III. INTERNATIONAL CRIMINAL COURT

The Right to be Defended in Person or Through Legal Assistance and the International Criminal Court

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Keywords: choice of counsel; Code of Conduct; indigency; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; legal aid; legal representation; self-representation; withdrawal of counsel.

Abstract: While the Statute of the International Criminal Court guarantees to suspects and accused the right to be defended in person or through legal assistance, it contains little guidance as to the extent to which this most fundamental right will be provided. In order to ascertain how broadly it should be applied, the authors examine the application of the right by the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia. The authors note that the defence-orientated approach taken by the *ad hoc* Tribunals to the right to be defended in person or through legal assistance not only conforms with international obligations, but also in many respects goes beyond that required by international human rights law. It is, therefore, crucial that the ICC listens to the experience of the *ad hoc* Tribunals and adopts similar, if not identical, rules and regulations relating to the qualifications, conduct and assignment of counsel.

1. INTRODUCTION

To ensure that those appearing before the International Military Tribunal at Nuremberg (Nuremberg Tribunal) were not given the slightest excuse to protest that they had been denied a fair trial, the framers of the Charter of the International Military Tribunal (Nuremberg Charter) guaranteed to every defendant the right to

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The authors are currently employed at the International Criminal Tribunal for the former Yugoslavia as Associate Legal Officers. The views expressed herein are those of the authors alone and do not necessarily represent those of the United Nations or the International Tribunal. *Author's Note*: since this article was written a number of issues discussed therein have been addressed by the *ad hoc* Tribunals and the Preparatory Commission of the International Criminal Court. These documents, along with many of those cited in this article, are available on the web-sites of the ICTY (http://www.un.org/icty/), the ICTR (http://www.ictr.org/) and the International Criminal Court (http://www.un.org/law/icc/).

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conduct his own defence before the Tribunal or to have the assistance of counsel.[1] In their eyes "Nuremberg [was not to] become a legal Versailles, planting a smouldering resentment in the breasts of Germans."[2] Similar sentiments were expressed by the drafters of the Charter of the International Military Tribunal for the Far East at Tokyo (Tokyo Tribunal)[3], and the right to legal assistance is one of the fundamental components of the fair trial guarantees provided to suspects and accused by the Statutes of the two existing *ad hoc* international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY)[4] and the International Criminal Tribunal for Rwanda (ICTR).[5]

The Statute of the International Criminal Court (ICC), which was adopted in Rome on 17 July 1998[6], also guarantees to suspects and accused the right to legal assistance of their own choice and, if they do not have sufficient means to pay for counsel and the interests of justice so require, to have counsel assigned to them. However, although the integrity and, ultimately, the success of the ICC will depend on its adherence to the fair trial guarantees, the Rome Statute contains little guidance as to the extent to which the right to be defended in person or through legal assistance will be provided. While the right is guaranteed from the time persons suspected of committing a crime within the jurisdiction of the ICC are questioned through to proceedings on appeal, there is no indication that it will be guaranteed during post-appeal proceedings. Furthermore, the Statute does not address who shall supply legal assistance nor does it indicate which, if any, ethical rules counsel will be subject to. More problematic is the fact that the Statute is silent as to the degree to which indigent accused will be entitled to receive legal aid and how the ICC will ensure that the representation such persons receive is adequate and effective.

These concerns can mostly be addressed through the Rules of Procedure and Evidence of the ICC (ICC Rules), which are currently being drafted by the Preparatory Commission of the International Criminal Court (Preparatory Commis-

1. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279, 59 Stat. 1544 (Nuremberg Charter), Art. 16(d).
2. J. Persico, Nuremberg – Infamy on Trial 94 (1994).
3. Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946 (amended 26 April 1946), TIAS No. 1589.
4. Statute of the International Criminal Tribunal for the former Yugoslavia, in the Secretary-General's *Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 3 May 1993, UN Doc. S/25704, reproduced in 32 ILM 1159 (1993).
5. Statute of the International Criminal Tribunal for Rwanda, annexed to Sec. C. Res. 955, UN Doc. S/RES/955 (1994), reprinted in 33 ILM 1602 (1994).
6. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) of 17 July 1998, UN Doc. A/CONF. 183/9 (1998) (Rome Statute), reprinted in 37 ILM 999 (1998). The Rome Statute was adopted with a vote of 120 in favour, seven against and 21 abstentions. The Statute will enter into force once 60 State Parties have ratified it. At the time of writing, six State Parties have done so, namely Fiji, Ghana, Italy, San Marino, Senegal and Trinidad and Tobago.

sion). In order to determine how broadly the ICC should apply the right to be defended in person or through legal assistance, the participants at the Preparatory Commission should examine the relevant rules and regulations, as well as the jurisprudence of the *ad hoc* Tribunals and, to a lesser extent, the tribunals that preceded them – thus taking advantage of their experiences and avoiding the barriers they encountered. Reliance on their experience is especially important on account of the awkward and protracted procedure that must be followed in order to amend the ICC Rules following their adoption.[7]

Accordingly, the article will firstly discuss the obligation to provide legal representation as laid down in various international legal instruments. The extent to which international criminal tribunals have guaranteed the right to be defended in person or through legal assistance will then be examined. Given that, in practice, the majority of accused appearing before the *ad hoc* Tribunals are indigent, the guarantee of legal aid under their respective Statutes is particularly important. The article will therefore examine the criteria suspects and accused need to satisfy in order to receive legal aid and the methods by which the *ad hoc* Tribunals have ensured that such representation is adequate and effective. Comments on how the ICC would best ensure the provision of these rights will be provided at the end of each section.

2. THE RIGHT TO LEGAL ASSISTANCE: THE LEGAL FRAMEWORK

The right to be defended in person or through legal assistance is one of the most fundamental provisions of the fair trial rights guaranteed to accused. By ensuring that criminal proceedings "will not take place without an adequate representation of the case for the defence"[8], this right serves a dual role: to ensure that the case of the defence is properly prepared and presented, and to guarantee that the procedural rights of persons accused of criminal offences are not inadvertently, or even purposely, neglected.[9]

7. According to Art. 51(2) of the Rome Statute, amendments to the ICC Rules – which may be proposed by any State Party, the judges acting by absolute majority or the Prosecutor – shall only enter into force upon adoption by two-thirds majority of the members of the Assembly of State Parties. *Id.* For a description of the amendment procedure *see* O. Triffterer, Commentary on the Rome Statute of the International Criminal Court 688-690 (1999).
8. Pakelli *v.* Federal Republic of Germany, European Commission of Human Rights, App. No. 8398/78, para. 84 (1978) *quoted in* D. Harris, M. O'Boyle & C. Warbrick, Law of the European Convention on Human Rights 256 (1995).
9. S. Stavros, The Guarantees for Accused Persons under Art. 6 of the European Convention on Human Rights 202 (1993).

2.1. International human rights instruments

Various international and multilateral human rights treaties guarantee to accused the right to be defended in person or through legal assistance. Although it does not explicitly refer to this right, the Universal Declaration of Human Rights (Universal Declaration) guarantees to every person charged with a criminal offence "the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for the defence."[10]

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) – which was adopted in accordance with the Universal Declaration – provides, insofar as relevant:

> (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 [...]
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> (3) In the determination of any criminal charge against him everyone shall be entitled to the following minimum guarantees, in full equality:
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> > (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.

The right of accused to be defended in person or through legal assistance is further guaranteed at a regional level in the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights (European Convention) and Fundamental Freedoms and the African Charter on Human and People's Rights (African Charter).[11]

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10. The Universal Declaration of Human Rights, Art. 11(1).
11. These instruments guarantee the right to be defended in person or through legal assistance in varying degrees. According to the fair trial guarantees provided by Art. 6(3) of the European Convention everyone charged with a criminal offence has the right: "(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." Likewise, Art. 8(2) of the American Convention assures to every person accused of a criminal offence the right: "(d) to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law." Finally, Art. 7(1)(c) of the African Charter provides that every individual has the right to have his cause heard and has "the right to defence, including the right to be defended by counsel of his choice." Although this provision does not guarantee the right to legal aid, in March 1992, at its eleventh session, the African Commission submitted a draft resolution for adoption by OAU General Assembly which guaranteed, *inter alia*, the right to legal assistance for indigent persons. The resolution

2.2. International criminal tribunals

According to the fair trial provisions of the Nuremberg Charter "a defendant shall have the right to conduct his own defence before the [Nuremberg Tribunal] or to have the assistance of counsel."[12] This provision was augmented by Article 16(e) which provided that "a defendant shall have the right through himself or through his counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution." The right to be defended in person or through legal assistance was also guaranteed by the Tokyo Charter[13] and was respected by the various military tribunals established by the four occupying powers under Control Council Law No. 10.[14]

In his report on the establishment of the ICTY, the UN Secretary-General stated that it was "axiomatic that the [ICTY] fully respect internationally recognised regarding the rights of the accused at all stages of its proceedings."[15] In his view, "such internationally recognised standards are, in particular, contained in Article 14 of the ICCPR."[16] Accordingly, the right of accused to be defended in person or through legal assistance – as prescribed in Article 21(3)(d) of the Statute of the ICTY – is identical to Article 14 (3)(d) of the ICCPR. The right to legal assistance of suspects questioned by the Prosecutor during his investigations is set out in Article 18(3) of the Statute.[17] The right of suspects and accused to be defended in person or through legal assistance is defined in Articles 17(3) and 20(4)(d) respectively of the Statute of the ICTR in exactly the same terms as their ICTY equivalent.[18]

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was adopted without change. *See* E. Ankumah, The African Commission on Human and People's Rights 127 (1996).

12. Nuremberg Charter, *supra* note 1, Art. 16(d).
13. Tokyo Charter, *supra* note 3, Art. 9(c).
14. After the trial of the major Nazi war criminals ended, the Nuremberg Tribunal was dissolved and the task of prosecuting the thousands of other individuals who were alleged to have committed war crimes was passed to each of the four occupying powers. Because each occupying power had its own system of law, Control Council Law No. 10 was enacted by the Allied Control Council of Germany to establish a common basis for conducting the trials. *See* H. Levie, Terrorism in War: The Law of War Crimes 71 (1992).
15. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), reprinted in 32 ILM 1159 (1993), at 106.
16. *Id.*.
17. Art. 18(3) provides that "[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands." ICTY Statute, *supra* note 4.
18. The ICTR's recognition of the right to be defended in person or through legal assistance, and in particular the provision of legal aid, should be contrasted with the fair trial rights provided to those tried by the national courts of Rwanda. In 1996 the Rwandan Government adopted legislation aimed at facilitating the prosecution of persons responsible for committing genocide and related crimes in its national courts. However, such legislation does not include any provision for assigned counsel for indigent accused – even those charged with offences that carry the death penalty. *See* V. Morris & M. Scharf, The International Criminal Tribunal for Rwanda, Vol. 1, at 521 (1998).

