represents a threat to international peace and security, the ICC can only act to initiate proceedings when the state where the alleged crime took place is a party to the Rome Statute (or has otherwise validly and voluntarily accepted the Court's jurisdiction), or in cases where the accused is a national of a state that is a party to the Statute.

The Preamble to the Rome Statute provides that it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. By ratifying, the Member State accepts a duty to ensure it is able to either lawfully try suspects in its national courts (according to Rome Statute standards), or cooperate with the ICC or other members in surrendering the suspect for trial elsewhere. Under Article 17, it is only if a Member State is unwilling or unable to prosecute international crimes, that the ICC can consider the case for possible international trial.

Indeed, at the heart of the ICC, and the main reason that it received the support of so many states, is the principle of 'complementarity'. Under this principle, the ICC must defer to national courts; the primary duty and opportunity to initiate investigations or prosecutions relating to a state's territory or nationals should lie with that state's national courts. Put differently, national courts become, on behalf of the international community, the principle fora for prosecuting international crimes. The intention was that the ICC only hear matters where, for whatever reason, the state is unable or unwilling to exercise its own jurisdiction to try suspects.

The whole ICC scheme relies, therefore, on national criminal justice systems being responsive and cooperative. This requires national laws to be in place, and capacity in the justice system to respond to requests from the ICC or to initiate investigations and trials. The Court is designed to rely heavily on the cooperation of national justice systems and agencies for investigation and other functions. Strengthening the national criminal justice system generally is both a requirement for fulfilling obligations on international criminal justice, and is a result of working to improve ICC response capability.

The composition of the Court is covered in Part IV of the Rome Statute. This Part provides for the process for appointment of judges and their conditions and terms of office, and for the Registry, Prosecutor's Office, and other staff (significantly, defence counsel are not mentioned in Part IV. Their role has been set out subsequently in Rules and Regulations, and in judicial application of the Statute). Part V deals with the power of the Prosecutor to initiate investigations,

and the various mechanisms for oversight of this power, including through the Pre-Trial Chamber, and for the issuance of warrants for arrest pursuant to investigations, and other functions.

In deciding whether to initiate an investigation following referral of the matter to the Court by one of the various means, the Prosecutor must take into account:

- Whether there is a reasonable basis for believing a crime within the Court's jurisdiction has been committed (see Article 53 of the Statute)
- Whether the national court is unwilling or genuinely unable to exercise jurisdiction (Article 17)
- Whether the matter is of 'sufficient gravity'
- Whether it is in 'the interests of justice' to proceed.

While these criteria appear to grant wide discretion to the Prosecutor, this is not unlike the discretion given to public prosecutors in domestic systems, nor has it been abused in practice. In any event, the decision to proceed is subject to judicial oversight. The decision not to proceed is also a matter that the Prosecutor must, with reasons, inform the Pre-Trial Chamber of, and such a decision is reviewable.

Part VI of the Rome Statute is of particular significance in terms of the role of defence counsel. Dealing with all aspects of the trial (supplemented in regulations), Part VI provides statutory protection for the rights of the accused to a fair trial and the presumption of innocence (see chapter 3 below), confidentiality and the protection of witnesses and victims, and related issues. Part VII deals with sentencing, and Part VIII with appeals.

Part IX sets out procedures for judicial assistance and international cooperation, while the remainder of Parts (to Part XIII) deal with enforcement of ICC orders, the Assembly of States Parties, budgetary issues, and ancillary issues. The Rome Statute is supplemented by a number of other important instruments and regulations either promulgated directly by the Assembly of States Parties, or by the Court bodies in terms of powers delegated to them. These bodies of rules (which are partly discussed in chapter 3 below) include:

- The Rules of Procedure and Evidence
- The Court Regulations
- The Registry Regulations
- The Code of Professional Conduct

THE ICC AND AFRICA: MYTHS AND MISCONCEPTIONS

A serious obstacle to obtaining fairness in international justice generally – and in Africa in particular – are the myths and misconceptions concerning the ICC's role on the continent. Before discussing the role of the defence lawyer in chapter 3, and the particular role of lawyers and the legal profession in Africa in 'bringing fairness to international justice', it is necessary to frankly consider these issues.

The ICC has been accused by African heads of state, the African Union (AU) and individual commentators, of being an imperialist or Western institution which disproportionately targets Africa, or is experimenting with African situations.⁷ In some respects, and especially since the Court's Pre-Trial Chamber confirmed the indictment of the President of Sudan, the Court faces an apparent legitimacy crisis in parts of Africa, or among certain constituencies including some political leaderships.⁸

This legitimacy crisis is illustrated by the outcomes of AU summits in February and July 2009, which resulted in statements expressing deep unease at the Sudan indictment, and of most concern, a call for non-cooperation with the ICC in the arrest of President al-Bashir of Sudan. AU Commissioner Jean Ping is reported to have commented to journalists at the February summit that 'we think there is a problem with the ICC targeting only Africans, as if Africa has been a place to experiment with their ideas'.⁹

In addition – and perhaps related to these misconceptions – there are significant problems arising from the fact that despite African states playing a major role in the ICC's creation, only three countries in Africa (South Africa, Senegal and Kenya) have actually implemented the Rome Statute into their national laws.¹⁰

The various accusations made against the ICC in relation to its role in Africa ignore historical legacies and undeniable facts. They also often proceed from ignorance of the Court's structures and processes and its efforts to ensure fair and transparent proceedings.¹¹ Consider the following points:

- 'It is only by ignoring the history of the Court's creation and the serious and engaged involvement of African States in that process, that one can assert that the ICC is a Western court'.¹²
- The ICC was not the 'idea' of some mysterious, scheming others, foisted upon unwilling or unwitting African states. On the contrary, and unsurprisingly given its experiences with crimes and impunity, Africa has led the way in the

creation of international mechanisms for criminal justice. African states played a crucial role in the process leading to the creation of the Court, in ways that often revealed a promising collaboration between the state and civil society movements. Forty-seven African states were present at the Rome Conference in July 1998, many of them supported the adoption of the final Statute, on which the vast majority voted in favour.

- Nearly a third of the 108 states that have ratified the Rome Statute are African.¹³ By June 2009, 30 African states had ratified (the most represented region) and 43 had signed the Rome Statute.
- More than 800 African civil society organisations are members of the Coalition for the International Criminal Court (CICC), representing approximately one-third of the membership. Twenty-one African countries have national coalitions for the ICC.
- As of June 2009, five of the Court's judges are African: Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), and Sanji Mmasenono Monogeng (Botswana). One former judge, Navanethem Pillay (South Africa), is now the UN High Commissioner for Human Rights.
- In the ICC's March 2009 judicial elections, 12 of the 19 judicial candidates were African citizens nominated by African governments. There are a number of Africans who occupy senior positions at the Court, including the following: Deputy Prosecutor Fatou Bensouda (The Gambia); Judge Fatoumata Dembélé Diarra (Mali) who was elected First Vice President in March 2009, and Deputy Registrar Didier Preira (Senegal).
- The fact that all current ICC investigations relate to African countries does not demonstrate an institutional bias: it reflects the fact that in three cases the countries themselves have referred matters to the Court (in effect, invited investigations) in relation to matters on their own territory (Uganda 2003, DRC 2004, Central African Republic 2004, Cote D'Ivoire has made a declaration under Article 12(3) provisionally referring a matter for possible investigation), while in the fourth case (Sudan) the UN Security Council referred matters for investigation on the basis of findings by a specially appointed commission, and having found that the situation there represented a threat to international peace and security (UNSC Resolutions 156 and 1564, culminating in Resolution 1593).

- The process for reviewing requests of investigations is carried out with considerable transparency. Many conceivable situations are beyond the Court's jurisdiction for obvious reasons, such as they relate to non-member states or to events before July 2002. The Prosecutor has not used the power to unilaterally initiate an investigation. The ICC does not exercise universal jurisdiction and was designed by states to defer institutionally to national justice systems (the complementarity principle). There is no evidence of a plot to target Africans. If anything, the experience has been of African states using the Court's procedures in relation to their own internal political struggles. The ICC is currently analysing situations outside of Africa, for instance in Colombia, Afghanistan and Georgia. The ICC prosecutor is also examining whether the ICC has jurisdiction over the Palestinian territories and any crimes that may have occurred there since 1 July 2002.¹⁴
- Detractors of the Court often refer to the fact that the US is not a party to the Rome Statute. However, it is seldom acknowledged that other major powers such as China and Russia are also not party to the Statute. Nor is it pointed out that in fact the US opposed, for the most part, the referral by the UN Security Council of the Darfur situation to the ICC, eventually abstaining from the Security Council vote on the matter.
- Rather than interfering in the sovereignty of African states, the Court was carefully designed (by states exercising their sovereign powers) to ensure the primacy of national jurisdiction, so that it is only when states are unable or unwilling to exercise jurisdiction against those reasonably suspected of committing international crimes, that the Court may act.
- Ending impunity for international crimes is a founding principle of the AU (Article 4 of the Charter constituting the AU) and a key element of its *raison d'être* in promoting peace, security and justice on the continent. The African Commission on Human and Peoples' Rights issued a resolution on ending impunity in Africa and on the ICC's role in this. Through the AU, African states have repeatedly reiterated their formal commitment to ending impunity, and ratification of the Rome Statute has featured prominently in AU strategic plans. In June 2009, Ministers from African states party to the ICC issued a statement recording their 'unflinching commitment ... to combating impunity' and stressing the need to reiterate the commitment of African States Parties to the ICC.

Africa and the ICC: speaking truth to power

... It's also important to remember that the ICC, as a court of last resort, acts only when national justice systems are unwilling or unable to do so. There will be less need for it to protect African victims only when African governments themselves improve their record of bringing to justice those responsible for mass atrocities.

Kofi Annan, Africa and the International Court, *New York Times*, 29 June 2009

There is no doubt that bringing peace to conflict affected areas is a complex process, and the utility of investigations and prosecutions while efforts are afoot at negotiating peaceful outcomes should be debated. However, there are enough challenges to fair international justice without inaccurate political messages obscuring the picture further. Dealing with these challenges requires ongoing education and awareness raising, and there is a role here for members of the African legal profession, including criminal defence practitioners. These issues are covered in chapter 4 of this handbook.

CHAPTER THREE

Defence counsel in the International Criminal Court

The issues facing defence counsel in the ICC and other international tribunals can be illustrated by the three anecdotes below:

At an IBA conference in Singapore in October 2007, Jean Flamme (then defence counsel to Thomas Lubanga, the first person to face trial in the ICC) openly criticised the Court for the lack of fairness in preparation of his client's case. He noted that while the prosecution had made up to 70 visits to the DRC and had 20 legal and other staff members, he lacked even co-counsel and had to make do with interns and trainees. He also alleged that he was refused postponement of the trial on the single request made, whereas this request had been frequently made and granted to the prosecution. He even alleged a plot to prevent him travelling to the DRC on 'security grounds'. An ICC legal officer present at the conference denied the allegations, and put the problems down to the immaturity of the Court rather than a conspiracy against defence counsel.¹⁵

The Hague based trial against former Liberian President Charles Taylor before the internationalised UN Special Court for Sierra Leone was affected early on by accusations from the defendant that his defence has been starved of resources (he used the term 'emaciated') and was unable to compete fairly with the prosecution arraigned against him. Taylor's

grievances – which he stated had prompted him to decline to appear at the prosecution's opening in June 2007 – included that he had only one counsel against nine for the prosecution, and that while he was held in The Hague, the Office of the Principal Defender was in Freetown, Sierra Leone. The Registrar of the Special Court had refused a request from Taylor to meet with the Principal Defender, by refusing to fund the latter's travel from Freetown to The Hague (the Court ordered such arrangements to be made).^{16, 17}

In the pre-trial procedures of Mathieu Ngudjolo Chui and Germain Katanga, Mathieu Ngudjolo Chui's counsel (Maitre Kilenda) argued that an adjournment was not sufficient for his preparation of defence in a complex case. Counsel argued that he needed more time to prepare a defence against a charge that had resulted from many months of prosecutorial preparation. Mathieu Ngudjolo Chui was not surrendered until February 2008 (four months after his co-accused Katanga). Counsel felt that given the gravity and scale of the charges and the complexity of the case, the adjournment granted was still not enough: 'The Prosecutor has been investigating for several years and the Defence has only had a couple of months to prepare for the confirmation of charges. One has to wonder about whether or not the accused has sufficient means to challenge the charges pressed against him' said Kilenda.¹⁸

If the problems facing international tribunals are great, the specific problems for defence counsel are greater.¹⁹ Such trials, partly because of their conflict related context and the explicitness of the institutional fight against impunity, mean that the atmosphere is different to ordinary criminal trials. Although prosecutors and judges may be fully independent, there is no denying that such trials are conducted in an atmosphere where passions often run high and public opinion is usually strongly against defendants accused of war crimes and other international crimes. This creates difficulties for defence counsel, aside from any structural or institutional issues or cultures, such as disclosure of prosecution evidence late in proceedings.²⁰

Such trials tend to be long, draining, complex (and based on still evolving legal principles) and involve multiple procedural hearings. Most clients cannot afford to

pay their counsel, who must rely on public funds. The overall process is constrained by limited budgets and the political and financial imperative to finalise cases expeditiously. In all these circumstances, it is difficult to balance 'fairness' to the accused with efficiency, expeditiousness, and the outcome expected by the wider public:

- On the one hand there have been considerable problems in ensuring equality of arms for defence teams in international criminal trials. Perceptions about the ICC are tied inextricably with wider perceptions about forums for international criminal justice. Given that knowledge of the ICC is often limited, and given the conduct of some proceedings by other tribunals also residing in The Hague, any perceptions of inequality of arms in the Special Court for Sierra Leone or the ICTY can impact upon impressions of the fairness of the ICC's own processes.
- On the other hand, as shown in this chapter, the ICC and its States Parties have learned from the experiences of other tribunals, and there is certainly now a far more acute awareness of challenges facing defence counsel, and steps taken to address some of these issues. It is therefore true to say that although there is a definite need to ensure greater fairness in international justice at the ICC, suggestions that the Court is structurally unsound from a fairness perspective ignore the facts that procedural and institutional measures are being taken to protect defence rights.