2.3. The International Criminal Court

During the work that preceded the Rome Conference, delegations submitted a vast number of proposals to the Preparatory Committee on the Establishment of the International Criminal Court (Preparatory Committee) on the right to be defended in person or through legal assistance. Since there was no consensus on the extent to which it should be applied – in particular, the degree to which the ICC should supply legal aid – in its report submitted to the Rome Conference, the Preparatory Committee was forced to bracket subparagraphs dealing with this right.[19] Since further proposals were submitted during the conference itself, the Working Group on Procedural Matters decided to refer these proposals along with the bracketed subparagraphs to informal consultations before approaching the Committee of the Whole. Arguments advocating limited legal aid were rejected in favour of providing for the highest standards of protection.[20] Hence the Rome Statute – closely following the wording of Article 14(3)(d) of the ICCPR – guarantees, in Article 67 (1)(d) thereof, that in the determination of any charge the accused shall be entitled:

> [...] 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.

The right of persons suspected of committing crimes within the jurisdiction of the ICC to legal assistance is set out in virtually identical language in Article 55 (2)(c) of the Statute.[21]

19. *See* R. Lee (Ed.), The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results 251 (1999).
20. *Id. See also* Triffterer, *supra* note 7, at 848.
21. Art. 55(2)(c) provides that where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities, that person shall have the right "[t]o 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." Rome Statute, *supra* note 6.

3. THE EXTENT OF THE RIGHT TO BE DEFENDED IN PERSON OR THROUGH LEGAL ASSISTANCE

3.1. The right to be defended through legal assistance

3.1.1. International criminal tribunals

The aforementioned provisions of the Rome Statute provide little guidance as to the extent to which the ICC should apply the right to be defended in person or through legal assistance. Although the wording of the right closely follows that of Article 14(3)(d) of the ICCPR, these provisions should not be interpreted in the same manner. There is a substantial difference between them. The latter deals with domestic legal systems applicable to member States, while the Rome Statute provides for the situation related to rights of the accused before the ICC.[22] In order to estimate how broadly the right should be applied it is, therefore, more appropriate to refer to the relevant regulations and jurisprudence of international criminal courts, in particular the *ad hoc* Tribunals.

Recognising that accused persons have the right to legal assistance at all stages of the proceedings, the *ad hoc* Tribunals both ensure that this right is guaranteed from the time they are personally served with the indictment – which occurs following the voluntary surrender, or arrest and transfer of the accused to their custody – through to appeal and review. Their Statutes further guarantee the right to legal assistance to suspects: commencing when they are officially notified that they are suspected of committing an offence.[23] The right to legal assistance is also afforded to persons detained under the authority of the *ad hoc* Tribunals, including those detained as witnesses.[24]

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22. *See* The Prosecutor *v.* Gerard Ntakirutimana, Separate and Dissenting Opinion of Judge Yakov Ostrovsky on the Request of the Accused for Change of Assigned Counsel, Case No. ICTR-96-10-T, ICTR-96-17-T, Tr. Ch. I, 11 June 1997 (Separate Opinion), at para. 4.
23. Although suspects are guaranteed the right to counsel during questioning by the Prosecutor, Rule 42 of both the ICTR and ICTY Rules provides that suspects may explicitly and voluntarily waive this right. In case of waiver, if the suspects subsequently express a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspects have obtained or have been assigned counsel. The Prosecutor *v.* Delalić & Others, Decision on the Motion on the Exclusion and Restitution of Evidence and Other Material seised from the Accused Zejnil Delalić, Case No. IT-96-21-T, Tr. Ch. II, 9 October 1996, at paras. 13-14.
24. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Directive on the Assignment of Defence Counsel, UN Doc. IT/73 Rev.7, 22 July 1999 (ICTY Directive), Art. 3(B); International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Directive on the Assignment of Defence Counsel as amended, 9 January 1996 (ICTR Directive), Art. 2(B). Such an approach complies with the jurisprudence of the European Court of Human Rights (European Court), which has recognised

Notwithstanding the importance of the relationship of confidence they have with their counsel, the right of accused to freely choose their legal representative is not absolute as the *ad hoc* Tribunals have both imposed regulations governing the qualifications and conduct of counsel.[25] In order to represent suspects or accused before the ICTY counsel must satisfy the Registrar that they are admitted to the practice of law in a State or are a University Professor of Law.[26] Further requirements are imposed upon persons wishing to represent indigent suspects or accused. According to the ICTY Rules, since its proceedings take place in an international and multilingual environment and in order to avoid any miscommunications between assigned counsel and the court's officials, assigned counsel must speak one of its two official languages, namely French and English.[27] Nonetheless, since neither of these languages are widely spoken in the former Yugoslavia, in exceptional circumstances the Registrar may assign counsel who speaks the language of the suspects or accused concerned but does not speak either of the two working languages.[28] The ICTR also requires counsel to be admitted to the practice of law in a State or a University Professor of Law[29], and, in relation to assigned counsel, to

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that the denial of access by, for example, a prisoner to counsel is a violation of the European Convention. *See* Campbell and Fell *v.* United Kingdom, Judgement of 28 June 1984, 7 EHRR 165, para. 99 (1985).

25. Such restrictions are permissible under the jurisprudence of international human rights bodies. In Ensslin, Baader and Raspe *v.* Federal Republic of Germany, the European Commission of Human Rights (European Commission) held that the German authorities could prevent a lawyer from representing the accused on the basis of his support for the criminal organisation to which they belonged. *See* Ensslin, Baader and Raspe *v.* Federal Republic of Germany, App. Nos 7572/76, 7586/76 and 7587/76, 14 DR 64 (1978). The European Commission has also acknowledged that counsel may be excluded for refusing to wear robes, for showing disrespect to the court or because they were appearing as a witness for the defence. *See* Harris, O'Boyle & Warbrick, *supra* note 8, at 259-260.

26. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 16, 15 July 1999 (ICTY Rules), Rule 44(A).

27. *Id,*. Rule 45(A). The ICTY Registrar has decreed that the term 'to speak' has been interpreted as being able to accurately express and communicate oral and written messages, even in a simple manner and to fully understand oral and written communications in one of the working languages. In its opinion, such abilities do not require native-speaker skills or style but a certain level of proficiency is essential. *See* The Prosecutor *v.* Kupreškić & Others, Transcript, Case No. IT-95-16-T, Tr. Ch. II, 17 August 1998.

28. ICTY Rules, *supra* note 25, Rule 45(B). In the Erdemović case, the Registrar assigned Mr. Jovan Babić to represent the accused – even though he did not satisfy the language requirements – on account of the fact that he had previously represented him in domestic proceedings, had earned his confidence, was familiar with all the aspects of the case against him and had acted for him informally in discussions with the Prosecutor. The Prosecutor *v.* Erdemović, Order on the Appointment of Defence Counsel, Case No. IT-96-22-PT, Tr. Ch. I, 28 May 1996.

29. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Rules of Procedure and Evidence, UN Doc. ITR/3/Rev. 6 (1998) (ICTR Rules), Rule 44(A).

speak English or French.[30] However, to enhance the effectiveness of representation, the ICTR further requires that they have, at least, ten years relevant experience.[31]

In the performance of their duties before the *ad hoc* Tribunals, counsel are required to advise and represent their clients in accordance with the relevant provisions of their respective Statutes and the rules and regulations adopted thereto, as well as the codes of practice and ethics governing their profession.[32] On 12 June 1997, the ICTY adopted a code of professional conduct for defence counsel appearing before the court.[33] The ICTR Registrar promulgated an almost identical code on 8 June 1998.[34] Taking into account codes of professional behaviour from various bar associations and the fundamental principles contained therein, the two Codes strike a balance between the inquisitorial and adversarial legal systems. On the basis that counsel have an overriding duty to defend their clients' interests, the underlying principles of the Codes are that:

> [...] while they appear before the Tribunal defence counsel must maintain high standards of professional conduct; they must act with competence, skill, care, honesty and loyalty; they must not reveal information which has been entrusted to him in confidence; and they must ensure that, in the representation of their client, no conflict of interest arises.[35]

Furthermore, these Codes provide that counsel must advise and represent their clients until their position has been duly terminated, or they are otherwise withdrawn with the consent of the Tribunal before which they are appearing.[36] When representing persons before the *ad hoc* Tribunals, counsel must abide by their clients' decisions concerning the objectives of representation, and must consult with them as to how such objectives are to be pursued.[37] Counsel must keep their clients informed about the status of the case, and "must promptly comply with all reasonable requests for information."[38] Finally, whether or not the client-counsel relationship continues, counsel must preserve the confidentiality of their clients' affairs and must not reveal to any person information that has been entrusted to them in confidence.[39]

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30. *Id.*, Rule 45(A).
31. *Id.*
32. *Id.*, Rule 44(B); *see also* ICTY Rules, *supra* note 26, Rule 44(B).
33. The Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, UN Doc. IT/125 (1997) (ICTY Code of Conduct).
34. Code of Professional Conduct for Defence Counsel, 8 June 1998 (ICTR Code of Conduct) (copy on file with authors).
35. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/52/375 (1997) (ICTY 1997 Annual Report), para. 88.
36. *Id.*,ICTY Code of Conduct, Art.s 4(2)(a) and (b); ICTR Code of Conduct, Arts. 4(2)(a) and (b).
37. *Id.*, ICTY Code of Conduct, Arts. 4(2)(a) and (b); ICTR Code of Conduct, Art. 4(2)(a) and (b).
38. *Id.*, ICTY Code of Conduct, Art. 7; ICTR Code of Conduct Art. 7.
39. *Id.*, ICTY Code of Conduct, Art. 8(1); ICTR Code of Conduct Art. 8(1). However, pursuant to Art. 8(2) of the Codes of Conduct of the *ad hoc* Tribunals, counsel may reveal information which has been en-

The consequences of violating the provisions of these codes are severe. In addition to being sanctioned by the Chambers, counsel who fail to observe the principles of professional ethics enunciated therein may be replaced and their misconduct communicated to the professional body regulating the conduct of counsel in their State of Admission, or if they are Professors and not otherwise admitted to the profession to the governing body of their University.[40] Such measures may also be invoked by the Chambers against counsel whose conduct is offensive or abusive, obstructs the proceedings or is otherwise contrary to the interests of justice.[41]

In the *Akayesu* Case, the counsel of the accused complained that another counsel, Mr. Luc de Temmerman, had interfered with his client while at the United Nations Detention Facility. After hearing the Commanding Officer of the Detention Facility, who confirmed that the alleged interference took place, Trial Chamber I of the ICTR – Judges Kama, Aspegren and Pillay – found the allegation sufficiently substantiated and decided:

> [...] to hereby warn to Mr. Luc de Temmerman that any further attempt to interfere with the relations between detainees other than his client and their assigned counsel or to influence matters not relating to the defence of his client or otherwise to act in any manner conducive to the obstruction of the proper conduct of the proceedings may motivate the Chamber to refuse him further audience before the Tribunal.[42]

The ICTR has also issued warnings to counsel who failed to attend scheduled hearings on the basis that such conduct was contemptuous and disrespectful to the court and amounted to an obstruction to the proceedings and was thus contrary to the interests of justice. In the *Musema* Case, the initial appearance of the accused was adjourned on two occasions as his assigned counsel, Ms. Marie-Paule Honeggar, had failed to travel to Arusha. Finding that she had deliberately disregarded the fixed dates for the initial appearance, Trial Chamber I decided to order the appearance of counsel for the re-scheduled initial appearance and issued a warning that she might be sanctioned by the refusal of further audience if she defaulted in complying with its request, in which case the Chamber would instruct the Registrar to replace her as counsel for the accused.[43] The Chamber further instructed the Regis-

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trusted to them in confidence in any one of the following circumstances: (a) when the client has been fully consulted and knowingly consents; or (b) when the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or (c) when essential to establish a defence to a criminal or disciplinary charge or civil claim formally instituted against counsel; or (d) to prevent an act which counsel reasonably believes: (i) is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; and (ii) may result in death or substantial bodily harm to any person unless the information is disclosed.

40. *See* ICTR Rules, *supra* note 29, Rule 46(D).
41. *Id.*, Rule 46(A) to (C); *see also* ICTY Rules, *supra* note 26, Rules 46(A) and (B).
42. The Trial Chamber also decided to communicate the warning to the Belgian Bar Association. The Prosecutor *v.* Akayesu, Decision on the Motion filed by Defence Counsel concerning the Interfering Conduct of another Party, Case No. ICTR-96-4-I, Tr. Ch. I, 31 January 1997.
43. The Prosecutor *v.* Alfred Musema, Warning and Notice to Counsel in Terms of Rule 46(A) of the Rules of Procedure and Evidence, Case No. ICTR-96-13-I, Tr. Ch. II, 31 October 1997. The Chamber also

trar to communicate the warning to the Swiss Bar Association. As a consequence of Ms. Honeggar's subsequent failure to appear for her client's re-scheduled initial appearance, the Chamber decided to sanction counsel by refusing her further audience and instructed the Registrar to replace her immediately.[44]

Since a number of counsel representing accused persons before the ICTY currently reside in regions which were ethnically cleansed during the conflict in the former Yugoslavia, questions have been raised regarding the involvement of certain counsel in the events that form the basis of the indictments against their clients. For instance, in the *Bosanski Samac* Case, the Prosecution brought to the attention of Trial Chamber III – Judges May, Bennouna and Robinson – a possible conflict of interest involving Mr. Borislav Pisarević, counsel of the accused Simo Zaric.[45] The Prosecution alleged that, as he had personal knowledge of and was intimately involved in many of the events at issue in the trial, Mr. Pisarević might be called as a witness either for the Prosecution or by one of the co-accused. In its opinion, his continued representation of the accused would be incompatible with the best interests of justice.[46]

On the basis that "a conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice" the Chamber found that there was a potential for conflict arising at the trial between Mr. Pisarević and his client. Nonetheless, as the accused had expressed confidence in Mr. Pisarević and had stated that "in no stage of the proceedings can a conflict of interest occur" between his counsel and himself, the Chamber decided that Mr. Pisarević could continue to represent the accused on the

took due consideration of the various unsuccessful attempts made by the Registry to secure the presence of the assigned counsel for the initial appearance.

44. The Prosecutor *v.* Alfred Musema, Decision to Withdraw Assigned Counsel and to Allow the Prosecution Temporarily to Redact Identifying Information of her Witnesses, Case No. ICTR-96-13-I, Tr. Ch. II, 18 November 1997. An almost identical situation arose in the *Akayesu* case. On the morning of 19 March 1998, the Prosecutor was due to commence its closing arguments, however, the hearing had to be delayed for one hour on account of the non-appearance of counsel, Mr. Nicolas Tiangaye and Mr. Patrice Monthe. After noting that the presence of counsel during closing arguments was not mandatory and observing that the defence could prepare its closing arguments on the basis of the transcripts of the hearing, Trial Chamber I allowed the hearing to proceed. However, before commencing the hearing, the Chamber issued a formal warning to the two counsel concerned that if they failed to appear for the second day of closing arguments scheduled for 25 March 1999, appropriate sanctions would be taken. Mr. Tiangaye and Mr. Monthe did appear for the afternoon session on 19 March 1998. When they appeared, the Chamber described their absence from the morning hearing as "regrettable", "humiliating" and a "serious contempt". Although they cited problems with the Registry as the grounds for their non-appearance, the Chamber rejected this as an invalid ground for leaving their client unrepresented at the morning's hearing. *See* The Prosecutor *v.* Jean-Paul Akayesu, Issuance of Warning Against Defence Counsel, Case No. ICTR-96-4-T, Tr. Ch. I, 19 March 1998.

45. The Prosecutor *v.* Milan Simić & Others, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, Case No. IT-95-9-PT, Tr. Ch. III, 25 March 1999.

46. *Id.*

provisio that he obtain the full and informed written consent of the accused within seven days.[47] Such consent was duly given.

Limitations were also placed on the qualifications and conduct of counsel appearing before the Nuremberg Tribunal as well as the numerous military tribunals conducted thereafter under Control Council Law No 10: namely that counsel be qualified to conduct cases before German courts or specifically authorised by the Tribunal.[48] Similar restrictions were imposed by the Tokyo Charter, which stated in Article 9(c) thereof, that each accused had "the right to be represented by counsel of his selection, subject to the disapproval of such counsel at any time by the Tribunal."[49]

3.1.2. The International Criminal Court

The provisions of the Rome Statute relating to the right to legal assistance ensure that the right is guaranteed from the time persons suspected of committing a crime within the jurisdiction of the ICC are questioned by either the Prosecutor or by national authorities through to appeal and revision proceedings. Nevertheless, the Statute is silent on whether the right will be guaranteed during post-appeal proceedings pursuant to Articles 84 (revision of conviction or sentence), 85 (compensation to an arrested or convicted person) and 110 (review by the Court concerning reduction of sentence) thereof. There is also no indication that sentenced persons will be entitled to legal representation when applying for transfer from the State of enforcement[50] or when they have a legitimate complaint about their conditions of detention and wish to bring such conditions to the attention of the ICC.[51]

More concerning are the practical ramifications of the procedure for the investigation of offences on the application of the right of suspects to legal assistance. According to the terms of the Rome Statute, in order to investigate allegations of

47. *Id.*
48. *See, for instance*, Nuremberg Charter, *supra* note 1, Art. 23 and Military Government – United States Zone Ordinance No. 7, 18 October 1946, Art. 1V (c). Despite the fact that most of the German counsel chosen by accused were themselves subject to arrest or trial in German courts for membership in the Nazi Party or the SS and thus, if convicted, would be barred from legal practice, not a single request for the representation of German counsel was denied. Through the intervention of the American authorities, in order to allow them to represent the accused such persons were granted immunity from prosecution in the German courts. In one of the subsequent Nuremberg proceedings, however, the court did deny the request of one accused to have an American lawyer substituted for one of the German counsel who had previously been selected by the accused himself. The Tribunal expressed doubt of the sincerity of the application when pointing out that the American was not, in fact, available. It was the opinion of the Judges before whom he was to appear that the attorney had by his previous conduct defying orders of the Military Governor and by his violation of standing Military Government regulations disqualified himself. *See* B. Ferencz, *Nuremberg Trial Procedure and the Rights of the Accused,* 39 The Journal of Criminal Law and Criminology 144, at 146-147 (1948).
49. Tokyo Charter, *supra* note 3.
50. Rome Statute, *supra* note 6, Art. 104 (2).
51. *Id.*, Art. 106 (3).

crimes[52], the Prosecutor must rely on the relevant national authorities to take the necessary investigative steps unless there are no such authorities available.[53] The provision of legal assistance to suspects is not universally applied. It is therefore imperative that State Parties who currently do not provide legal assistance to suspects amend their domestic legislation in order to provide such a right to persons suspected of ICC crimes. The authors concede, however, that should State Parties amend their domestic legislation in such a manner, a two-tiered system of rights, one for ICC and another for purely domestic purposes would be created. The likelihood of such an eventuality may cause State Parties to either choose to delay implementing domestic legislation guaranteeing to persons suspected of ICC crimes the right to legal assistance or refuse to do so all together.