Before considering how the role of defence counsel is being dealt with in the ICC, what exactly are the rights of the defendant in trials and other proceedings before the ICC? What does 'equality of arms' mean in international tribunals?

THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW

Any discussion of the role of defence counsel in the ICC must first consider the procedural and substantive rights of suspects and accused persons. It is the availability of competent and enabled defence counsel that, in practice, often determines whether these rights are respected and protected. In turn, how these rights are exercised is a matter directly related to whether the procedures are fair, and are seen to be fair, and thus whether the ICC is credible and legitimate. These protections are to be found in the Rome Statute itself, and in the body of general

principles of international human rights law, in particular the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and (in the present context) the African Charter on Human and Peoples' Rights 1981.²¹ These rights include:

- The right to equality before the law
- The right to a fair trial by a competent, independent and impartial court
- The right to be tried without undue delay
- The presumption of innocence
- The right to avoid self-incrimination
- The right to be present at the trial, and to a public hearing
- The right to legal counsel
- The right to equality of arms
- The right to confront and dispute the evidence against one and to have adequate opportunity to formulate a defence.

(Forerunners to the ICC were the ad hoc international tribunals for Rwanda and former Yugoslavia. Article 21 of the ICTY statute and Article 20 of the ICTR statute deal with the rights of the accused, but otherwise the issue of the defence was not dealt with in setting up the tribunals. It was only covered later through the Rules of Procedure and Evidence drafted by the judges and registry (Rules 44-60 of both tribunals). Both tribunals established mechanisms to deal with assigning counsel when defendants lacked their own.²²

The Rome Statute

Defence rights are protected through the Statute by reference to various stages in proceedings, and in terms of an overall fair trial.

Article 55 deals with the rights of persons during an investigation. Legal representation is required to ensure that such a person:

- Shall not be compelled to incriminate himself or herself or to confess guilt (55(1)(a))
- Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment (55(1)(b))

- Shall have the free assistance of an interpreter and translator where necessary (55(1)(c))
- Shall not be subjected to arbitrary arrest or detention, and
- Shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute (55(1)(d)).

Article 55 also provides that when a person is about to be questioned either by the Prosecutor, or by national authorities under the Statute, such a person is to be informed prior to being questioned:

- That there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court (55(2)(a))
- That the person has the right to remain silent 'without such silence being a consideration in the determination of guilt or innocence' (55(2)(b))
- That 'the person has a right to have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it' (55(2)(c))
- Of the right to be questioned only in the presence of counsel unless the person has voluntarily waived his or her right to counsel (55(2)(d)).

Article 63 provides that the trial is to take place in the presence of the accused, who can be removed for disrupting the Court only in exceptional cases and as strictly required (and must be able to follow the trial through technology). Article 64(7) also reaffirms that the trial shall be public unless exceptional circumstances dictate otherwise.

Article 64(2), dealing with the functions and powers of the Trial Chamber, states that the Chamber '*shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses*' [emphasis added]. In seeking fairness and expeditious conduct of proceedings, the Chamber is to confer with the parties on facilitating these ideals (Article 63(3)(a)) and, significantly for the defence, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial (Article 63(3)(b)).

Counsel also has a role in relation to admissions of guilt, governed by Article 65. When an accused makes such an admission, the Chamber must check whether this is made voluntarily and with understanding, after 'sufficient consultation with defence counsel.' Article 66 reaffirms the presumption of innocence, as follows:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67 of the Rome Statute is the principal provision, and provides relevantly as follows:

1. 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) ... 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 of or documents presented to the Court are not in a language which the accused fully understands and speaks;
 - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (h) To make an unsworn oral or written statement in his or her defence; and
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, 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. In case of doubt as to the application of this paragraph, the Court shall decide.

As we shall see, Rule 20 of the ICC Rules of Procedure and Evidence is also very significant. It requires the Registry to 'ensure the professional independence of defence counsel' and to 'conduct all its operations in a manner that promotes the rights of the defence, consistent with the principle of fair trial' as defined in the Rome Statute.

The International Covenant on Civil and Political Rights (ICCPR)

The rights in the Rome Statute draw directly from the ICCPR (which itself is based on the Universal Declaration of Human Rights). Many provisions of the ICCPR – which has been ratified by most countries in the world – reflect customary international law and so bind all states in all their official acts. While the ICC as a treaty-created body is not itself a party to the ICCPR, in practice it is seen as subject to the restraints that the ICCPR places on conduct.

Articles 9 and 10 of the ICCPR deal with situations of deprivation of liberty and treatment of detained persons. The most important provision, however, is Article 14. Article 14(1), (2) and (3)(b) – (e) are particularly relevant to the role of the defence counsel in bringing fairness to international justice. Article 14 provides (relevantly) as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... any judgement rendered in a criminal case ... shall be made public...
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The African Charter on Human and Peoples' Rights

Finally, further support for the significance of fair trial rights can be derived indirectly from the African Charter. Article 3 guarantees every individual the equal protection of the law, while Article 7 states that every individual 'shall have the right to have his cause heard.' This is said to comprise the right to appeal against acts violating his other rights, the presumption of innocence and the right to be defended by a counsel of choice, and the right to be tried 'within a reasonable time' by a competent court.

WHAT DOES 'EQUALITY OF ARMS' MEAN?

Article 67(1)(b) to (e) of the Rome Statute goes to the heart of the defence counsel role and the equality of arms between the prosecution and the defence. In terms of general human rights principles, the Human Rights Committee has stated that the principle revolves around ICCPR Articles 14(3)(b) and (e) in particular, and includes, at its core, that there will be fair notice of the case against one, and that one will be afforded a fair opportunity to contest and challenge the evidence against one.²³

A strong defence is necessary to ensure fair and impartial justice, without which the ICC and similar courts – and indeed international law itself – cannot sustain its legitimacy.²⁴ The Lawyers' Committee for Human Rights has stated that equality of arms is one of the single most significant criteria of a fair trial.²⁵

The principle is inherently connected to the adversarial system of criminal justice, replicated for the most part in the ICC, which requires the prosecution to put its case in public to the court, and for the defence to be given an equal or fair opportunity to challenge the factual and legal basis of the prosecution's case. This process is intended to ensure that the guilt (or otherwise) of the accused is only determined after the most rigorous testing by the defence. As the US Supreme Court has succinctly expressed it, the right to legal representation (which is one fair trial right) is a right to the effective assistance of counsel: the right of the accused to require the prosecution's case to 'survive the crucible of meaningful

adversarial testing.¹²⁶ It is this notion that the accused must not only be represented, but that counsel must be able to effectively represent the accused (test the case against him or her), that underpins equality of arms.

What have international courts understood by 'equality of arms'?

- The principle of equality of arms is an expression of the general right to a fair trial guaranteed in international human rights law: a fair trial is difficult to achieve when the defence is placed at a serious disadvantage relative to the prosecution. If this occurs routinely or systematically during international criminal prosecutions, not only will particular convictions possibly be legally unsound, but the institution itself will lose credibility – the overall independence and impartiality of the court will be questioned. This is the position even if there is general public support for the overall prosecutorial aims of the court, since the public understands (even more so in recent years, after the stigma at Guantanamo Bay) that however important the fight, whether against impunity or terrorism, there are some things which ought not to be sacrificed: these include not adhering to due process of law, and substantially unfair proceedings which undermine any moral claims made in otherwise genuine attempts to combat international criminal activity.
- It has been made clear in a variety of international proceedings that in law the principle does not mean that the defence must be afforded the same resources as the prosecution. It is merely a requirement that the defence be provided with resources and means that are adequate to the task – that is – that enable the reasonable enjoyment of a right to fair trial.
- The European Court of Human Rights (ECHR), in confirming that the principle does not mean 'full' equality (of resources etc), has defined the concept in the negative, in the sense that the defence must not be placed at a 'substantial disadvantage'. The principle 'requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent ...'.²⁷
- Since its first judgment in the *Tadic* case, the ICTY has followed a similar line to the ECHR, stating that the principle merely requires that *neither* party is unfairly disadvantaged in presenting its case.²⁸ At a minimum, the ICTY has held that it requires adequate time and facilities for one's defence, under

conditions that do not create a substantial disadvantage vis-à-vis the prosecution.²⁹ Recently in the *Karadicj* case, the accused insisted on representing himself, but sought the ICTY Registry's funding of expensive legal advice. The Tribunal made it clear that it saw the overall criterion of adequacy of resources (for equality of arms) as being what was necessary to 'assist the efficient and effective presentation of the Defence case' which required only modest financial support.³⁰

- In the ICTR, the Tribunal ruled in *Prosecutor v Kayishema* that 'equality of arms' does not require that the defence have access to the same resources as the prosecution. The Tribunal took the principle to refer to equality of rights in the formal sense: 'equality of arms ... does not necessarily amount to the material equality of possessing the same financial and/or personal resources ...'.³¹
- In the ICC, although the Rome Statute does not mention the principle of equality of arms as such (in listed defence rights in Article 67), the Rules of Evidence and Procedure make it clear that the Court is obliged to assist in ensuring that it is possible to conduct an 'efficient and effective' defence. Arguably, if the Statute were negotiated today there would be stronger language on equality of arms. The meaning of the term is likely to be further elaborated over time by judicial rulings. The ECHR and ICTY definitions of the term (above) will be considered persuasive to the ICC. In the *Lubanga* case (now the ICC's first trial), on a defence application for simultaneous access to French transcripts, the Trial Chamber noted that in order to protect the defendant's fair trial rights, these minimum guarantees must be 'generously interpreted'. However, the Court reaffirmed that the principle does not require equality of resources and that indeed it is 'impossible to create a situation of absolute equality of arms' between the prosecution and defence.³²
- The IBA has stated that it supports the interpretation of the ICTY and ICTR that equality of arms does not mean 'equality of means' and only requires that there is no substantial disadvantage.³³ However, the ICC has been at pains to point out that the special formal recognition given to victim's participation rights in the ICC system creates more burden on the defence and so makes the notion of equality of arms distinct in the ICC from the ad hoc tribunals.
- It should be remembered that although the Prosecutor has access to more resources than the defence in the ICC system, the Prosecutor bears the burden of proof, and is under an obligation to investigate exonerating circumstances in the same way they investigate incriminating ones (Article 54(2)(1) of the Rome Statute).