Although Article 55 provides that suspects shall be informed prior to interrogation of their right "to be questioned in the presence of counsel unless [they have] voluntarily waived [their] right to counsel," it omits to specify that such access must be granted promptly upon arrest. In this connection, Principle 7 of the United Nations Basic Principles on the Role of Lawyers provides that States must "ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention." Moreover, in relation to the interrogation itself, there is no certainty that the questioning of suspects will not proceed until counsel are present. It is equally unclear whether the questioning will cease immediately should suspects express their desire to have the assistance of counsel. These last two concerns are both addressed by Rule 42(B) of the ICTY Rules, which provides:

> Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Although the Rome Statute refers to the fact that suspects and accused shall have the right to legal assistance it does not address whom shall supply such assistance. The prevailing definition of 'counsel', as found in most national systems, is that only those persons who are admitted to practice law qualify as 'counsel': those who are not admitted may not. The underlying assumption of this view is that persons satisfying the requirements for being admitted to practice law, and only those per-

52. According to Art. 15, the Prosecutor may initiate investigations not only upon referral from the Security Council or State Parties to the Rome statute, but also on information from victims, non-governmental organisations or any other reliable source. *Id.*

53. *Id.*, Art. 57(3). The Prosecutor will be able to be present and assist the state authorities, but only if this is not prohibited by national law. Similarly, the Prosecutor may take certain "non-compulsory measures," such as interviewing a voluntary witness without the presence of state authorities if it is essential for the request to be executed. However, the Prosecutor can only take these steps after consultations with the state and, in cases where there has been no formal declaration of admissibility, the state can impose conditions on the Prosecutor's ability to do so.

sons, are qualified to provide a criminal defence.[54] However, this premise is only half-correct. Candidates for admission to the bar are seldom required to acquire or demonstrate the skills and legal knowledge generally recognised as prerequisites to represent accused competently. Moreover, in the majority of national jurisdictions, upon admission counsel need no additional training or experience before assuming responsibility for conducting a criminal trial.[55]

In most situations, little harm would be caused by a court indulging in the fiction that the admittance of counsel to a bar association denotes competence to practice in all areas of law, including criminal cases. Most accused do not arbitrarily obtain counsel from a general pool of admitted counsel, but retain or are appointed experienced members of the criminal bar to represent them.[56] Nonetheless, for cases falling within the jurisdiction of the ICC indulging in the fiction that persons who are admitted to practice law are universally competent may have grave consequences. Since such cases will be generally more complex than national criminal cases, including most capital cases, the level of skill required to provide a competent defence must be greater.

The ICC should therefore adopt a narrower definition of counsel: one that encompasses not only those counsel who are admitted to practice law in a State but also those who have the requisite skills, knowledge and character to provide an adequate defence. In this connection, the Preparatory Committee has argued that the qualification of counsel should be based on the capacity to practice before the highest criminal court in the country.[57] In the authors' opinion such a restriction would be appropriate.[58]

It is the further view of the authors that, although there are six official languages of the ICC (Arabic, Chinese, English, French, Russian and Spanish), persons representing accused must also have an excellent knowledge of and be fluent in at least one of its two working languages, namely English and French. While counsel may be authorised to use a language other than English or French before the Cham-

54. *See* B. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment,* 78 Iowa L. Rev. 433, at 438-445 (1993).
55. *Id.,* 476-489.
56. *Id.,* 434.
57. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March-April and August 1996) GA, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) (PrepCom Report: Proceedings), at para. 272.
58. It is noted that a University Professor of Laws may represent suspects and accused before the *ad hoc* Tribunals. Since a University Law professorship does not automatically carry with it the necessary knowledge or experience relevant to conduct an adequate defence before the ICC, the authors would not be in favour of any proposal to this effect. Such a position was taken by the Expert Group established in 1999 to prepare an evaluation of the functioning and operation of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda with the objective of enhancing the efficient use of the resources allocated to the Tribunals. *See* Identical letters dated 17 November 1999 from the Secretary-General addressed to the President of the General Assembly and to the Chairman of the Advisory Committee on Administrative and Budgetary Questions, UN Doc. A/54/634 (1999) (Expert Group Report), para. 210.

bers[59], it is imperative that such a language requirement be adopted in order to avoid any miscommunication between counsel and ICC officials.[60] Given that the interrogation of suspects will be performed primarily by the police authorities of the State in which they are detained this requirement should not be applied to counsel wishing to represent such persons.

It is obvious that the parties appearing before the ICC, the prosecution and the defence, must both be in a position to operate effectively before the court. The creation of the Office of the Prosecutor, under Article 42 of the Rome Statute, will guarantee a good level of familiarity of this office with the rules and practices of the court. However, the same cannot be said for the defence. It is conceded that the repertoire of skills required to represent defendants before the highest national criminal courts, while extremely relevant, may not be sufficient to defend accused persons before the ICC. Accordingly, in the authors' opinion, counsel appearing before the ICC should also have substantial experience in criminal and international humanitarian law.[61]

Furthermore, it is opined that counsel be conversant with both the adversarial and inquisitorial criminal systems. On the basis of the Rome Statute, the ICC will operate as a court with a unique set of procedural and evidential rules. Being created as an international organ adjudicating upon crimes established by international law and international humanitarian law in particular, the Statute is, and the ICC Rules will be an original blend of rules with roots both in adversarial and inquisitorial criminal procedure. Furthermore, it is likely that the composition of the Chambers of the ICC will be made up of Judges who originate from both the adversarial and inquisitorial criminal systems. Since the decisions of the Judges will be informed from their own legal backgrounds, in order to provide effective representation to their clients counsel should have a thorough understanding of and proficiency in techniques of both systems. Given that this requirement may prove onerous and may limit the number of counsel who will be eligible to appear before it, in the authors' opinion the ICC should consider setting up and operating a training and orientation programme to familiarise counsel with the ICC and its rules and practices. Such a programme would not only increase the effectiveness of representation, thus protecting the right to legal assistance, it would also ensure that

59. Rome Statute, *supra* note 6, Art. 50(3).

60. This requirement would be advantageous, particularly as the Judges are all required to speak one of the two working languages. *Id.*, Art. 36 (3)(c). Such a proposal was agreed upon by the delegates of the third session of the Preparatory Commission. *See* UN Doc. PCNICC/1999/L.5/Rev.1/Add.1 (1999) (Report of Third Session of Preparatory Commission), at 28.

61. During the third session of the Preparatory Commission, the delegates recommended that counsel should have established competence in criminal law and procedure, as well as the necessary relevant experience, whether as a judge, prosecutor, advocate or in another similar capacity, in criminal proceedings. Report of Third Session of Preparatory Commission. *Id.*

counsel have a clear understanding of the international and administrative context before which they are appearing.[62]

During its discussions, the Preparatory Committee proposed that a person who witnessed the crime for which the accused has been indicted should not act as counsel for the defence.[63] Furthermore, persons should not be permitted to represent accused if it is proved or deemed very probable according to objective facts that they have participated in or aided any of the crimes being investigated in the proceedings, destroyed or concealed evidence or assisted in the escape of the accused.[64] In the authors' opinion, these provisions should be incorporated into a code of ethics governing the conduct of counsel appearing before the ICC. The code of ethics, which could be similar to those promulgated by the *ad hoc* Tribunals, should, at a minimum, encompass such matters as scope and termination of representation, competence and independence, diligence, confidentiality, conflict of interest and candour before the court.

During the third session of the Preparatory Commission, the delegates recommended that the President of the ICC, on the basis of a proposal made by the Registrar, should draw up a draft code of professional conduct for counsel, which would then be transmitted to the Assembly of State Parties for adoption.[65] While the authors welcome such a suggestion, it is noted with some concern that according to the proposal, as drafted, representatives from the defence counsel will not be included in the consultation process. It is essential that defence counsel are given the opportunity to comment on the code of ethics and propose amendments where necessary.[66] In this connection, it should be noted that the members of the Advisory Panel – a consultative body on defence counsel mat-

62. The usefulness of such a programme is illustrated by problems that arose during the pre-trial preparation of the defence in the *Tadić* case. Following his transfer to the ICTY, Professor Michail Wladimiroff and Mr. Alphons Orie were assigned to represent the accused as lead and co-counsel respectively. Although both had impeccable credentials and had considerable competence, since they were trained in the Dutch inquisitorial system, neither had developed the necessary skills required to actively participate in an adversarial trial. Cognisant of their inexperience in adversarial trial procedures, Professor Wladimiroff and Mr. Orie, through the Registry, approached the American Bar Association's Central and East European Law Initiative (CEELI) for assistance in fine-tuning their trial techniques, particularly the art of examining and cross-examining witnesses. Using mock trial and videotaped direct and cross-examination exercises to highlight the practical techniques that may be useful during the actual trial, CEELI conducted a week-long training exercise for the defence team. Although they subsequently hired the services of a British Barrister to assist them during the trial, the training that they received provided them with sufficient skills and more importantly confidence to examine and cross-examine several of the witnesses who appeared before the court. *See* M. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel,* 7 Duke J. of Comp. & Int'l L. 519, at 524-526 (1997).

63. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol II, (Compilation of Proposals) GA, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) (PrepCom Report: Proposals), at 197.

64. *Id.*

65. Report of Third Session of Preparatory Committee, *supra* note 60, at 30.

66. Currently, it has been proposed that only State Parties, the Prosecutor or the Judges acting by an absolute majority may propose amendments to the Code. *Id.*

ters set up under the Directives of the *ad hoc* Tribunals[67] – were granted the opportunity to submit written comments on the codes of conduct governing the behaviour of defence counsel appearing before the *ad hoc* Tribunals prior to their adoption: a number of which were taken into consideration.[68]

3.2. The right to be defended in person

3.2.1. International criminal tribunals

Although persons tried by the Nuremberg and Tokyo Tribunals were all represented by counsel, the *ad hoc* Tribunals have both encountered situations whereby accused persons have chosen to waive the right to be assisted by counsel and defend themselves in person. During September and October 1998, Jean-Paul Akayesu, who dismissed his counsel after being convicted, represented himself before the ICTR during the sentencing phrase of his trial.[69] In September 1999, Radomir Kovac conducted his own defence before Trial Chamber II of the ICTY – Judges Cassese, Mumba and Hunt – in relation to proceedings challenging the form of the indictment submitted against him.[70]

Given that the possibility exists that accused persons may exercise the right to represent themselves in person without considering the seriousness of the charges against them and the penalty threatened, neither of the *ad hoc* Tribunals view such a decision lightly. Accused persons must elect in writing that they intend to conduct their own defence.[71] Furthermore, they are under a duty to show diligence, although the degree of diligence required depends on the complexity of the legal and factual issues involved and the personal circumstances of the accused.[72]

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67. The seven-member Advisory Panel consists of the President of the Bar Associations of the Netherlands (in the case of the ICTY Advisory Panel) and Tanzania (in the case of the ICTR Advisory Panel) – who act as President of the Advisory Panel – two members chosen by ballot from the list of persons who had indicated their willingness to represent suspects and accused, two members proposed by the International Bar Association and two members proposed by the Union internationale des avocats. The members of the advisory panel are elected for a two-year term. ICTY Directive, *supra* note 24, Art. 32; ICTR Directive, *supra* note 24, Art. 31.
68. *See* ICTY Code of Conduct, *supra* note 33; ICTR Code of Conduct, *supra* note 34.
69. Triffterer, *supra* note 7, at 857.
70. The Prosecutor *v.* Gagović & Others, Motion Against the Indictment, Case No. IT-96-23-PT, Tr. Ch. II, 2 September 1999. This dispute was quickly resolved and the accused was assigned counsel of his choice. The Prosecutor *v.* Gagović & Others, Decision (Radomir Kovac), Case No. IT-96-23-PT, Tr. Ch. II, 6 September 1999.
71. ICTY Rules, *supra* note 26, Rule 44(G); ICTR Rules, *supra* note 29, Rule 45(F).
72. Such an approach is consistent with the jurisprudence of the European Court. In the *Melin* case, the fair trial rights of the accused – who was a lawyer – were deemed not to be infringed when he was not sent a copy of the judgement giving the reasons for his conviction in time for him to prepare his appeal. The European Court held that as a lawyer the accused should have taken steps to obtain the judgment in time. *See* Melin *v.* France, Judgement of 22 June 1993, 17 EHRR 1 (1994), para. 25. It should be noted that the right of the accused to defend himself in person as guaranteed by Art.

3.2.2. The International Criminal Court

In their reports, although the Preparatory Committee recommended that there be a presumption in favour of the accused being represented by counsel, they acknowledged that should the accused choose to do so they must be permitted to conduct their own defence.[73] On account of the grave crimes with which they would be charged and the dire consequences thereof, the ICC should, however, ensure that any decision made by accused persons to conduct their own defence is informed and voluntary. In this connection, it would be appropriate for the accused to indicate in writing that they intend to exercise this right. In exceptional circumstances – where the accused are unable to adequately defend themselves – the ICC should consider appointing a lawyer, at the court's expense, to follow the trial in order to ensure that justice is upheld.[74]

4. THE EFFECTIVENESS OF THE RIGHT TO LEGAL ASSISTANCE: LEGAL AID

4.1. International criminal tribunals

4.1.1. Criteria suspects and accused must satisfy in order to receive Legal Aid

On account of the economic situation in the former Yugoslavia as well as the Great Lakes Region of central Africa, the right of indigent suspects and accused to receive free legal assistance is one of the most important rights guaranteed under the Statutes of the *ad hoc* Tribunals. Nevertheless, the right to legal aid is one of the most sensitive issues arising from the fair trial guarantees of international human rights law. Although accused persons are assured the enjoyment of the fair trial provisions without discrimination on the basis of property, indigent accused are placed at a disadvantage vis-à-vis accused who have sufficient means to retain counsel privately. The provision of legal aid addresses this problem by ensuring that all accused enjoy equal access to legal assistance. However as its provision involves the problem of the appropriate use of public funds in the administration of justice, inevitably the demand for legal aid far outweighs availability.[75]

6(3)(c) of the European Convention is not absolute. A State may require that accused be assisted by counsel in the interests of justice during the trial stage or on appeal. *See* Harris, O'Boyle & Warbrick, *supra* note 8, at 258. Nevertheless, the Human Rights Committee has taken a stricter approach in Michael and Brian Hill *v.* Spain (Comm. No. 526/93 para. 14.2) where legislation prohibiting accused from defending themselves in person was deemed to be contrary to Art. 14(3)(d) of the International Covenant.

73. PrepCom Report: Proceedings, *supra* note 57.
74. Triffterer, *supra* note 7, at 857.
75. Stavros, *supra* note 9, at 207.

The relevant provisions of the Statutes of the *ad hoc* Tribunals are both augmented by their Rules – which place the primary responsibility for providing and regulating the legal aid system operated by the *ad hoc* Tribunals on their respective Registrar[76], as they are the only officials working therein who have access to the information and expertise required for determining whether suspects or accused are indigent.[77] In order to set out the legal framework for the assignment of counsel, the Registrars of the *ad hoc* Tribunals have both prepared a Directive on Assignment of Defence Counsel, which prescribe the procedure for such an assignment, the status and conduct of assigned counsel and the calculation and payment of fees and disbursements.[78]

In order for indigent suspects or accused to receive legal aid from the *ad hoc* Tribunals, they must make a request for the assignment of counsel to the Registrar in question[79] who must decide, in accordance with the facts of the individual case, whether the suspects or accused concerned do not have sufficient means to retain counsel of their choice.[80] It should be noted that while the burden of proving that they lack sufficient means to retain counsel lies with the suspects or accused concerned, in conformity with international standards of human rights this requirement need not be shown 'beyond all doubt'. In *Pakelli v. Germany,* the European Court held that legal aid should be supplied to an applicant if there are 'some indications' that he is indigent.[81] Since the applicant had spent two years in custody at the time his appeal was being examined and had offered to prove his indigency to the German authorities, in the absence of any indication to the contrary, the Court considered this condition satisfied.[82]

In order to avoid any misunderstanding, the Directives of the *ad hoc* Tribunals specify the factors that must be considered when determining whether suspects or accused are indigent. For instance, according to Article 7 (B) of the ICTY Directive, the Registrar shall take into account:

> [...] means of all kinds of which [a suspect or accused] has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, ac-

76. ICTY Rules, *supra* note 26, Rule 45; ICTR Rules, *supra* note 29, Rule 45.
77. In this connection, it has been opined that it would be "difficult for a Trial Chamber to make the necessary assessment of facts upon which the determination of indigency rests." *See* The Prosecutor *v.* Dokmanović, Decision on Defence Preliminary Motion on the Assignment of Counsel, Case No. IT-95-13a-PT, Tr. Ch. II, 30 September 1997 (Dokmanović Decision), para. 12.
78. *See* ICTY Directive, *supra* note 24; ICTR Directive, *supra* note 24.
79. ICTY Rules, *supra* note 26, Rule 45(C)(i); ICTR Rules, *supra* note 29, Rule 45(C)(i).
80. ICTY Directive, *supra* note 24, Art. 6; ICTR Directive, *supra* note 24, Art. 5.
81. Pakelli *v.* Federal Republic of Germany, Judgment of 25 April 1983, 6 EHRR 1 (1984), para. 34.
82. *Id.*

> count shall also be taken of the means of the spouse of a suspect or accused, as well as those of persons with whom he habitually resides.[83]

Account shall also be taken of the apparent lifestyle of the suspects or accused concerned, and their enjoyment of any property, movable or immovable, and whether or not they derive income from it.[84]

Although not explicit from the wording of this provision, only the disposable income and capital of suspects or accused shall be taken into account when determining their financial means.[85] Such an approach ensures that persons whom they support, or towards whom they have financial obligations are not adversely affected by a determination that they have sufficient means to retain counsel privately. However, where it appears that suspects or accused have intentionally deprived themselves of any means, or have converted any part of their assets into means which are not considered in the determination of indigency, such means shall be taken into account when determining whether they are indigent.[86]

To assist this assessment, suspects or accused requesting legal aid must complete a declaration of means stating their income, capital assets and any financial obligations of themselves, their spouse and any person with whom they habitually reside.[87] Given that the processing of information regarding the indigency status of suspects or accused is delicate, this declaration must be certified by the appropriate authorities, either at the place where the suspects or accused concerned reside or are found or any other place considered appropriate in the circumstances.[88] The certification of the declaration of means provides independent confirmation of their financial means.[89] The legal aid programmes of domestic jurisdictions do not require such a certification since officials of their domestic courts have access to information which can confirm the contents of the declaration. This is not the case in re-

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83. Other than the fact that it does not illustrate the types of income and capital which shall be taken into consideration, the relevant provision of the ICTR Directive is identical to Art. 7(B) of the ICTY Directive. *See* ICTR Directive, *supra* note 24, Art. 6(B).
84. *Id.*, Art. 6(C); *see also* ICTY Directive, *supra* note 24, Art. 7 (C).
85. The disposable income of accused is calculated by determining the periodic and non-periodic income the accused will receive in the three months following the date of the request for assignment, excluding any family or social benefits to which the accused may be entitled. The disposable capital of accused, on the other hand, is the value of every item of a capital nature belonging to the accused at the date of the request for assignment excluding value of any interest in the main or only residence in which the accused or their family reside. *See* The Prosecutor *v.* Dokmanović, Further Explanation of the Registrar regarding the Decision not to assign Toma Fila as Defence Counsel to Slavko Dokmanović, Case No. IT-95-13a-PT, Tr. Ch. II, 4 September 1997 (Further Explanation).
86. *Id.*
87. ICTY Directive, *supra* note 24, Art. 9; ICTR Directive, *supra* note 24, Art. 8.
88. *Id.*
89. During the United Nations consideration of the first Annual Report on the ICTR, the delegate from Rwanda stressed the "importance that the financial situation of genocide suspects be fully investigated before they are provided with defence counsel, since the key architects of genocide possess tremendous wealth as a result of having completely looted the Rwandan economy during the genocide crisis." Statement of Rwanda, UN GAOR 51st Sess., at 20, UN Doc. A/51/PV.78 (1996).

gional or international jurisdictions, and hence the need for the certification. In fact it can be said that the *ad hoc* Tribunals are heavily reliant on the co-operation of the relevant authorities to certify within a reasonable time that the details provided by suspects and accused in their declaration of means are true and correct.