Problems in ensuring equality of arms

Structural bias

By reference to their legal pronouncements and their actual practice, the various international tribunals have been criticised for not advancing a more substantial notion of equality of arms. The ICTY has been described as affording *de jure* but not *de facto* equality to the defence: while the tribunal afforded all rights on paper, there was no equality of arms in fact, so that the defence was at a 'significant disadvantage' in practice, in a way that threatened 'the legitimacy and credibility of the international criminal justice system' since 'procedural guarantees do not always translate into institutional practice'.³⁴

These structural biases towards the prosecution are inherent in international tribunals because they openly exist to end impunity (rather than talking in terms of ensuring justice), because judges tend to have human rights backgrounds which (so it is said) bias them toward victims, and because states are obliged to cooperate with investigators, whereas they can mostly disregard defence requests for assistance.^{35, 36}

Neglect of defence issues

Mark Ellis, President of the IBA, has observed that issues relating to defence counsel in the ICTY, in many ways the forerunner of the ICC, were 'an afterthought', despite rhetoric about fair trials.^{37, 38} There has been an understandable distance that unfortunately can manifest in systematic inequality of arms. During the early part of the ICTY, defence teams were not allowed into the Tribunal cafeteria for reasons related to safety of confidential information.

It is perhaps revealing that even in the case of the Special Court for Sierra Leone, often praised for its attention to defence independence and equality of arms issues, the original agreement between the United Nations and Sierra Leone for its establishment made no mention of a mechanism for managing the needs and interests of the defence. The Principal Defender's office came into being as a result of negotiations between the Registrar and the Judge President Geoffrey Robertson.³⁹

The Rome Statute only mentions the role of the defence by reference to fair trial rights for the accused – there is no institutional statutory mention of the defence role, alongside that of the Chambers, Prosecutor and Registry.⁴⁰ The

defence related architecture of the ICC was only added subsequently in response to the relative neglect of defence counsel issues, in particular through the duty given to the Registry in Rule 20 to ensure the ability of defence counsel to exercise its fair trial rights.

Resources, resources, resources

Despite the fact that the Special Court for Sierra Leone has given more attention to the independence and means of the office of defence counsel than other modern tribunals, it has nevertheless been criticised for the substantial inequality of resources and opportunities between investigators and prosecutors on the one hand, and defence teams on the other.⁴¹ This is the most frequent complaint made about defence issues in recent tribunals. Other principal grounds of complaint include:

- The practice of the prosecution making disclosure too close to the trial (which is especially problematic when translation of large numbers of documents is required)
- Challenging witness statements when there is no means to cross-examine them
- Responding to interventions by represented victims (in addition to responding to the prosecution case)
- The difficulty of cross-examining already traumatised victims
- The insistence by some defence counsel that their function is to defend an accused against particular serious legal charges and not to contribute to building an historical record as part of a wider purpose behind international trials.⁴²

The 'resources' complaint is one of the most pertinent and refers to:

- Personnel (legal counsel, assistants, research or investigatory and support staff)
- Infrastructure or the means to obtain it (physical space and access to information, IT and library facilities, and so on), and
- Time.

Other resource challenges include the provision of security during investigations in-country, access to certain locations and witnesses, and the difficulty of defence counsel securing cooperation and assistance from government officials.⁴³

Resolving these resource problems requires funding, and the latter mentioned factors in particular are more actionable when they carry the institutional weight and bureaucratic support of the tribunal, court or UN system. On all these issues, there have been claims that the defence is being disadvantaged generally in international criminal proceedings.

Beyond resources – an institutional mindset problem

The challenges that defence counsel face go beyond the lack of resources:

- How is the tribunal (here the ICC) geared to assisting defence counsel to fulfil their roles?
- Is the institution structured and cultured in the notion that defence rights require positive institutional action, not just recitation in instruments?

This is what is meant by the possibility of 'structural bias' against the defence. Whether or not there is equality of arms (even if just a lack of 'substantial disadvantage') depends partly on the institutional culture or mindset of a tribunal. In other words, whatever the statutory rules or regulations or fundamental rights, do the measures in place and the practice of the institutions reveal that the tribunal really accepts the role of enabled defence counsel in achieving the objectives of fairness, expeditiousness and efficiency?

In this regard, 'the tribunal' refers not only to judges and prosecutors and registry staff in the ICC (and how they see the defence's role), but also to those who sit on the Assembly of States Parties and who control budgets and other crucial issues. Until there is a more profound grasp of the significance of equality of arms among all these actors, the institutional attitude to the defence counsel role is likely to remain under developed.

The four problems in ensuring equality of arms discussed above illustrate a significant legal-procedural and institutional-cultural struggle to elevate the interests of the defence to a level that reflects the importance of equality of arms and the fundamental nature of defence fair trial rights.⁴⁴

Some of the problems experienced by defence counsel in past international trials are inescapable aspects of working in a complex, still evolving system subject to significant resource constraints, and often understandable political pressure for timely completion of mandates or efficient conduct of trials. Before considering

(in the section below) the ICC's own procedures and measures to give effect to equality of arms, it is worth discussing the progress that has been made in ensuring equality of arms.

Progress in ensuring equality of arms

An inevitable institutional bias

There is a degree of truth to the suggestion that international criminal tribunals are institutionally biased or structurally predisposed towards the prosecution and its case. The Rome Statute in its Preamble quite clearly states the objective of ending impunity and not allowing crimes of international concern to go unpunished – the Preamble does not for instance make mention of the importance of fairness.

It is also true that although it is a legal institution operating under its own strict constitutional limits, the ICC expressly has a wider overall purpose that is in some senses political, including the legal-political purpose of ending impunity. But this is equally true of all criminal justice systems, which exist at least in part for the proper functioning of our political societies. Formal legal adjudicative means to achieve these political ends are valid and defensible.

The purposes of international trials quite openly extend beyond applying norms and determining the guilt or innocence of persons on certain charges, and finding appropriate punishments. The ICC and its cousin institutions are intended to, among other things, prevent self-help or private justice (vengeance), to display and record a formal historical record for future generations, and by so doing also to provide some reparation and closure to victimised communities and individuals.⁴⁵ So it is true that 'international trials are, to a much greater degree [than domestic trials] addressed to audiences outside the courtroom'.⁴⁶

More directly, the 'bias' (more resources to the prosecution) is explicable because the prosecution bears the burden of proof and of assembling a case. It is also obliged, under Article 54 of the Rome Statute, to investigate not only incriminating evidence, but evidence that points away from the accused's guilt – and it is generally obliged to disclose any evidence it has that harms its own case.

The fact, then, that there is some inherent tilting towards enabling the prosecution in international forums such as the ICC does not necessarily mean that the principle of equality of arms is inevitably compromised from the outset. It

merely means that there needs to be special vigilance to ensure that defence rights are observed in substance as well as in form, and that the system is monitored or reformed so that the defence is not substantially disadvantaged.

Many criticisms are based in myth or assumption

Although there are legitimate criticisms to be made of the status of equality of arms in international tribunals such as the ICC, many perceptions and stereotypes about fairness for the criminal defence in international trials have no basis in fact.

For example, the perception that despite their formal appearance the ICTY and ICTR have been chambers of 'victor's justice' with little prospect for one to mount a successful defence, do not stand up to scrutiny. One researcher found that overall acquittal rates in international tribunals (roughly 15 per cent in the ICTY and ICTR) are higher than in US federal criminal trials, or trials in France and Germany.⁴⁷ The study showed that defendants in the ICTY were acquitted of nearly half (43 per cent) of all counts against them.⁴⁸ Acquittals on individual counts (which may amount to partial acquittals overall) suggest an overall fairness in international justice.

This is not to dismiss the many arguments for greater procedural and resource equality of arms. It is merely to point out that there is, among other things, a role for lawyers and the legal profession to attack or defend the international system on its merits and not by reference to assumptions. (See also the textbox 'How experienced defence counsel see their role in international trials' on page 39).

Understanding on equality of arms and defence issues is evolving strongly

It is impossible in this handbook to give a full account of the history of defence counsel in international law. International tribunals have, since Nuremberg, struggled with issues and mechanisms concerning the independence and operability of defence lawyers.⁴⁹ Despite the problems mentioned in the previous section, the trend is towards greater awareness of and respect for the principle of equality of arms and defence counsel's important role in bringing fairness to international justice.

The rights of the defence have evolved over time and in particular, appreciation of the importance of the role of the defence to fair and legitimate international justice has evolved historically (and especially since the ICTY and ICTR

experiences, which have been extremely important and influential in shaping the ICC treatment of defence rights).^{50, 51} There is now a far greater sensitivity to the issues facing the accused in relation to defence counsel, and counsel themselves.

The ICC has given considerable attention to equality of arms so far

Given the experience of the ICTY and ICTR it was anticipated that the ICC would need to spend a large part of its early work on resolving issues related to fair trial rights, including the system for assigning defence counsel where necessary.⁵² The ICC learned a great deal from the ICTY and ICTR on dealing with defence counsel issues, including fee arrangements. Its Registry made serious efforts to learn from past experience, by a concerted programme of consultations and seminars with bar associations, experts, and existing international or internationalised criminal tribunals.⁵³

Since the ICC came into existence, the importance of institutional support to defence counsel has become well recognised. Thus, in recommending the establishment of what is now the newest international tribunal, the Special Tribunal for Lebanon, the UN Secretary General Kofi Annan reported to the Security Council that 'the need for a defence office to protect the rights of suspects and accused has evolved in the practice of the UN based tribunals as part of the need to ensure equality of arms.'⁵⁴ This sort of statement – and action – did not accompany the shaping of earlier ad hoc UN tribunals.

The measures that the ICC has taken institutionally and in its pre-trial procedural rulings in order to give effect to equality of arms are considered in the next section. These reveal that it is inaccurate to criticise the Court for unfairness, even if more could be done on defence issues, and in educating the public, the profession, and member states about these challenges and efforts.

How experienced defence counsel see their role in international trials

Despite what is sometimes suggested, there is no evidence that defence lawyers themselves do not believe in the overall legitimacy, fairness and motivation of international criminal proceedings. A recent survey of defence lawyers who have worked on cases before the ICTY and ICTR has shown that defence counsel with experience of international criminal tribunals do not see these as serving primarily political purposes.⁵⁵

Despite the academic criticism of aspects of the tribunals, it appears that 'familiarity actually breeds respect instead of contempt' – the vast majority (79.5 per cent) of those surveyed with actual experience of working in defence roles did not see trials there as 'politicised and slanted in favour of the opposition.' The research supports the argument that the increasing numbers of acquittals and dismissals of prosecution cases, along with robust debates about substantive and procedural issues (including equality of arms generally), have increased the perception among practitioners of the fairness of international justice.⁵⁶ Results of the survey included:

- Most defence counsel in the ICTY and ICTR are not motivated primarily by financial considerations or public recognition. Instead the leading motivation appears to be the professional and intellectual challenge, contribution to the development of legal doctrine, and participation in the wider scheme of international justice.
- Most defence counsel believe that acquittals are possible (they do not believe the process is merely a political exercise).
- Most defence counsel confine their case to factual and legal issues and do not believe that using political statements is an appropriate or useful tactic in trials. Most discourage their clients from making political arguments, and some would refuse to represent accused persons who are determined to politicise their trial.

The research revealed that 'the typical international criminal defence attorney is not a lawyer with a political agenda, but rather an experienced defence attorney interested in taking on a new professional challenge' and 'professional curiosity'. While some were motivated financially, especially local lawyers, the research showed that if there was an ideological reason for participating, it was a 'higher' level one, that is belief in the right to a fair trial and in the right to representation for even the most unpopular defendants,⁵⁷ while many did not appear to doubt their clients were involved in the events, but challenged the specific charges or believed they were grounded in overly-expansive legal doctrine. They see a principle role as uncovering evidentiary weaknesses in the prosecution's case.

It would be interesting to conduct a survey of African legal professionals – those who have defence counsel experience and others – in order to ascertain not only the level of awareness about the ICC (including equality of arms issues), but also perceptions of the possibility for a fair trial for accused persons in the ICC.

DEFENCE COUNSEL IN THE ICC: PRINCIPLES, MECHANISMS AND PROCEDURES

The Court itself states in its public (online) materials that 'defence is a fundamental pillar of the scales of justice at the International Criminal Court, and a key component of a fair trial ... the Court is ... steadfast in its commitment to ensure the proceedings before it are in conformity with the highest legal standards and due process rights of suspects and accused persons.'⁵⁸

This section, in describing the principles and architecture for ensuring equality of arms, examines the efforts that the Court has made, especially more recently, to give practical effect to equality of arms principles.

Principles: ICC rules and principles relating to equality of arms

As noted, the Rome Statute itself, although it sets out the rights of accused persons relating to equality of arms, does not make mention of defence counsel and their role, and does not deal with institutional mechanisms for the defence. There are, however, a number of specific principles consistent with defence rights relating to defence counsel and the ICC's duty to assist and enable them in their important functions.

While one cannot rely solely on the form of rules in showing equality of arms, it is clear that the ICC system provides for the principle through its various rules and regulations. Since its commencement, institutional mechanisms have been established to cater for defence needs and interests. A further positive feature is that it is also clear that the ICC incorporates efforts to consult with the legal profession and its representative associations.

Rules of Procedure and Evidence

The Rules of Procedure and Evidence⁵⁹ oblige the Registrar to organise the Registry in a manner that promotes the rights of the defence. Rule 20 of the ICC Rules of Procedure and Evidence is significant: it requires the Registry to 'ensure the professional independence of defence counsel' and to conduct all its operations 'in a manner that promotes the rights of the defence, consistent with the principle of fair trial' as defined in the Rome Statute. According to Rule 20, the guiding principle is what is necessary for an 'efficient and effective' defence:

1. ... the Registrar shall organise the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, inter alia:
 - (a) Facilitate the protection of confidentiality [Art. 67(10(b))];
 - (b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;
 - (c) Assist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;
 - (d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues;
 - (e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;
 - (f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialisation and training of lawyers in the law of the Statute and the Rules.
2. The Registrar shall carry out the functions stipulated in sub-rule 1, including the financial administration of the Registry, in such a manner as to ensure the professional independence of defence counsel.
3. For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.

Registry regulations

In addition, the regulations on the duties and powers of the Registrar (Chapter 4 which deals with counsel issues and legal assistance)⁶⁰ extend Rule 20 and provide

that in order to 'give full effect to the rights of the defence' the Registrar is obliged to cooperate with and assist defence counsel, including to facilitate their travel to the Court or site of custody or other location. This includes ensuring the relevant immunities and protections are in place.

Under these regulations, the Registrar is also obliged to open 'channels of communication' and hold consultations with any professional body or association for defence counsel which may be established, and may arrange things such as seminars 'for the purpose of holding in-depth discussions of the role of the legal profession before the Court' (reg. 119(1) and regs. 120-121).

For the purposes of 'the specialisation and training of lawyers in the law of the Statute and Rules', subject to available resources, the Registrar is obliged to take a number of steps (reg. 140) to assist the professional advancement of counsel, with due attention to equal participation and geographic distribution, and ensuring that counsel from more disadvantaged jurisdictions are able to access training (reg. 142). Training related issues are important to equality of arms and are discussed further below.

Principles: professional conduct issues for ICC defence counsel

Since 2005 there has been a uniform Code of Professional Conduct for counsel appearing before the ICC.⁶¹ Based on the ICTY and ICTR experience, there was early recognition in the ICC of the need for a Code, although reaching the final document was a difficult process.^{62, 63} The Code is based on Rule 8 of the Rules of Procedure and Evidence (and see Rule 20(3)). In carrying out his or her duties, defence counsel is bound by the legal documents of the Court as well as the Code. All counsel who appear before the ICC are subject to the Code: Rule 22(3). The Code itself asserts (Article 4) that it has primacy over other ethical or professional responsibility codes in relation to conduct of the counsel related to Court matters, and Article 5 (see textbox on page 46) sets out the sworn affirmation that is required of defence counsel.

Article 6 is significant. It provides:

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:

- (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or
- (b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7 provides in part:

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.
3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court, including the enforcement of this Code.
4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

Article 8 deals with confidentiality and secrecy requirements. Article 9 deals with the relationship with the client, and Article 12 with situations in which a counsel must not represent or must cease to represent a client. Counsel has a right to refuse to agree to represent a client, and has a duty to refuse if there is a conflict of interest (Article 16), an Article 12 situation of impediment to representation, or when the counsel does not believe they have the expertise or time to deal with the matter properly. Articles 17 and 18 deal with the duration and means of termination of a representation agreement. There are a range of other matters covered, including obligations and prohibitions in relation to fee issues.

Article 14 provides that the relationship of client and counsel is 'one of candid exchange and trust, binding counsel to act in good faith when dealing with the client. In discharging that duty, counsel shall act at all times with fairness, integrity and candour towards the client.' When representing a client, counsel shall:

- 14(2)(a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's

duties under the Statute, the Rules of Procedure and Evidence, and this Code; and

- (b) Consult the client on the means by which the objectives of his or her representation are to be pursued.⁶⁴

Equally important is Article 24 (part of Chapter 3 of the Code), dealing with duties to other counsel and participants generally:

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.
4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.
5. Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings.

Chapter 4 of the Code deals with disciplinary mechanisms for violations and alleged violations of the Code by counsel.

Part of one's professional duty is not to take on a case that one is not competent to defend. Rule 22 of the Rules of Procedure and Evidence requires defence counsel to have established competence in international law, or criminal law or procedure as well as relevant experience as judge, prosecutor or similar capacity in criminal proceedings. Article 7(2) provides that counsel must 'maintain a high level of competence in the law applicable before the Court. He or she shall participate in training initiatives required to maintain such competence.'

The ICC is a world court drawing from all regions and legal traditions and this may result in varying expectations and perceptions of roles and practices. For example, in the civil law tradition it is appropriate to discuss the case privately with the assigned judge – this would be grounds for a mistrial in most common law

(adversarial) systems. It is also true that those not from an adversarial system are less comfortable with strong cross examination of the other side's witnesses.⁶⁵

Defence counsel's solemn duties under the ICC Code of Conduct

Article 5 of the Code contains the compulsory solemn declaration by counsel:

'...I solemnly declare that I will perform my duties and exercise my mission before the International Criminal Court with integrity and diligence, honourably, freely, independently expeditiously and conscientiously, and that I will scrupulously respect professional secrecy and the other duties imposed by the Code of Professional Conduct for Counsel before the International Criminal Court.'

Mechanisms: the Office of Public Counsel for Defence

The Rome Statute itself is silent on any institutions to represent defence interests or to support them. In 2006, and in order to address equality of arms, a new independent ICC office (falling administratively under the Registry) was created to support defence lawyers and their teams: the Office of Public Counsel for the Defence (OPCD). The ICTY and ICTR had over time, and under pressure from representative bodies of defence counsel, both developed units for managing and supporting defence counsel issues. These existed essentially within the Registry.

If the Rome Statute were negotiated today, there would be reference to defence support structures given the experience of other tribunals and the evolution of understanding on the need for such mechanisms. The Special Court for Sierra Leone has a Principal Defender's office which is somewhat separate from the Registry, as does the newest international tribunal, the UN Special Tribunal for Lebanon, whose defence office is funded through the tribunal itself.⁶⁶

In 2004 ICC members decided against creating a permanent office of defence counsel because of the cost of retaining high quality counsel on an ongoing basis even if there was little work at the ICC, and to prevent there being a limited, exclusive set of defence counsel. The 2006 creation of the OPCD was in recognition of the changing workload of the Court – defence counsel would be chosen from the list and requested to assist the Court, and the OPCD would support them and provide legal advice.

The OPCD is intended to contribute to 'levelling the playing field' between the prosecution and defence, giving advice to lawyers on the ICC list, and building the capacity of defence teams to respond quickly to the need for assistance. It is particularly intended to assist with the early stages of mounting a defence or dealing with defence issues.

If appointed as duty counsel, the OPCD can provide information to the suspects on their arrival at the Court, and a written explanation of their rights. It can also provide an 'institutional memory' on dealing with defence issues, of great assistance to new defence counsel.⁶⁷ One particular role of the Office is to help protect the interests of the accused during the initial stages of proceedings, before defence counsel has been appointed or selected, or when there is merely a 'situation' before the Court (and before a suspect has even been named).

The intention was that the OPCD would also ensure that defence counsel issues and the rights of the accused are given attention and understood in the ICC's work generally, inside and outside the institution. The OPCD has also provided the defence with legal research and advice, and developed templates of common motions for defence counsel.

The OPCD is dealt with in Court Regulations 76 and 77, and in Section 5 (regs. 143-146) of the 2006 Regulations of the Registry, and its staff are members of the Court staff. Registry Regulation 144(1) provides for the Office to be independent in that it is not to receive any instructions from the Registry in fulfilling its task, although the Registry must assist the Office with ensuring confidentiality. Members of the OPCD can act at short notice, if necessary and in exceptional cases, as duty counsel or as counsel for a person requiring legal assistance before a Chamber, and are bound in such cases by the Code of Professional Conduct (see below). When acting as duty counsel, the Registrar must provide the OPCD with 'all information and documents' necessary for fulfilling these functions (reg. 145). The Office can also in some respects assist counsel when they are acting alone and without a legal aid funded team (see below).

The OPCD acted as duty counsel in the case of Germain Katanga, but due to its need to assist all teams it cannot routinely act directly in individual cases. OPCD should also avoid doing so because of the risk of perceptions that the defence is not independent of the ICC: although the OPCD is independent, its members are ICC staff, and the distinction might be lost on the wider public. There is also a need to be able to reassure suspects of the independence of their defence.⁶⁸

In a measure of fulfilling equality of arms, in the Lubanga case (the first ICC trial), the OPCD has provided substantive legal research and support to the Lubanga defence team.⁶⁹ As the IBA has noted, given the daily length of proceedings, the defence team has very little time or resources to carry out research to be able to respond in a timely manner to legal issues as they arise.⁷⁰ The OPCD now has 'real time' access to proceedings from their offices (which are in a separate facility) to assist the defence.

The IBA has further pointed out that, 'given the limitations on the size of the defence team due to constraints under the Court's legal aid budget, the supporting role of the OPCD is crucial to filling the gap', but that in order to fulfil its mandate, the OPCD must be adequately staffed.⁷¹ The Office presently has only four permanent staff members (principal counsel, legal assistant, associate counsel, and case manager). A counsel position has been granted on a temporary basis for 2009 and the OPCD hopes that this position will become permanent for 2010.

Mechanisms: Defence Support Section, Division of Victims and Counsel

This division of the Registry is distinct from the OPCD and is incorporated fully within the Registry. It administers the legal aid scheme of the ICC, and the publicising and administering of the list system of available and eligible counsel (see below). The Division also has a training coordination function, as well as the responsibility to assist defence counsel administratively, for example with required travel, visas, and means to secure the cooperation of government officials (see Chapter 4 of the Regulations of the Registry). The first contact on defence related issues by a suspect upon arrival at the ICC is with this Division, which explains basic rights and provides the suspect with the list of counsel.⁷²

The separation of the Division from the OPCD is an important distinction between substantive issues (handled by the OPCD which is independent) and administrative issues for the defence (where for obtaining responses to requests it is useful that the office dealing with these is within the Registry). Human Rights Watch has pointed out that the separation of the OPCD from the Division, and the fact that the OPCD does not need to deal with counsel fees and other administrative tasks, helps to create an impression of independence and avoids the OPCD being perceived as merely agents of the Registry and the ICC.⁷³

It should be noted that the status and support that victims have before the ICC is a potential concern for defence counsel, since the defence has, in effect, to deal

with two sources of allegation and argument (from the victims' representative and from the Prosecutor). This is considered in more detail below.

Procedures: the list of defence counsel

There is no permanent defence team for all ICC cases. Most ICC defence counsel maintain their own practices in their national jurisdictions. The decision was taken that it was preferable to have a diverse and rich array of legal representation before the Court, and enable participation from practitioners everywhere, rather than an exclusive core of lawyers. However, there are strict criteria and a process for being eligible for selection.

The Registrar is obliged to establish and maintain a list of counsel and their details, and take steps to provide mechanisms for those seeking to be listed as counsel (Rule 21(2) below; also Registry reg. 122). The Registry is obliged to provide assistance to a person who is seeking legal assistance (within the framework of Court proceedings), by providing them with the list of counsel (reg. 128). The Defence Support Section within the Registry manages the list and promotes its existence.

The ICC List of Counsel consists of a roster for defence counsel and legal representatives for victims and is open to international lawyers from any jurisdictional system who fulfil the requirements (see below). The Registry is responsible for selecting and admitting individual applications (Rule 21; see also Regulations of the Court, regs. 67-70). Potential ICC counsel may seek to be listed by the Registrar and can elect to be available to represent victims only, or defendants only, or both. Under its regulations, the Registry also deals with obtaining lists of potential assistants to counsel (under regs. 124-127, Court Reg. 68, five years of relevant experience is required), and for Court funded professional investigators assisting the defence (regs. 137-139).

Procedures: criteria and qualifications for defence counsel

The ICC has set criteria for defence counsel in order to ensure better quality proceedings. This includes the requirement of at least ten years relevant experience in international or criminal law. In this respect the ICC has learned from the early experience of the ICTY in particular, where poor quality defence

counsel were unable to assist the Court to streamline trials and pre-trial procedures.

Rule 22 of the Rules of Procedure and Evidence (appointment and qualifications of Counsel for the defence) deal with this issue, as well as making it clear that counsel are subject to various rules while serving before the Court:

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.
2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.
3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties.