If the declaration is not certified or the information regarding the financial means of suspects or accused is incomplete or irrelevant, the Registrars of the *ad hoc* Tribunals may request the gathering of any information, hear the suspects or accused concerned, consider any representation, or request the production of any documents likely to support the request.[90] Where suspects or accused encounter delays in obtaining certification of their declaration of means or the additional information required, in order to avoid delays to on-going investigations or court proceedings counsel may be assigned to them for a period of time not exceeding thirty days.[91] Although not explicit from the wording of this article, in furtherance of its policy that the right to legal aid should not be affected while awaiting confirmation of the financial means of the suspects or accused concerned, the ICTY has, in exceptional circumstances, authorised the renewal of the temporary assignment for two further periods of thirty days.[92]

Although not specified in the Directives of the *ad hoc* Tribunals, whenever there is any uncertainty as to the financial means of suspects or accused who request the assignment of counsel, such uncertainty will be decided in their favour.[93] On 30 July 1997, the ICTY Registrar decided that the accused Slavko Dokmanović had sufficient means to retain counsel privately.[94] When determining that he did not satisfy the requisite conditions of indigency, the Registrar took account of the fact that he owned a five-year old motor-vehicle and several small pieces of land in Trpinja, Croatia, where his spouse also owned property, and that his son, with whom he habitually resided, owned an eighteen-month old motor-vehicle.[95] Arguing that the value of the property and assets in question were significantly less than that estimated by the Registrar, the accused asked Trial Chamber II – Judges McDonald, Odio-Benito and Jan – to review the Registrar's decision. In regard to the uncertainty of the value of his property, the Chamber stated:

> [...] it is clear that there is a dispute concerning the value of the property of the Accused, particularly the house and land at Trpinja, and this substantially affects the total amount of his financial assets. In addition, it is conceivable that the disposal of this property may prove problematic for the Accused in his current situation. Until the questions over the value of the property and its disposability are resolved within the

90. ICTY Directive, *supra* note 24, Art. 10; ICTR Directive, *supra* note 24, Art. 9.
91. *Id.*, ICTY Directive, Art. 11(B); ICTR Directive Art. 10(B).
92. *See* The Prosecutor *v.* Miroslav Krstić, Decision, Case No. IT-98-33-PT, Tr. Ch. I, 7 January 1999, and The Prosecutor *v.* Miroslav Krstić, Decision, Case No. IT-98-33-PT, Tr. Ch. I, 12 February 1999.
93. Further Explanation, *supra* note 85.
94. The Prosecutor *v.* Dokmanović, Decision not to Assign Mr. Toma Fila as Defence Counsel to Mr. Slavko Dokmanović, Case No. IT-95-13a-PT, Tr. Ch. II, 30 July 1997.
95. *See* Further Explanation, *supra* note 85.

> Registry, the Trial Chamber finds it appropriate to exclude this property from the calculation of the financial means of the Accused. This alone has substantial effect and the Trial Chamber thus finds that the Accused is indeed indigent at the present time. He, therefore, has the right to counsel assigned by the Registrar.[96]

The Registrar subsequently assigned counsel to the accused.[97]

After examining the declaration of means and relevant information obtained, the Registrars of the *ad hoc* Tribunals shall determine whether or not the suspects or accused concerned are indigent and, if so, shall assign counsel to them.[98] According to the Statutes of the *ad hoc* Tribunals, suspects are entitled to free legal assistance so long as they do not have sufficient means to pay for it[99], yet indigent accused are only entitled to receive legal aid "where the interests of justice so require."[100] Consequently, when determining whether to grant requests for legal aid from accused, account must not only be taken of their financial situation but also other matters; such as the stage of procedure, the expected length of trial and the gravity, difficulty and complexity of the case.[101]

Upon determining that suspects or accused are entitled to free legal assistance, the Registrars of the *ad hoc* Tribunals must assign them counsel from a list of persons who have indicated their willingness to represent indigent suspects or accused and who satisfy the necessary criteria.[102] The decision of the Registrar in question is then notified to both the suspects or accused concerned and their counsel and, if applicable, to the professional body or governing body of the assigned counsel.[103] The *ad hoc* Tribunals are also required under their Headquarters Agreement to notify the Ministries of Foreign Affairs of the respective Host States of the names of counsel and the suspects or accused to whom they have been assigned.[104]

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96. Dokmanović Decision, *supra* note 77, para. 12.
97. The Prosecutor *v.* Dokmanović, Decision to Assign Mr. Toma Fila as Lead Counsel, Case No. IT-95-13a-PT, Tr. Ch. II, 8 September 1997.
98. ICTY Directive, *supra* note 24, Art. 11(A); ICTR Directive, *supra* note 24, Art. 10(A).
99. ICTY Statute, *supra* note 4, Art. 18 (3); ICTR Statute, *supra* note 5, Art. 17(3).
100. *Id.*, ICTY Statute, Art. 21(4)(d); ICTR Statute, Art. 20(4)(d).
101. *See* Further Explanation, *supra* note 85. Such an approach complies with the case law of the European Court, see Harris, O'Boyle & Warbrick, *supra* note 8, at 262.
102. ICTY Directive, *supra* note 24, Art. 14(A); ICTR Directive, *supra* note 24, Art. 13(A). It should be noted that counsel may also be assigned in the interests of justice to accused who request the assignment of counsel but do not comply with the requirements set out in the respective Directives, as well as accused who fail to obtain or request the assignment of counsel or to elect in writing that they intend to conduct their own defence (ICTY Directive, Art. 11 *bis*; ICTR Directive, Art. 10 *bis*). *See also* The Prosecutor *v.* Sikirica & Others, Decision (Dosen), Case No. IT-95-8-PT, Tr. Ch. II, 21 July 1995.
103. *Id.*, ICTY Directive, Art. 12; ICTR Directive, Art. 11.
104. Agreement Between the United Nations and the Kingdom of The Netherlands concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991, UN Doc. S/1994/848 (1994), Art. XIX; Agreement Between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Tribunal for Rwanda, UN Doc. A/51/399-S/1996/778 (1995), Art. XIX.

The assignment of counsel may be withdrawn when information is obtained which establishes that suspects or accused have sufficient means to allow them to pay for the costs of their defence.[105] The Registrars of the *ad hoc* Tribunals may also withdraw the assignment of counsel if indigent suspects or accused come into means which, had they been available at the time the request for the assignment of counsel was made, would have caused them not to grant the request.[106] For example, on 6 August 1999, the ICTY Registrar decided to withdraw the assignment of counsel to the accused, Mario Cerkez, Drago Josipović, Mirjan Kupreskić, Vlatko Kupreskić, Zoran Kupreskić, Dragan Papić and Vladimir Santić, in light of the financial support which they were presumed to have received from an organisation named "Croatian Prisoners in The Hague".[107] According to media reports, on two occasions during 1999 this organisation raised funds for the accused through the auction of art works, totalling an estimated DM 4,300,000. Although the accused claimed that their financial situation had not substantially changed since these events, the Registrar considered that a considerable sum of money had been made available to them and as a consequence their state of indigence had ended.[108] The seven accused each filed an appeal against her decision, arguing that the amount

105. ICTY Directive, *supra* note 24, Art. 19 (A)(ii); ICTR Directive, *supra* note 24, Art. 18(B). The decision to withdraw the assignment shall be reasoned and must be notified to both the accused and his counsel (ICTY Directive, Art. 19(B); ICTR Directive, Art. 18(C)). Such withdrawal shall take effect from the date of the receipt of the notification, following which all the costs and expenses incurred by the representation of the accused cease to be met by the Tribunal (ICTY Directive, Art. 19(C); ICTR Directive, Art. 18(D)). However, the withdrawal of the assignment of counsel does not exclude an accused from the benefit of the legal aid scheme administered by the Registry *in futuro*. Once his newly acquired funds are exhausted the accused may submit another request for legal assistance to the Registrar. In accordance with Arts. 17(C) and 18(C) of the ICTR and ICTY Directives respectively, although the assignment of counsel may be withdrawn, the Registrar in question at the request of counsel may determine that all or part of the costs and expenses of legal representation of the accused necessarily and reasonably incurred shall be covered by the Tribunal if such costs and expenses cannot be borne by the accused because of his financial means. However, it has been the practice of the *ad hoc* Tribunals that only those costs and expenses associated with the international character of the proceedings will be covered under this provision. An accused who disguises his assets or otherwise deceives or seriously misleads the Registry of the *ad hoc* Tribunals so as to benefit from the provisions of Rule 44 of both the ICTR and ICTY Rules may be ordered to repay the costs and expenses incurred in providing legal assistance to him. Rule 45(H) of both the ICTR and ICTY Rules provides that "where an alleged indigent person is subsequently found not to be indigent, the [Trial] Chamber may make an order of contribution to recover the costs of providing counsel."

106. *Id.*, ICTY Directive, Art. 19(A)(i); ICTR Directive, Art. 18(A).

107. *See* The Prosecutor *v.* Kordić & Others, Decision (Mario Čerkez), Case No. IT-95-14/2-T, Tr. Ch. III, 6 August 1999; The Prosecutor *v.* Kupreškić & Others, Decision (Drago Josipović), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999; The Prosecutor *v.* Kupreškić & Others, Decision (Mirjan Kupreškić), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999; The Prosecutor *v.* Kupreškić & Others, Decision (Vlatko Kupreškić), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999, The Prosecutor *v.* Kupreškić & Others, Decision (Zoran Kupreškić), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999; The Prosecutor *v.* Kupreškić & Others, Decision (Dragan Papić), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999; and The Prosecutor *v.* Kupreškić & Others, Decision (Vladimir Santić), Case No. IT-96-16-T, Tr. Ch. II, 6 August 1999.

108. During the second auction held in Mostar, Bosnia and Herzegovina, a letter signed by the accused was read out in which they expressed their gratitude for the support lent to them. *Id.*

raised from the auctions was far lower than amount cited. Furthermore, they alleged that the money was not used to pay for their defence but was used instead to help with the expenses incurred by members of their family wishing to visit them in The Hague, for pocket money to spend in the United Nations Detention Unit, to pay for the defence in cases where assignment of counsel had not been granted and for occasional assistance for their families in exceptional circumstances.[109]

On 3 September 1999, Trial Chambers II and III hearing the *Kupreskić and Others* and *Kordić and Cerkez* trials respectively, reversed the decisions of the Registrar.[110] Having considered the evidence before the Registrar – who in their opinion had the burden of proof in determining whether or not the accused were indigent – the Trial Chambers found that the evidence was not sufficient:

> Media reports may serve as a first step to launch an investigation into the veracity of the reported facts. That newspapers and other kinds of media are very often a highly unreliable source of information is common knowledge. Their reports, unsubstantiated by other material, cannot by themselves be sufficient evidence for a court of law.[111]

The Chambers ordered that the assignment of counsel "continue without interruption with regard to all accused."[112]

4.1.2. Effectiveness of legal aid: free choice of counsel

Where legal aid is granted the jurisprudence of international human rights bodies is clear that courts have a special responsibility to ensure that the legal assistance provided to indigent suspects and accused is effective. In *Artico v. Italy,* the officially appointed counsel, citing other commitments and ill-health, failed to represent the accused during certain court proceedings.[113] The Italian government argued that they had discharged their obligations under the European Convention by merely nominating counsel. The European Court disagreed:

> The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...] [m]ere nomination does not ensure affective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified

109. *See* The Prosecutor *v.* Kordić & Others, Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, Case No. IT-95-14/2-T, Tr. Ch. III, 3 September 1999 (Cerkez Decision); The Prosecutor *v.* Kupreskić & Others, Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, Case No. IT-96-16-T, Tr. Ch. II, 3 September 1999 (Kupreskić Decision).
110. *Id.*
111. *Id.*, Kupreškić Decision, para. 7; referred to in the Cerkez Decision, para. 4.
112. *Id.*
113. Artico *v.* Italy, Judgement of 13 May 1980, 3 EHRR 1 (1981).