Procedures: assigned counsel and legal aid

Virtually all defence counsel in modern international criminal trials have been assigned by the tribunals, rather than retained by the accused themselves. As already noted, Rule 20(1)(c) obliges the Registry to assist arrested persons, those being questioned in relation to a charge (Article 55(2) of the Statute), and accused persons, in obtaining legal advice and the assistance of legal counsel. There is a system of 'duty counsel' in the event that legal representation is needed at any point and at short notice (for example, if one counsel withdraws from representing his client). Under reg. 129 (Court Reg. 73), the Registrar is obliged to assist in providing duty counsel, by 'guaranteeing the availability of counsel' whenever it is required (in particular, at the outset of proceedings).

Rule 21 deals with the assignment of legal assistance by the Court in relation to Statute Articles 55(2)(c) and 67(1)(d) dealing with the right to representation:

1. ... criteria and procedures for assignment of legal assistance shall be established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations ...
2. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.
3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.
4. A person choosing to represent himself or herself shall so notify the Registrar in writing at the first opportunity.
5. Where a person claims to have insufficient means to pay for legal assistance and this is subsequently found not to be so, the Chamber dealing with the case at that time may make an order of contribution to recover the cost of providing counsel.

The ICC Registry has operated the system of assigned counsel paid for under legal aid by the Court as follows:⁷⁴

Ad hoc counsel

This involves assignment by the Pre-Trial Chamber of counsel when there is an investigation or situation in which the Court becomes engaged, to represent the 'general interests of the defence' pending the further development of the matter (Rome Statute Article 56(2)(d)), often in cases where there is not yet any named suspect, or the suspect is not yet before the Court. The Chamber has the power to appoint counsel in the interests of justice (Court Reg. 76). These ad hoc counsel are appointed to ensure that from the outset of proceedings, there is a dedicated party looking out for defence interests.

For example, ad hoc counsel might be appointed in relation to applications for victims' participation (Article 68(3)), unique investigative opportunities (Article 56(2)) and to respond to *amicus curiae* submissions received under Rule 103 of the Rules of Procedure and Evidence. Thus ad hoc counsel may be appointed before there is any particular suspect, before the charged suspect has been brought before

the Court, and before the suspect has selected and retained a counsel from the list. Such counsel have been paid the same rates as duty counsel.

Ad hoc counsel have been appointed even at the initial 'situation' stage (before there is any named suspect) in relation to DRC, the Uganda referral, and the Darfur situation. Mainly, this has been to safeguard defence interests in relation to victim and witness requests for protective measures (because the defence still needs to test any evidence).

The system of ad hoc appointments is still accompanied by a degree of uncertainty for defence counsel. For example, in the Uganda referral (*Prosecutor v Kony*), counsel had been appointed 'to represent the interests of the defence' in relation to applications by victims to participate in proceedings (see below). This leaves counsel in an uncomfortable position – there is no means for them to take instructions from their clients (those appearing on the charges in the *Kony* case). However, counsel are able to act in the interests of what a nominal defendant might require in order to maximise their lawful defence interests.

Duty counsel

These are counsel appointed under Article 55(2) (where no trial has yet taken place) when the suspect is in the Court's custody. That is, when persons are being questioned by the Prosecutor, and in the case of Thomas Lubanga, delivered to the Court as an accused person. The purpose of such a counsel is to provide appropriate assistance to persons questioned by the Prosecutor who wish to exercise their right to assistance. Since requests for assistance are unpredictable and occur sporadically, and so appropriate provision has been made in the administrative mechanism relating to this assistance.

Substantive counsel

Once the Registry has shown the accused the list of available defence counsel, the accused may select a legal representative from this list for the purposes of representing them in the more substantive matters of the proceeding. In the ICC system, the composition of the actual defence team is nominally assigned to the lead counsel who is the duty counsel appointed at the outset of proceedings (even if this person is subsequently replaced).

How assigning and selecting counsel works: the Lubanga case example

The treatment of Thomas Lubanga is an illustration of the ICC system of assigning counsel, in keeping with defence rights. In this case, a duty counsel was involved.

Immediately upon Lubanga's transfer to the Detention Centre in 2006, the Registry presented him with a list of duty counsel who had confirmed their availability to assist him in his first appearance before the Chamber. After that first appearance, and after consulting the full list of counsel authorised to appear before the Court, Lubanga appointed Jean Flamme (a Belgian lawyer) as his counsel. Flamme appointed a legal assistant under the Court's legal aid system, a case manager and a resource person for investigations. The Registrar authorised such appointments. Following preliminary hearings, a further legal assistant was approved by the Registrar and added to the defence team. Flamme also received assistance from the Office of Public Counsel for the Defence and from persons on the Court's internship programme.⁷⁵

Once the accused has selected a counsel to be assigned, under the Regulations the counsel then enters into a representation agreement with the accused person. This person is then the counsel's client. The ICC's Code of Professional Conduct for Counsel (see below) then applies. This provides that counsel must fulfil the representation agreement in good faith, keep the client informed of case developments (so that the client can in turn give informed instructions), and put the client's legal and legitimate interests first, avoiding conflicts of interest. When there is no identifiable client, or no identifiable accused, the duties of counsel are inevitably less clear.

Fee and cost issues

The ICC legal aid system covers all 'reasonably necessary' costs for the conduct of an 'effective and efficient' defence. These may include counsel fees, fees of assistants and investigators, office fees, translation, and travel costs. Under reg. 83 of the Court's Regulations, it is the Registrar who is responsible for the administration of the legal aid programme of the Court. The Registrar is obliged to manage the legal assistance paid by the Court 'with due regard to confidentiality and the professional independence of counsel' (reg. 130(1)). The Registry will fund

counsel fees as well as the costs of the defence team according to fixed criteria reviewed from time to time.

At the trial level the Court's legal aid programme allows for one lead counsel, a co-counsel, two legal assistants and a case manager. The team may also be assisted by interns. The accused selects a lead counsel from the list. After the first appearance (where counsel is alone), the lead counsel chooses a core defence team (one assistant and a case manager), who are Registry funded. Except when counsel acts alone, this core team is supplemented with additional staff during the trial phase depending on the scale and complexity of the charges or other aspects of the case. The lead counsel requests support from the Registrar, and any refusal of extra staff can be reviewed by the Chamber.

In the following cases, however, the counsel must act alone (i.e. Registry support for team members will not be provided):

- Ad hoc counsel (representing the general interests of the defence, usually early in the proceedings)
- Duty counsel (assistance provided for a person undergoing questioning by the Prosecutor)
- Post-trial (the period between the closing arguments and the judgment).

Although acting alone at these times, counsel may receive assistance from the Office of Public Counsel for the Defence.⁷⁶ There is clearly a need for attention to the case management and research assistance that defence counsel need in ICC cases, which involved years of investigations, hundreds of witnesses and documents, and very serious charges. It is when questions of staffing arise that equality of arms becomes a very real issue.

Application for legal assistance is in terms of the requirements of regs. 131-132, and includes necessary proof of indigence (inability to afford one's own counsel). That is, the ICC scheme for assisted legal counsel depends on a finding that the accused is indigent, or unable to pay for the costs of their defence. This has proved a controversial and difficult issue, but has the Court's attention.⁷⁷ The accused who avails himself of legal aid does not, in the ICC, have a completely unfettered right to choose his or her counsel: the Court has the right to select a counsel for the accused when required in the interests of justice.

The ICC approach during its evolution was for the Registrar to manage all issues of assigning and compensating defence counsel, according to clear

guidelines, and with oversight (in effect) of the Pre-Trial Chamber which has overall conduct of the matter.⁷⁸ Counsel were to operate on a fee structure (for level of lawyer, case complexity and stage of proceeding) negotiated at the outset and subject to review, with a capped maximum. Other payments (for travel and subsistence and so on) were part of the scheme.

Fees are now based on a fixed monthly fee system, comprising a maximum allocation for each phase of proceedings decided by reference to an agreed action plan for every six months or before a new phase, with provision for fee disputes (regs. 133-135). The remuneration of defence teams now falls under a specific scale stipulated by the Registry. The OPCD staff are remunerated according to the UN salary scale. Legal aid commissioners (reg. 136) assist the Registry in relation to fees and legal aid budgeting issues.

The guiding principle in the regulations is whether counsel actions (and associated costs) are necessary for the 'effective and efficient' representation of defendant clients. The Committee on Budget and Finance of the ICC's Assembly of States Parties continues to oversee the development of the legal aid system, showing particular attention and concern for the rigour of the test for indigents eligible for assistance, preventing abuse of aid funds, and keeping the costs of legal aid reasonable.

Procedures: the uncooperative defendant

In the past, some defendants (most famously Slobodan Milosevic) have denied the jurisdiction of international tribunals such that they ignore defence counsel appointed to them, who nevertheless may be obliged to assist the court. The ICTY in some cases imposed counsel against the will of defendants, so as to assist the tribunal. The ICTY and ICTR have repeatedly maintained that it is possible for counsel to conduct the defence without the accused's full cooperation and to use their professional judgment in deciding which aspects of the accused's defence to advance, and to keep records of disagreement against the possibility of appeal on these exact grounds: counsel is independent of the accused and must exercise their judgment, and protect the accused's lawful interests at trial, without allowing the accused to abuse these rights.⁷⁹

For the purposes of the handbook it is not necessary to consider this complex ethical and legal area in detail – it is sufficient to note that there is inherently a high degree of risk of uncooperative defendants, or those who seek to self-represent

including to demonstrate non-recognition of the forum, and to try to politicise the trial by making overly political statements at the trial.⁸⁰ The Registrar will mediate any dispute between defendants and their counsel (reg. 119(3)).

CURRENT AND FUTURE CHALLENGES RELATING TO THE ROLE OF DEFENCE COUNSEL

The ICC is at 'a critical standard-setting phase' of its existence and has been described as being at an 'institutional crossroads' in relation to some of these still unsettled issues and the difficult balance involved in them.⁸¹

There remain a range of challenges, some already noted, facing defence counsel in ensuring equality of arms in the ICC so as to ensure fairness in international justice. This handbook is not a guide to substantive or procedural law, nor lessons learned or tactics for defence counsel in trials. Instead, and in addition to problems of resources and the various issues covered in the preceding section, what follows are some current issues that are likely to continue to receive attention as the ICC evolves.⁸² One aim of the handbook is to increase the capacity of African legal professionals to join and shape these debates on the important role of defence counsel.

It is not easy to balance institutionally the competing claims of the right to a fair trial and the imperative for efficiency in administering international justice.⁸³ In addition, consensus on a number of issues affecting defence counsel is difficult to achieve. One of the reasons is that the ICC has a diversity of practices and experiences in different jurisdictions.⁸⁴ There is 'little doubt that the issue of equality of arms for defence counsel, particularly assigned counsel, will continue to be a contentious issue in future international criminal trials'.⁸⁵

The International Bar Association is a leading institution in exploring challenges relating to defence counsel at the ICC. Its ICC Monitoring and Outreach programme continues to study contentious and difficult issues. This work is vital – and it is important that African lawyers are informed participants in these debates.

The elusive balance: fairness and efficiency

In monitoring and resolving equality of arms issues in the ICC, there will inevitably be a tension between the interests of fairness and accuracy on the one

hand, and efficiency and time on the other. Although the accused is entitled to a trial without undue delay (Article 67), the political and budgetary pressure for quicker completion of investigations and trials is likely to remain.

The experience of the ICTY and ICTR is partly relevant (although they were ad hoc mandated tribunals while the ICC is a permanent international court). The Completion Strategy for the ICTY and ICTR (based on UN Security Council Resolution 1503) was designed to expedite and increase the efficiency of the cases on the tribunals' dockets. The strategy has involved dropping some charges from overloaded indictments, reducing the mass of evidential material, and various mechanisms to speed up the trial process.

While swifter, leaner justice with fewer indictments may be a benefit for defendants and their counsel, dangers always exist for the defence in such situations. The unavoidable problem is that the limited budget for international tribunals creates a demand for more efficient proceedings. This is not to say that fairness and accuracy are sacrificed in such situations, but the right to a fair trial and to present and challenge evidence and make arguments must still be maintained. Wherever expedited proceedings take place there is a greater need for vigilance to ensure fairness and accuracy, and to ensure that justice continues to be done, and is perceived to be done.