> of the situation, the authorities must either replace him or cause him to fulfil his obligations.[114]

However, the Court observed that the State "cannot be held responsible for every short-coming on the part of a lawyer appointed for legal aid purposes."[115] In *Kamasinski v. Austria* – emphasising that the conduct of the defence is a matter between the accused and their counsel – the Court added that "the competent national authorities are required [...] to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way."[116]

To ensure that indigent suspects or accused receive effective legal assistance, it is the practice of the *ad hoc* Tribunals that such persons are given the opportunity to nominate counsel who will represent them on legal aid. The Directives of the *ad hoc* Tribunals also provide a procedure for the withdrawal of the assignment of counsel should the relationship between client and counsel deteriorate to a point whereby continued representation is no longer effective. Finally, the *ad hoc* Tribunals both ensure that assigned counsel are provided with the resources necessary to prepare the defence of their clients.

Although one of the best ways to ensure that indigent accused are provided effective representation is to allow them to select a particular counsel to represent them, this issue has become one of the most contentious issues relating to the right to legal aid. According to the jurisprudence of the European Court, the right of accused to legal assistance of their own choosing is guaranteed only where they have sufficient means to pay for such assistance.[117] Indigent accused are not entitled to be consulted when counsel are appointed[118] and, moreover, it is not a requirement that counsel be known to accused, even when they are not permitted to attend the hearing.[119] A similar approach is followed by the Human Rights Committee who have decreed:

> Although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation under Article 14(3)(d) [of the ICCPR] by the State party. [120]

A different approach has been taken by the *ad hoc* Tribunals and the international criminal tribunals that preceded them. Both the Nuremberg and Tokyo Charters stated unequivocally that the accused – who were effectively indigent as their bank

114. *Id.*, para. 33.
115. *Id.*, para. 36.
116. Kamasinski *v.* Austria, Judgement of 19 December 1989, 13 EHRR 36 (1990), para. 65.
117. X *v.* United Kingdom, App. No. 9728/82, 6 EHRR 345 (1983).
118. X *v.* Federal Republic of Germany, App. No. 6946/75, 6 DR 114 (1976).
119. App. No. 1807/63, cited in Harris, O'Boyle & Warbrick, *supra* note 8, at 263.
120. Pratt and Morgan *v.* Jamaica, ICCPR, Comm. Nos. 210/86 and 225/87, at para. 13.2.

accounts had been seized by the occupying powers – were to be allowed the counsel of their choice.[121] In this connection, the Judges and court administrators of both Tribunals went to great lengths to ensure that the principle of free choice of court appointed counsel was respected as illustrated by the fact that the Nuremberg Tribunal ordered that the son of the accused, Franz von Papen, an army captain who had been incarcerated as a prisoner of war be released so that he could assist his father's defence.[122] Although the ICTY Registrar is not required to assign counsel of the accused's own choosing, "the practice of the Registrar has been to permit the accused to select any available counsel from this list and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary requirements."[123]

The involvement of indigent accused in the selection of counsel is not as far-reaching in the ICTR as its Yugoslav counterpart. In the *Ntakirutimana* Case, the accused, Gerard Ntakirutimana, asked Trial Chamber I – Judges Kama, Ostrovsky and Aspegren – to replace the counsel assigned to him with a particular counsel of his choice. The accused based his objection to the assigned counsel solely on the ground that he was a Tanzanian national and that Tanzania maintained special ties with the present government of Rwanda.[124]

The Trial Chamber, by two votes to one, refused to accede to the accused's request, declaring that "Article 20(4) of the Statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his or her choice."[125] They added, however:

> [...] mindful to ensure that the indigent accused receives the most efficient defence possible in the context of a fair trial, and convinced of the importance to adopt a progressive practice in this area, an indigent accused should be offered the possibility of designating the counsel of his or her choice from the list drawn up by the Registrar for this purpose, the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request of the accused.[126]

121. A. Tusa & J. Tusa, The Nuremberg Trial 216 (1984).
122. D. Sprecher, Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account, Vol. 1, at 127 (1999).
123. The Prosecutor *v.* Delalić and Others, Decision on Request by Accused Mucić for Assignment of New Counsel, Case No. IT-96-21-PT, Tr. Ch. II, 24 June 1996.
124. The Prosecutor *v.* Gerard Ntakirutimana, Decision on the Motions of the Accused for Replacement of Counsel, Case No. ICTR-96-10-T, ICTR-96-17-T, Tr. Ch. I, 11 June 1997.
125. *Id.*
126. *Id,* In a decision rendered in the *Nyiramasuhuko* case on 13 March 1998, on a defence motion requesting the appointment of a specifically named co-counsel, Trial Chamber I – Judges Kama, Aspegren and Pillay – held that the same test applies, *mutatis mutandis*, to the appointment of a co-counsel. The Prosecutor *v.* Pauline Nyiramusuhuko and Arsene Ntahobali, Decision on the Motion on the Decision of a Request for Assignment of Counsel, Case No. ICTR-97-21-T, Tr. Ch. I, 13 March 1998 (Nyiramusuhuko Decision), at 16.

Based on the information presented, the majority, Judges Kama and Aspegren, considered that the Registrar did have "reasonable and valid grounds" for not granting the accused's request.[127]

The ability of indigent accused to choose their assigned counsel was further limited by the promotion within the ICTR of a policy of diversity of representation through equitable distribution of assigned counsel. In the *Nyiramasuhuko* Case, Trial Chamber I stated that when assigning counsel "the Registrar shall [...] take into consideration, *inter alia*, the resources of the [ICTR], competence and recognised experience of counsel, geographical distribution [and] a balance of principle legal systems of the world."[128]

Since the number of appointments of assigned counsel from Canada and France made up one-half of all appointments, on 18 November 1998 the ICTR Registrar used this ruling to implement a moratorium on the appointment of assigned counsel from these two countries in order to achieve a greater geographic balance and a better representation of the principal legal systems of the world.[129] This moratorium was vigorously contested, in particular by the accused Jean-Paul Akayesu after the Registrar refused to appoint Mr. John Philpot, a Canadian, as his counsel. Arguing that the exclusion of Canadian and French lawyers was a discriminatory policy based on nationality which had no place in an institution of the United Nations and that the Rule of Law required that he be represented by a lawyer in whom he had confidence, the accused sought judicial review of the Registrar's Decision.[130] The Appeals Chamber – Judges McDonald, Shahabuddeen, Vohrah, Wang and Nieto-Navia – agreed and on 27 July 1999 ordered the Registrar to assign Mr. Philpot to represent the accused.[131] In reaching their decision, the Chamber referred to the fact that:

> [...] the practice of the [ICTR] has been to provide a list of approved counsel from which an accused may choose and that Mr. John Philpot was included in this list by the Registrar upon the insistence of the [accused] that he desired that Mr. Philpot be

127. In his Separate and Dissenting Opinion, Judge Ostrovsky agreed that Art. 20(4)(d) of the ICTR Statute gave the accused the right to be consulted concerning his choice of assigned counsel, but he differed from the majority in holding that, in the circumstances of the case, this mandated granting the request of the accused to replace his counsel. Separate Opinion, *supra* note 22, paras. 7 to 9.

128. Nyiramasuhuko Decision, *supra* note 126.

129. See Statement of the Registrar on the Assignment of Counsel (27 October 1999) available on the ICTR website: http://www.ictr.org (Registrar Statement): *see also* Expert Group Report, *supra* note 58, para. 231.

130. *See* The Prosecutor *v.* Jean-Paul Akayesu, Motion for Judicial Review under Section 19 of the Statute and Rules 73 and 105 of the Rules of Procedure and Evidence, Urgent Motion for Oral, Case No. ICTR-96-4-A, App. Ch., 20 January 1999; and The Prosecutor *v.* Jean-Paul Akayesu, Appellant's Reply to Registrar's Arguments, Case No. ICTR-96-4-A, App. Ch., 28 April 1999.

131. The Prosecutor *v.* Jean-Paul Akayesu, Decision Relating to the Assignment of Counsel, Case No. ICTR-96-4-A, App. Ch., 27 July 1999.

> assigned to him, and [...] that the Registrar thereby gave the [accused] a legitimate expectation that Mr. Philpot would be assigned to represent him before the [ICTR].[132]

In light of the decision of the Appeals Chamber, on 27 October 1999, the ICTR Registrar lifted the ban imposed on assigned counsel from France and Canada. However, claiming that was it never meant to be permanent, the Registrar stated that the moratorium had fulfilled its limited objective of achieving greater diversification in the pool of defence counsel and better representation of the principal legal systems of the world.[133]

4.1.3. Effectiveness of legal aid: withdrawal of counsel

Should accused persons loose confidence in their assigned counsel so that continued representation becomes untenable, the Registrars of the *ad hoc* Tribunals may, at the request of the accused or their counsel withdraw the assignment of counsel.[134] In such cases, the Registrar in question must immediately assign new counsel to the accused.[135] On 20 August 1997, Trial Chamber I of the ICTR – Judges Kama, Aspegren and Pillay – received a request from the accused, Georges Rutanganda, asking that his lead counsel, Mr. Luc de Temmerman, be replaced as he had "failed to provide sufficient legal and strategic assistance in support of his defence."[136] Noting that "the unique and international character of the proceedings before [the ICTR] necessitates full protection of the fair trial rights of the accused", on 31 October 1997 the Trial Chamber, who had sole authority to withdraw counsel at the time, held:

> A proper and efficient defence of the accused [...] does require establishment and maintenance of full confidence between the accused and the Defence Counsel. The counsels, in turn, whether or not assigned by the [ICTR], are bound by the ethical standards of their profession to ensure the best possible defence of their clients with prejudice and vigour.[137]

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132. *Id.*
133. The Registrar also commented that the moratorium had helped prevent monopolisation by a particular group of lawyers of legal representation at the ICTR, which could have led to frustration of its judicial process through dilatory and other tactics. *See* Registrar Statement, *supra* note 129.
134. ICTY Directive, *supra* note 24, Art. 20(A)(i); ICTR Directive, *supra* note 24, Arts. 19(A)(i) and (ii).
135. *Id.*, ICTY Directive, Art. 20(D); ICTR Directive, Art. 19(D). Where a request for withdrawal has been denied, the person making the request may seek the President's review of the Registrar's decision (ICTY Directive, Art. 20(E); ICTR Directive Art. 19(E)).
136. *See* The Prosecutor *v.* Georges Rutaganda, Decision on the Accused's Motion for Withdrawal of His Lead Counsel, Case No. ICTR-96-3-T, Tr. Ch. I, 31 October 1997.
137. *Id.*, para. 2.