The role of victims and impact on defence rights

In international criminal justice trials, it is becoming increasingly difficult to balance the interests of victims and the rights of the defence. For present purposes, the concern is the impact of victims' participation and protection on the rights of the defence: how to 'grant meaningful participation rights to victims without compromising the defendant's right to fair and expeditious proceedings'.⁸⁶

The problem for defence counsel is that the Rome Statute gives unusually explicit attention to the participation rights of victims. The ICC practice of accommodating victim participation (through legal representatives) may have the effect of obliging the defence to undertake its own investigation of evidence other than that presented by the prosecution, and to be forced to respond to the case presented for the victims as well as the prosecution (on which the liberty of the client depends).

In the *Lubanga* case before the ICC, for example, there were 74 requests from victims to participate in the proceedings, and the defence was required to comment on those applications within 10-15 days. The time required to prepare

these responding observations is an enormous additional burden on the defence, which also has to observe time limits imposed in relation to other issues.

There is also the potential for the process of witness protection as it relates to disclosure – very important in trials during or after violent conflict – to affect the fairness of proceedings by depriving the defendant of timely and substantial information necessary to investigate and respond to allegations made against them.

The rights of the accused to confront their accusers and test the evidence put against them, and to a speedy trial process, comes into conflict with the legitimate concerns of victim participation, protecting witnesses from possible reprisal, encouraging witnesses to appear at the ICC, and avoiding re-traumatising witnesses. There should be an inherent preference for disclosure unless there are compelling reasons for restrictions in order to safeguard witnesses. Anonymous participation can put the defendant at a disadvantage and needs to be closely scrutinised in each case.⁸⁷

An enhanced role for victims is a logical part of fulfilling some of the Court's functions, as well as having a basis in principle. As is often said, international criminal justice, dealing as it does with allegations relating to mass atrocities, partly serves a function of providing a forum for the peaceful and formal representation and resolution of legal aspects of these events. However, it is important that processes to deal with the victims' right to participate in trial proceedings do not interfere with the rights of the defence.

It is possible, and preferable, that ICC practice will err on the side of defence rights over victim's rights, if there is any conflict. Article 64(2) of the Rome Statute states that in ensuring a fair and expeditious trial full respect for the rights of the accused must be maintained, as well as due regard for the protection of victims and witnesses, while participation of victims must not be prejudicial to the accused's rights (Article 68(3)). As the IBA has strongly argued, this indicates that defence rights should in general take primacy over victim's legitimate interests.⁸⁸ In this sense one is not balancing equal considerations. The ICTY approached the issue in that way.

This argument is reinforced by considering that there is no international criminal law outside the Rome Statute protecting victim's rights in the way that the defence is to be protected. Conceptually the trial is brought primarily for an

offence against the international community, not against the victims themselves.⁸⁷ These matters will remain contentious and still await formal resolution in the ICC.

Fairness through early and complete disclosure by the prosecution

Again partly because of concern for the interests of victims, informants and witnesses, Article 54(3)(e) of the Rome Statute allows the Prosecutor to obtain information confidentially (the information cannot be disclosed to the defence unless the person or organisation who provided it consents to its disclosure.)

It was the late disclosure of the potentially exculpatory confidential material which initially led to the stay of proceedings in the Lubanga case, since it may have affected Lubanga's team's ability to test its case and conduct an effective defence.⁹⁰ Although the ICC Trial Chamber has ruled on this issue in a way that tends to support the rights of the defence, it is likely that there will continue to be tension, generally and on a case by case basis, between confidentiality of evidence and the Article 67(2) right of the defence to full disclosure by the prosecution of materials that might potentially be exculpatory (i.e. anything which might demonstrate the innocence of the accused, or affect the credibility of prosecution evidence).

These sorts of procedural or structural challenges compound any resource or institutional challenges to equality of arms in the ICC. It is important for African lawyers to be engaged in these debates, as representatives of the continent's law profession.

Making lawyers matter: opportunities, support and training

The IBA has stated in its *Equality of Arms Review* that a key to future success is for the Court to 'show lawyers that they matter' to the ICC, while Philippe Kirsch, the former Judge President of the ICC, has observed that 'a closer dialogue between the International Criminal Court (ICC) and the legal profession is of paramount importance to fulfilling the ICC's mandate'.⁹¹ The truth is that action is required both by the Court (especially through training and other outreach opportunities) and by legal professionals themselves (including African lawyers and legal associations), who should seize the initiative and approach the ICC about how

they can contribute to bringing fairness to international justice. Consider the following:

- Training of defence counsel (and potential defence counsel) is, along with independence and adequate resources, described as one of three 'structural necessities' for achieving equality of arms in the ICC.⁹² The Registry conducts an annual seminar for counsel, and has in the past managed to obtain financial support to bring African lawyers to participate.⁹³ There is a need for more Registry attention to this element in improving the quality of defence counsel available for Court service. Note that the Registry regulations require it to direct its attention to this issue where it can. The precise role of the Registry vis-à-vis the OPCD in training and outreach needs to be clarified. Partnerships with international and national bar associations and civil society might be useful in this regard. Such training should aim to strengthen the national criminal justice capacity of countries, through ICC related training.⁹⁴
- The Defence Support Section needs further support in reaching out to African legal associations so that they may inform their members of the possibility of becoming involved in ICC work.
- As the IBA notes (and as this handbook partly attempts to do), the Court 'needs to do much more to convince lawyers that it is worth appearing before the ICC'.⁹⁵ Along with training, a range of engagement and awareness raising initiatives are needed, including in Africa, to encourage wider participation in defence counsel roles. This includes female lawyers – only about 40 out of 240 lawyers on the ICC's current list are women. There is a need to rationalise the process for inclusion on the ICC's list of defence counsel, and to promote awareness about this among African lawyers.

The various benefits of involvement in ICC work should be better publicised among African defence lawyers. Incentives to lawyers to become involved in ICC work include the professional reward and challenge, enhanced professional reputation, networking opportunities, privileges accruing from being a part of the List Counsel support system, and training in international criminal law provided to list counsel. It is possible that potential defence lawyers are unaware that the Court provides logistical and administrative assistance, in addition to competitive remuneration, to those selected as ad hoc or duty counsel.

Building ICC defence counsel capacity in Africa

'... Training should be provided to African lawyers in order to facilitate their participation in ICC proceedings. Although it is the responsibility of individual practitioners to take the initiative to acquire the skills required to practice before the ICC, more opportunities should be made available to African lawyers to be exposed to the Rome Statute and its jurisprudence with the aim of encouraging participation in the work of the ICC. The representation of African lawyers at the ICC List of Counsel is disproportionate if one considers that all cases before the Court are from Africa. This also contributes to the misperception of geographical bias of the Court.'⁹⁶

Mabvuto Hara, SADC Lawyers Association President, IBA-EQ 2008

CHAPTER FOUR

Conclusions and recommendations

CONCLUSIONS

- Legitimacy and credibility are central to the international criminal law system. Fairness is indispensable to establishing and maintaining legitimacy. One significant element of ensuring fairness in proceedings is the availability of competent, independent and committed defence counsel. The seriousness of the charges at issue, the fundamental nature of fair trial rights, and the need for public perception of credibility in international justice all require effective defence counsel who enjoy equality of arms.
- Contrary to perceptions, good defence counsel can fully represent their client's interests while not obstructing the ICC from its own imperatives and objectives. Such lawyers are officers of the Court and can contribute not only to the actual and perceived fairness of proceedings, but to their accuracy and efficiency. Their participation helps to shape the jurisprudence of the Court in a more sophisticated way.
- To date the ICC has generally shown a strong record on safeguarding defence rights, showing that despite pressure for results it is prepared to substantially slow down proceedings to ensure the defence has adequate time to prepare properly. However, as Human Rights Watch notes, it remains too early to comprehensively assess the Court's performance in safeguarding fair trial rights.⁹⁷

- One true measurement of success for the institutions created to provide formal international criminal justice is whether there is fairness in their procedures and practice. This measure informs the wider role that international adjudication forums play (in attempts to bring peace while also resolving demands for accountability and justice). The number of convictions is not the foremost measure of success. The role of defence lawyers in presenting their clients' case before impartial and independent judges is a vital part of ensuring fairness. Whether the ICC and ad hoc UN sponsored tribunals are 'just' is inseparable from whether they are fair. The legality of the ICC is beyond question, but whether it is also perceived as legitimate and commands the respect of the international community and global public depends on the system's capacity to balance efficiency and effectiveness with fairness and accuracy.
- There is now a consensus that it is not enough that the rights of the defence are spelled out in formal terms in the Rome Statute and related rules and procedures. What is needed is action on the spirit, as well as the letter, of the rules in order to show beyond doubt the international community's clear and unequivocal commitment to fairness in international justice.
- There is a need for African lawyers to engage in an informed and confident way in ICC or national prosecutions, including as defence counsel, and in debates about the ICC's role in Africa and domestic implementation. There is a need for lawyers in Africa to be aware of the treatment by the ICC of defence rights, so as to be able to defend the Court's record in controversial debates in Africa. Legal professional bodies and individual practitioners can assist in promoting the interests of international justice, and in ensuring that fairness is built into national responses. There is a clear role for associations of African legal professionals to play in informing debates about international criminal justice, national measures against impunity, the role of defence counsel, and the importance of fairness in all forums of justice. However, perhaps more important is for Africans – and the legal profession in African countries – to take a lead in identifying criminal justice capacity needs and shaping responses to these.⁹⁸
- A by-product of greater engagement by African lawyers in the ICC (including in defence roles) will be the enhanced ability of African lawyers to put pressure

on their national governments to fully incorporate the Rome Statute into national law, while raising the profile of the need for better resourcing and rights based improvements in national justice systems.

- Fairness is not only important in international trials. Accused persons in many of our continent's criminal justice systems face a far greater challenge than those brought before the ICC, with its various mechanisms, protections, oversights, and resources. Any efforts to increase the capacity of national justice systems to deal with international crimes should be designed in a way that has positive effects for the national criminal justice system generally. African defence lawyers who are able to engage in the ICC system, either in The Hague or in their own country, ought to consider ways to highlight fair trial issues in their own jurisdictions. Since national courts can be forums for pursuing international justice, and in order to fulfil the ICC principle of complementarity, there is a need to boost criminal justice capacity in national professions and jurisdictions (although domestic legislative implementation of the Statute may be the greater priority).
- The ICC is at a procedural crossroads, and one significant challenge will remain the balance between the rights of the defence, and other competing considerations – time and case efficiency, victims' rights, budgetary issues, and so on.⁹⁹ 2012 will mark a decade since the Rome Statute came into force and the Court was established. Commentary in 2012 on the Court's performance might give insufficient attention to the remarkable fact that the Court exists at all. As a legal body attempting to operate in a highly politicised international context, its performance must perhaps be judged on what it was enabled to do by member states, rather than what it was able to do itself. Like the UN system, the criticism is far too often of the institution itself, whereas it is only member states who are able to change how things are done.
- The relationship between peace and justice will continue to be debated in Africa, and the role of the ICC will continue to feature in this debate. While it represents the institutional form of high ideals, it is also useful to remember that it is only one mechanism among several that the African community of states – and the international community as a whole – can use to end and prevent conflict.

- The ICC is itself a human rights institution. Moreover, it is not only prosecutors, seeking to bring perpetrators to justice, who are the human rights lawyers here. Those who appear as counsel on behalf of accused persons are also human rights lawyers: they serve an idea of fairness and equality in the administration of justice. In this respect, all participants (investigators, prosecutors, defence, judges) are all fulfilling distinct roles that together make the process stronger, more transparent, more fair and more just. Beyond its institutional reality, the ICC is a powerful and important idea. The Court's creation has made an idea – to end impunity for the worst international crimes – a reality. This reality may seem incomplete or frustrated, but nevertheless, a system exists to fairly decide the guilt or otherwise of those accused of crimes that offend humanity at large. Apart from its actual operations and decisions, it is perhaps the idea of the ICC that holds most promise, and demands our support. The idea of a mechanism for bringing perpetrators to justice may help prevent further crimes from being committed. The idea of a forum for justice and memorialisation may offer some comfort to victims, and in this way contribute to lessening cycles of violence. The idea of an impartial forum at the international level can give comfort to those whose belief in justice is matched by a concern for fairness. For African legal practitioners, the idea that there is a fair forum for the investigation and adjudication of international crime can help to assure African lawyers that to participate in the ICC process – including as a defence lawyer – is to make a contribution to humanity's quest for justice. For this idea to become a reality, a number of steps are needed. Some of these are outlined in the section on recommendations below.
- There is a need for legal practitioners, national and regional professional associations, legal educators, and the judiciary across African countries, to engage in debates about how to end impunity in Africa and how to ensure fair, efficient and accurate criminal justice mechanisms at the national and international level. There is a need for African lawyers to engage in debate about the ICC and its role, equipped with an understanding about the issues and facts at stake. Although African lawyers, activists, government officials and others played a big part in the ICC's establishment (and continue to work throughout the Court system), there is in particular a need for greater appreciation of the role of the defence lawyer, and means to ensure that African practitioners can confidently and competently represent defendants in future, should they feel a professional vocation to do so.

It is by promoting awareness of the ICC's strengths and limitations, and by participating directly in its processes, that African lawyers can continue to contribute to bringing fairness to international justice.

RECOMMENDATIONS

To African legal practitioners

African legal practitioners ought to consider engaging professionally with the ICC, including by registering and training to act as defence counsel. This includes being prepared to act as defence counsel in national proceedings, if any, undertaken in fulfilment of Rome Statute obligations. It also includes becoming more active at the national level in advocacy for the domestic implementation of the Statute, or ratification (as may be relevant).

African legal practitioners and teachers ought to consider taking the initiative in acquiring and disseminating expertise in international criminal law and procedure.

Law students, academics, judges and government legal officers ought to consider the ways in which they might contribute to African engagement in the ICC's wider objectives, and in debates on the ICC's role, including the role of defence counsel.

To African bar associations

See the above recommendations to individual practitioners.

Bar Associations in African countries ought to seek out opportunities to network formally and informally with the IBA and bar associations outside of Africa, including accessing expertise and assistance to develop capacity for an ICC capable pan-African bar.

In particular, better resourced African bar associations ought to consider establishing programmes to assist weaker bar associations in their sub-region, in order to increase the capacity of as many African countries as possible to contribute defence practitioners towards the efforts of a global criminal justice system.

To the African Union

The AU has a role in ensuring fairness in international justice, both in terms of support to defence lawyers, and in wider support to the institution (the ICC) that African countries helped to create, and which a majority of AU member states are members of through their ratification of the Rome Statute. The AU's own Charter calls for member states to act together to end impunity for international crimes.

To the ICC Registry and Assembly of States Parties

The Registry ought to consider efforts, within its powers and resources, to increase awareness among the African legal profession of the means to register for defence counsel work with the ICC, and for training opportunities once listed or at least once assigned. This includes outreach by the Registry, in terms of its regulations, to professional associations in African countries. The Defence Support Section ought to be encouraged and enabled to conduct further efforts to publicise, within the African professions, the system of applying to be included on the list of available ICC defence counsel.

The OPCD should be encouraged and enabled to fulfil its intended function to conduct outreach (and participate in ICC media events) about defence rights and the measures taken by the ICC to protect them, in order to explain these issues and efforts to communities. This issue should not be left to the OPCD – the ICC system as a whole has an obligation to ensure there is understanding of fair trial rights and how the ICC works strongly to protect these. This can greatly add to perceptions of the legitimacy of international justice.

Other general measures the Registry might take are to ensure adequate staffing of the OPCD and coherence with the Defence Support Section. States Parties ought to provide additional resources to the OPCD.

To the International Bar Association

The IBA has led the way in many respects through the publication of *Equality of Arms Review* and other initiatives. The IBA ought to continue to concentrate on consensus building, training, networking and advocacy for and with African bar associations (national and regional). Specifically, the IBA should explore avenues

to increase African legal practitioners' understanding of, and engagement with, the ICC, including in defence counsel capacities, and in ways that contribute to the longer term strengthening of generic capacity in the national criminal justice system.

To legal educational and resource institutions

Those educational institutions (law schools) and information institutions (publishers, libraries, etc) inside Africa can play a role in ensuring better understanding of the ICC and issues of fairness in international justice, through specific programmes and through outreach to international partners in the provision of specific resources and linkages.

In order to provide a basis for a more comprehensive African defence bar, and to consolidate the experiences of the last decade and more, African law schools should consider whether their curricula offer courses in international law, international criminal law, and international human rights law, and seek partnerships and other assistance in creating or developing such courses.

To the media in Africa

It is important that media commentators dealing with ICC issues know about the many sources of information about the Court, its structure and operations, and efforts at procedural reform, as well as all sides of the debate on the role of the ICC in Africa, so as to make a constructive (even if critical), fact based contribution to public debate about Africa's commitment to ending impunity and the means adopted to pursue this.

Notes

- 1 The views expressed herein are those of the author alone and do not necessarily reflect the views of the ICC.
- 2 Hara, Interview with Mabvuto Hara, President of the SADC Lawyers Association.
- 3 For an easy-to-read overview, see NHRC, *The Road to the ICC*. For a fuller historical overview, see Cassese et al, *The Rome Statute of the International Criminal Court*, and Schabas, *An introduction to the International Criminal Court*. For a comprehensive assessment of the ICC's first few years, see HRW, *Courting History* and IBA, *First Challenges*.
- 4 Laughland, *A History of Political Trials*.
- 5 Waddell and Clark, *Courting conflict*.
- 6 Situations and cases, International Criminal Court.
- 7 See generally du Plessis, *The International Criminal Court and its work in Africa*; ICC Coalition, *Africa and the International Criminal Court*; Goldstone, *Does the ICC target Africa*; Mochochoko, *African and the International Criminal Court*.
- 8 Du Plessis, *Building African capacity to respond to African international criminal justice problems*.
- 9 Quoted in Goldstone, *Does the ICC target Africa*.
- 10 African countries in major conflict zones still lack legal mechanisms to deal properly with suspected persons who may be within their jurisdiction. From a defence lawyers' perspective, and in terms of ensuring due process to persons accused of crimes, the lack of a clear national legislative framework to either try a person or extradite them to another ICC member state, or the Court itself, leaves an unsatisfactory situation (see generally Du Plessis and Ford, *Unable or Unwilling*). The wider danger is that when persons are surrendered to the Court by African states that have not legislated clear procedures and substantive offences into their laws, their due process and fair trial rights are at greater risk of being undermined or overridden. From a prosecutor's perspective, this is the risk of a strong case being undermined by procedural irregularities which a court might decide preclude the chance of a successful prosecution.
- 11 See also ICC Coalition 2009; Du Plessis, *The International Criminal Court and its work in Africa*; Du Plessis and Ford, *African states are destroying their credibility*; Goldstone, *Does the ICC target Africa*.
- 12 Du Plessis, *The International Criminal Court and its work in Africa*.
- 13 See www.iccnw.org for updated details of ratifications by African countries.
- 14 'A UN Fact Finding Mission on the Gaza conflict concluded in September 2009 that serious violations of international human rights and humanitarian law were committed by Israel in the context of its military operations in Gaza from December 27, 2008 to January 18, 2009, and that Israel committed actions amounting to war crimes, and possibly crimes against

humanity. The Mission also found that Palestinian armed groups had committed war crimes, as well as possibly crimes against humanity. The Mission recommended that the UN Security Council set up a body of independent experts to report to it on the progress of the Israeli and Palestinian investigations and prosecutions. If the experts' reports do not indicate within six months that good faith, independent proceedings are taking place, the Security Council should refer the situation in Gaza to the ICC Prosecutor.' UN High Commissioner for Human Rights, Press Release.

- 15 Young, ICC takes a beating.
- 16 Wilson, 'Emaciated' defense.
- 17 In the Special Court for Sierra Leone, issues arose in 2007 when the court-appointed counsel for the accused had his instructions to appear withdrawn by the accused. The Court nevertheless ordered the counsel to continue appearing. The counsel (Karim Khan) was faced with a dilemma between the direct order of the Court, and his obligations to his client under the Code of Conduct, which required him to discontinue representing Taylor (Wilson, 'Emaciated' defense). Such issues are of course by no means unknown in national criminal justice systems. However, they may create particular dilemmas for appointed counsel in ICC proceedings.
- 18 IBA-EQ 2008.
- 19 Wilson, Assigned defence counsel in domestic and international war crimes trials, 146.
- 20 Wilson, Assigned defence counsel in domestic and international war crimes trials, 147.
- 21 The Geneva Conventions relating to the law of armed conflict also provide for certain procedural guarantees for prisoners of war, in relation to any charges of war crimes or other crimes that may be brought against them. Provisions such as Article 105 of the 3rd Geneva Convention (on the right of prisoners of war to legal representation in any trial against them) reinforce the general rights of accused persons in post conflict trials.
- 22 For a history of the issue of defence rights in the ICTY and ICTR and other tribunals, see Wilson, Assigned defence counsel in domestic and international war crimes trials.
- 23 *Morael v France* 207/1986 (28 July 1989) and see *Fei v Colombia* 514/1992 (4 April 1995). Along with these issues, the right to be tried 'without under delay' is probably the most difficult one, in practice, for tribunals such as the ICC to fulfil (see Schomburg and Wild, The defence rights, 538). The nature, impact and aftermath of serious armed conflicts or campaigns envisaged in the offences in the Rome Statute result in considerable difficulties in gathering evidence, witness details, and so on.
- 24 See generally Bohlander et al, *Defense in International Criminal Proceedings*.
- 25 LCHR, *What is a fair trial?*; also Nowak, *UN Covenant on Civil and Political Rights*.
- 26 *United States v. Cronin* 466 US 648, 655 (1984).
- 27 *Kaufman v Belgium* 10938/84 (1986) 50 DR 98; *Niderost-Huber v Switzerland* [1997] ECHR 18990/91, 18 February 1997, [23]; more recently *SH v Finland* (App no 28301/03) [2008] ECHR 28301/03.
- 28 *Prosecutor v Dusko Tadic* IT-94-1A, 15 July 1999, [48]. *Prosecutor v Milutenovic* ICTY IT-99-37-AR73.2, 13 November 2003 confirmed that in the ICTY, equality of arms between the defence and the prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources. The principle of equality of arms

would be violated only if either party is put at a disadvantage when presenting its case, the tribunal held.

- 29 *Prosecutor v Kordic and Certez* IT-95-14/2A, 17 December 2004, [175]-[177].
- 30 *Karadicj* IT-95-5/18-PT 28 January 2009.
- 31 *Prosecutor v Kayishema* (Appeals Chamber) 1 June 2001 [63-70], upholding ICTR-95-1, 21 May 1999, [60].
- 32 *Prosecutor v Lubanga* (ICC-01-04-01/06) Decision 14 December 2007, [18], [19].
- 33 IBA 2009.
- 34 McGonigle, *De facto v. de jure* equality, 13.
- 35 Ibid.
- 36 On the issue of institutional bias since Nuremberg, see the special discussion of 'fair trials and the role of the international criminal defence' in Various, *Developments in the law*. For a full consideration of defence rights in the ICTR and ICTY, see Schomberg and Wild, *The defence rights*; also Ellis, *Defence counsel appearing before international tribunals*.
- 37 Ellis, *Defence counsel appearing before international tribunals*, 507.
- 38 It is clear, however, that Ellis is not stating that the ICTY's proceedings were unfair. Indeed he appears at pains to argue that they were fair despite relative neglect of defence counsel issues early on.
- 39 Wilson, 'Emaciated' defense, 8.
- 40 Others point out that while the ICC's office for defence support is physically separate from the Court building, the Prosecutor's office remains in the same building as the Court itself.
- 41 Writing about the '(in)equality of arms at the international tribunals' Heller, (In)equality of arms, quoting James Cockayne of the International Peace Institute, notes that among other things, in the Special Court the Prosecutor is an Assistant Secretary General in the UN system, whereas the head of the Defence Office is much lower on the UN ladder; the defence budget is a fraction of that of the prosecution, which has access to vehicles, phones, investigators, security, and other institutional features not available to the defence.
- 42 Other criticisms and complaints by defence counsel (or others) have included the relatively poor quality of defence lawyers in international tribunals – perhaps a reflection of the resourcing issue. Local defence lawyers in the ICTY, for example, were said to be of such poor quality as to be of very little assistance to the Tribunal in fulfilling its functions (Heller, (In)equality of arms). This is not a criticism one hears, to date, in relation to the ICC.
- 43 In areas that are still subjected to armed conflict or where security is very poor, there are questions about whether the trial of the accused should go ahead at all, if defence counsel have been unable to satisfactorily access witnesses due to the conflict and prevailing political situation. Sometimes equality of arms comes down to practical issues such as having sufficient time to confer with the accused, as his representative, at the end of each trial day, where the detention centre is some way from the Court (see IBA, *First challenges*).
- 44 In the course of this struggle in the ICTY, defence counsel set up the Association of Defence Counsel (ADC-ITY) which in 2002 was formally recognised by the Tribunal. Prospective defence counsel must be members of the ADC in order to appear at the Tribunal, a measure partly intended to improve the quality of defence counsel at the ICTY (see generally McGonigle, *De facto v. de jure* equality, and the links to associations at the end of this handbook).

- 45 See Turner, Defence perspectives on law and politics.
- 46 Turner, Defence perspectives on law and politics, 536.
- 47 Turner, Defence perspectives on law and politics.
- 48 Ibid.
- 49 Wilson, 'Emaciated' defense.
- 50 Bohlander et al, *Defence in international criminal proceedings*.
- 51 For the interested reader, Bohlander et al, *Defence in International Criminal Proceedings* also offers an authoritative and comprehensive overview of elements of a robust defence, and lessons learned from past experiences of defence counsel. Such issues and detail are beyond the scope of this handbook.
- 52 Ellis, Defence Counsel appearing before international tribunals, 492.
- 53 As described in Ellis, Defence Counsel appearing before international tribunals, 494.
- 54 *Report of the Secretary General on the Establishment of a Special Tribunal for Lebanon* (UN Security Council, New York, 15 November 2006 [UN Doc S/2006/893]), quoted in Wilson, 'Emaciated' defense.
- 55 Turner, Defence perspectives on law and politics.
- 56 Ibid.
- 57 Turner, Defence perspectives on law and politics, 546ff.
- 58 ICC website.
- 59 Rules of Procedure and Evidence (adopted by the State Parties September 2002), Official Records ICC-ASP/1/3.
- 60 The Regulations of the Registry ICC-BD 03-01-06 (entry into force 6 March 2006).
- 61 Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted December 2005.
- 62 Ellis, Defence counsel appearing before international tribunals, 505.
- 63 Before the ICTY and ICTR, there were a number of professional ethical issues, including problems of corruption and fee-splitting by defence counsel (defence lawyers apportioning a part of their fee (or making other gifts and payments) to their clients and clients' families). For discussion of this, see Ellis, Defence counsel appearing before international tribunals.
- 64 A defence counsel may pursue both factual and legal challenges to the case presented by the prosecution. There is nothing illegitimate about pursuing an acquittal on legal or procedural ('technical') grounds, as opposed to merely challenging the factual evidence against the client (Heller in Turner and Heller, Defence perspectives on law and politics). The professional ethical duty of the defence counsel instead requires him or her to advance arguments of law or fact that have a reasonable basis to them.
- 65 See McMorrow, Creating norms of attorney conduct.
- 66 The UN Extraordinary Chambers in Cambodia has a permanent separate office for supporting defence activities. The specially created War Crimes Chamber of the Court of Bosnia and Herzegovina, established by the international community's High Representative under the Dayton Peace Agreement, is another internationalised tribunal in recent times that has had a dedicated Criminal Defence Section to provide legal and administrative support to accused persons and their counsel. See HRW, *Courting history*; and Wilson, 'Emaciated' defense, 8 for discussion.
- 67 HRW, *Courting history*.

- 68 Ibid.
- 69 The OPCD helps counsel acting alone or their teams upon request from them without discrimination. Substantive legal research and support has been and is provided to ad hoc counsel, duty counsel and defence teams at any stage of the proceedings.
- 70 IBA, First challenges.
- 71 Ibid.
- 72 Human Rights Watch has argued that it would be more appropriate and logical for this function to be filled by the OPCD: HRW, *Courting history*. This makes sense, as the OPCD is better placed institutionally to provide independent advice and to be in direct contact with the suspects on issues of their rights.
- 73 HRW, *Courting history*.
- 74 See also 'Report on the Operation of the Court's Legal Aid System' ICC/ASP/6-4, 31 May 2007.
- 75 Ibid.
- 76 Court legal aid does not cover any proceedings that might be brought before a national court of an ICC member on arrest proceedings there before the person concerned is surrendered to the Court.
- 77 HRW, *Courting history*.
- 78 The ad hoc tribunals (ICTY and ICTR) both revisited the issue of fees a number of times. Most accused persons availed themselves of counsel assigned by the tribunal. The fee structure started off far too low to attract competent lawyers on a sustainable basis. Many defence lawyers have continued to appear despite the opportunity costs to their own practices, and many appearances before the tribunal were in effect pro bono work by international lawyers, academics and others. Various increases have been enacted. However, once defence fees started to consume a larger part of the tribunals' budgets, and in order to give defence counsel an incentive to move the trial process along and not prolong it unnecessarily, a capping system was introduced, and an adjustable lump sum payment system. There were also issues of whether the fees were too low for suitably qualified lawyers from wealthier jurisdictions, and disproportionately high for lawyers from less wealthy jurisdictions (see Ellis, Defence counsel appearing before international tribunals).
- 79 *Nyiramasohuko and Ntahobali* (Motion for Withdrawal of Counsel) ICTR 97-21-T, 21 June 2001 also Barayagwiza ICTR 97-19-T, 2 November 2000.
- 80 Jorgensen has written on the standards for counsel when representing an uncooperative accused, and the assignment of counsel against the wishes of the accused: Jorgensen, The problem of self-representation at international criminal tribunals,
- 81 IBA, Balancing rights.
- 82 For more detailed analysis of the Court's performance since establishment, see IBA, First challenges; and HRW, *Courting history*.
- 83 The Court itself has acknowledged that there is a need for it to respond to the influence of certain factors on the capacity of the person appearing before the Court to conduct the defence appropriately, in particular short time limits, the intervention of victims, and issues to do with disclosure of materials (including through the Court's electronic system): 'Report on the Operation of the Court's Legal Aid System' ICC/ASP/6-4, 31 May 2007.

- 84 Ellis, Defence counsel appearing before international tribunals, 505.
- 85 Wilson, 'Emaciated' defense, 6.
- 86 IBA, Balancing rights, 15.
- 87 In addition to resources challenges, in the *Lubanga* case some of the more controversial issues have involved the impact on equality of arms and fair trial rights of protective measures such as the proceedings being partly non-public, and the lack of opportunity to directly question witnesses.
- 88 IBA, Balancing rights, 26.
- 89 One difficulty for the defence counsel's job is the tendency, even in IBA material, to refer to certain trial participants as 'victims' in a manner that suggests an institutional bias towards conviction. This flows from the Rome Statute's explicit treatment of victim status. Whether or not the persons are 'victims' vis-à-vis the accused is surely – in law – supposed to be dependent upon a determination of the accused's legal and factual responsibility for their situation. However, this in-built language, which puts the defence 'on the defensive' from the start, is perhaps inherent in the notion of a trial brought by an independent prosecutor's office.
- 90 In the *Bemba* case, the Pre-Trial Chamber has ensured a disclosure regime that requires both sides to file material with the Registrar, in order that parties be better prepared for preliminary hearings and trial, while the Appeals Chamber has ruled on an equality of arms issue such that soon after the time of arrest, the defence must be granted access to documents that are essential to any challenge to the lawfulness of detention.
- 91 IBA-EQ 2008.
- 92 Wilson, Assigned defence counsel in domestic and international war crimes trials.
- 93 HRW, *Courting history*.
- 94 Research by the ISS on the effect of the ICTR on the profession of the host country Tanzania showed that a decade of hosting this international criminal tribunal had only marginally raised the profile and understanding of international criminal law among the local legal profession, who mainly felt unable to engage in the proceedings. This was one issue undermining efforts to promote domestic implementation of the Rome Statute in that country: Du Plessis and Ford, *Unable or unwilling*. The problem is likely to be far more evident, therefore, in countries with little or no direct exposure to international criminal law and its institutions.
- 95 IBA-EQ 2008.
- 96 Although this handbook is partly premised on increasing the engagement by African lawyers in the ICC in a defence capacity, there may be good reasons to avoid seeking to match accused persons with lawyers from within their own particular community.
- 97 HRW, *Courting history*.
- 98 Du Plessis, Building African capacity.
- 99 IBA, Balancing rights.

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Further reading and resources

ICC documents (including the Rome Statute, Rules and Regulations)
<http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/>

ICC Frequently asked Questions

<http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/>

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How to apply to be included in the List of Counsel

Suitably qualified African legal practitioners can apply to be listed on the Registry's list of counsel (for victims or defence):

<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Counsel/>
This site includes the application forms (listed below) required for applying to be included in the List of Counsel. These may also be obtained by writing to or calling the ICC Registry, at the above address (attention Registry of the International Criminal Court, Division of Victims and Counsel (Ref: List of Counsel)).

The Court specifically encourages and welcomes applications from female candidates, as well as from candidates practicing in countries in which a situation has been brought before the Court.

Candidates seeking to be admitted to the List of Counsel must provide all of the following documents for their applications to be considered complete:

1. Candidate application form
2. Certificate of good standing
3. Original or certified copy of registration with governing body
4. Certificate issued by the relevant authority of each State of which the person is a national or where the person is domiciled stating the existence, if any, of criminal convictions
5. Detailed curriculum vitae, allowing for appraisal of the candidate's competence and experience
6. Valid copy of professional insurance policy
7. Legible copy of birth certificate
8. Legible copy of identity card
9. Legible copy of passport/travel document
10. Two passport size photographs

INSTITUTIONAL LINKS

The ICC and other international tribunals

- International Criminal Court (ICC) www.icc-cip.int
- International Criminal Tribunal for the former Yugoslavia: <http://www.un.org/icty/>
- International Criminal Tribunal for Rwanda: <http://www.un.org/ictf/>
- Court of Bosnia and Herzegovina: <http://www.sudbih.gov.ba/>
- Special Court for Sierra Leone: <http://www.sc-sl.org/>
- European Court for Human Rights: <http://www.echr.coe.int/echr/>
- Inter-American Court of Human Rights: <http://www.corteidh.or.cr/>
- African Commission on Human and People's Rights: <http://www.achpr.org/>

Relevant transnational legal professional organisations

- International Bar Association: <http://www.ibanet.org/>
- IBA ICC Project: http://www.ibanet.org/Human_Rights_Institute_ICC_Outreach_Monitoring/ICC_monitoring_and_outreach_project.aspx

- American Bar Association (Africa Programme): www.abanet.org/
- European Criminal Bar Association: <http://www.ecba.org/cms/> see also <http://defenseattorneys.eu/index.htm>
- International Criminal Defence Attorneys Association (a network of international criminal defence lawyers): <http://www.aiad-icdaa.org/>
- International Criminal Bar: <http://www.bpi-icb.org/>
- Union Internationale des Avocats: <http://www.uianet.org/>
- Lawyers Without Borders: <http://www.lawyerswithoutborders.org/>
- ICTY Association of Defence Counsel: <http://www.adcicty.org/>
- American Society of International Law: <http://www.asil.org/>
- International Association for Penal Law: <http://www.penal.org>
- International Commission of Jurists: <http://www.icj.org/>
- Hieros Gamos: <http://www.hierosgamos.org/>
- International Centre for Criminal Law Reform and Criminal Justice Policy (Vancouver): <http://www.icclr.law.ubc.ca/Site%20Map/Publications%20Page/International.htm>

Compendium of codes on criminal defence practice

<http://www.lawofcriminaldefense.com/codes.php>

Relevant international civil society organisations

- ICC Now – Coalition for the ICC: www.iccnnow.org/
- International Crime in Africa Project (ICAP): www.iss-africa.org/
- International Centre for Transitional Justice: www.ictj.org/
- Lawyers Committee for Human Rights: www.lchr.org
- Amnesty International (ICC Programme): www.amnesty.org/
- Human Rights Watch (ICC programme): www.hrw.org/



Those who come before the International Criminal Court (ICC) are accused of the most serious crimes known to the international community. Nevertheless, such persons are entitled to a fair trial. Indeed, the grave nature of the allegations requires effective representation to prevent a perception of unfair targeting of individuals. Both fundamental human rights protections and political practice require fairness in administering justice in forums like the ICC. One-sided attempts to prosecute war criminals can undermine efforts to resolve conflicts. Bringing the rule of law to post-conflict societies requires a public example of rule by laws rather than by vengeance and settling of scores. International criminal justice is only likely to be just, legitimate and sustainable to the extent that it is fair.

A competent and capacitated defence team is indispensable to fair and efficient investigations and trials. Although the role of the defence lawyer has been relatively neglected in international trials, there is now a greater understanding of the importance of good defence counsel to the ICC's objectives.

This handbook hopes to increase the interest and capacity of African lawyers to engage constructively in public, political and professional debates about the ICC and its role in Africa, and to act as defence counsel. Because the ICC gives preference to national measures to investigate and try international crimes, any increased capacity on ICC related issues will also benefit national criminal justice systems in Africa.

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