Taking account of the fact that Mr. de Temmerman had been absent from hearings for a considerable period, the Chamber found that there were sufficient grounds for directing the Registrar to replace him with a new counsel without delay.[138]

Given the consequences that a withdrawal may have on the court proceedings, the reasons for the dissatisfaction must be genuine. A request for withdrawal must not be made for "frivolous reasons or in a desire to pervert the course of justice."[139] For instance, on 17 June 1999, Mr. Tom Moran submitted a motion to the ICTY Appeals Chamber seeking to be relieved immediately as co-counsel of the accused, Hazim Delić, on the basis that he was unable to provide effective representation to the accused without risking his employment. The Appeals Chamber – Judges Hunt, Riad, Wang, Nieto-Navia and Bennouna – denied the Motion on two grounds.[140] Firstly, it held that the allegation that Mr. Moran may loose his employment if he continued to represent the accused was unproved and secondly, even if proved, the allegation would not constitute a proper basis upon which a withdrawal may be made. In this connection, the Chamber stated that to withdraw an assignment on the basis of the personal interest of counsel was contrary to counsel's obligations under the ICTY Code of Conduct and to the interests of his client and of justice.[141]

4.1.4. Effectiveness of legal aid: resources provided to assigned counsel

The provisions of the Directives of the *ad hoc* Tribunals relating to the remuneration of counsel and the reimbursement of costs and expenses incurred ensure that the resources available to assigned counsel are not only adequate, but are comparable to those of the prosecution.[142] Pursuant to Articles 17 and 18 of the ICTR and ICTY Directives respectively, assigned counsel may hire the services of investigators, researchers, translators and interpreters and other support staff necessary for the preparation of the defence.[143] Moreover, under exceptional circumstances and at the request of the person assigned as counsel, the Registrars of the *ad hoc* Tribunals may assign a second counsel to assist assigned counsel.[144]

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138. *Id.*
139. The Prosecutor *v.* Delalić and Others, Decision on Request by Accused Mucić for Assignment of New Counsel, Case No. IT-96-21-PT, Tr. Ch. II, 24 June 1996.
140. Although it was not ordinarily appropriate for a Chamber to consider a motion for the withdrawal of the assignment of counsel where no such motion had been presented to the ICTY Registrar, the Appeals Chamber decided, given that there was a very short time period between filing of the Motion and the date upon which the appellant brief of the defence was due, to consider the motion on its merits. The Prosecutor *v.* Delalić & Others, Order on the Motion to Withdraw as Counsel due to Conflict of Interest, Case No. IT-96-21-A, App. Ch., 24 June 1999.
141. *Id.*
142. *See* A. Cassese, *Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights*, 4 EHRLR 329, at 339 (1997).
143. Because of budgetary constraints, limits are placed on the number of support staff assigned counsel may hire and the amount those persons may be paid. *See* ICTY 1997 Annual Report, *supra* note 35.
144. ICTY Directive, *supra* note 24, Art. 16(C); ICTR Directive, *supra* note 24, Art. 15(C). When deciding whether to assign co-counsel the Registrar in question may take into account such matters as the com-

The magnitude and complexity of cases that are brought before the *ad hoc* Tribunals necessitate that counsel work full time on their clients' defence.[145] In recognition of this fact, the relevant provisions of the Directives of the *ad hoc* Tribunals governing the remuneration of counsel provide that assigned counsel are paid at an hourly rate for their services, at a rate comparable to that of prosecuting counsel.[146] Furthermore, taking account of the fact that the majority of counsel reside outside the territory of the Host States, the Directives ensure that the costs assigned counsel incur travelling to and from the seat of the *ad hoc* Tribunals are reimbursed and that they receive a daily allowance to cover food, accommodation and local transportation costs.[147]

4.2. The International Criminal Court

4.2.1. Criteria suspects and accused must satisfy in order to receive legal aid

Despite the fact that the delegates attending the Rome Conference enlarged several of the minimum guarantees enshrined in Article 14 of the ICCPR, the right of indigent accused to receive legal aid was one of the most contested provisions of Article 67 of the ICC Statute. Given that the budget of the ICTY in respect of payments to assigned counsel amounts to approximately fifteen per cent of the entire ICTY

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plexity of the case against the accused, the logistical problems in the preparation of the defence, the experience of assigned counsel with adversarial procedures, particularly cross-examination and the availability of assigned counsel during the course of the proceedings. *See, for instance*, The Prosecutor *v.* Delalić & Others, Decision (Ms. Mira Tapusković), Case No. IT-96-21-PT, Tr. Ch. II, 10 December 1996; The Prosecutor *v.* Delalić & Others, Order on the Request by Defence Counsel for Zdravko Mucić for Assignment of a New Counsel, Case No. IT-96-21-T, Tr. Ch. II, 17 March 1997 and The Prosecutor *v.* Tadić, Decision to Withdraw the Assignment of Mr. Nikoli Kostić, Case No. IT-95-1-A, App. Ch., 2 September 1997.

145. Such commitment was demonstrated by the assigned counsel in the *Tadić* case, who each spent between twelve and fourteen hours a day, six days a week on the defence of the accused. *See* Ellis, *supra* note 60, at 529.

146. Annex VI of the ICTY Directive states that lead counsel shall be remunerated at a rate of $80 to $110 per hour depending on experience, while co-counsel are to be paid at a fixed rate of $80 per hour. *See* Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/51/292 (1996), para. 109. Due to budgetary constraints, however, limitations have been imposed on the maximum number of hours assigned counsel may claim as remuneration. In addition, limits have been placed on the number of investigators and consultants assigned counsel may hire and the amount such persons may be paid. ICTY 1997 Annual Report, *supra* note 34, para. 87. As of 15 May 1998 the maximum number of hours assigned counsel may be remunerated per month is 175. *See* T. Wilkinson, *Reason to take on War Crimes Tribunal*, Los Angeles Times, 15 May 1998.

147. ICTY Directive, *supra* note 24, Arts. 26 (daily subsistence allowance) and 30 (travel expenses); ICTR Directive, *supra* note 23, Arts. 22(iii) (daily subsistence allowance) and 27 (travel expenses). In the interests of justice and in order to ensure the full exercise of the rights of the defence, the Registrars of the *ad hoc* Tribunals may also authorise the reimbursement of travel and accommodation costs incurred during investigative missions assigned counsel undertake. *Id.*, ICTY Directive, Art. 30(C); ICTR Directive, Art. 27(C).

budget[148], a number of delegates proposed limiting the scope of legal aid, thus reducing the financial expenditure of the ICC.[149] Fortunately, the majority favoured arguments advocating the highest standards of human rights, and it was eventually agreed that legal representation would be provided to indigent suspects and accused at the expense of the ICC.

One of the most concerning features of the Rome Statute is that it fails to specify who shall be responsible for administering the legal aid system operated by the court. In the authors' opinion, since the Registrar of the ICC will be responsible for the non-judicial aspects of the administering and servicing of the court[150] and will establish within the Registry a unit to protect the interests of victims and witnesses[151], authority for administering the legal aid system should be vested in this official. To facilitate the professional independence of counsel and to provide them with the necessary support, assistance and information they require, a specialised unit should be established within the Registry to deal with such matters.[152] In this connection, the Registrars of the *ad hoc* Tribunals have both established Defence Counsel Units within their respective offices to act as the channel of communication between counsel and the organs of the court and to ensure that counsel receive the co-operation and support to which they are entitled.[153]

148. The budget of the ICTR for this purpose amounts to almost ten percent of the total expenditure estimates. Expert Group Report, *supra* note 58, para. 203.

149. The expenses of the Court and the Assembly of State Parties shall be provided by assessed contributions made by State Parties as well as funds provided by the United Nations, subject to approval of the General Assembly. *See* Rome Statute, *supra* note 6, Art. 115. The budgetary and financing mechanisms of the ICC thus differ to the *ad hoc* Tribunals. Although the expenses of the ICTY shall be borne from the regular budget of the United Nations, the expenses of the ICTR are merely expenses of the Organisation. Such an approach was taken to avoid the dispute which arose within the Fifth Committee of the General Assembly over whether the ICTY should be funded out of the general United Nations budget or out of the peacekeeping budget. *See* R. Moseley, *War Crimes not everyone's priority. Some nations call Tribunal a barrier to Bosnian peace,* Chicago Tribune, 30 April 1995.

150. Rome Statute, *id.*, Art. 43(1).

151. *Id.*, Art. 43(6).

152. During the second session of the Preparatory Commission a number of State Parties proposed establishing an office of the defence under the roof of the ICC Registry. According to their proposal although the office would in general be financially dependent on the budget of the Registry, the ICC Registrar would be responsible for ensuring that all matters which are essential to the professional independence of defence counsel would be administered in "an independent manner." *See* UN Doc. PCNICC/1999/WGRPE(4)/DP.2 Rev.1 (1999). Having received the support of the majority of delegates, this proposal was adopted during the third session of the Preparatory Commission, Report of the Third Session of the Preparatory Commission, *supra* note 60, at 28.

153. *See* ICTY 1997 Annual Report, *supra* note 35, para. 86. The work of the Units involves assisting the Registrar in developing and maintaining the list of persons who have indicated their willingness to represent indigent accused and monitoring the requirements regarding the professional duties and responsibilities of assigned counsel, their qualifications and their remuneration. The respective Units have also been involved in determining whether a suspect or an accused is entitled to the provision of legal aid and have provided valuable advice to the Registrars of the *ad hoc* Tribunals when defence counsel have sought to resign their assignment or an accused has sought their replacement. *See* Expert Group Report, *supra* note 58, para. 202.

Since their inception, the *ad hoc* Tribunals have encountered several difficulties relating to the assignment of counsel, particularly in regard to the payment of the fees and disbursements, and have amended their rules and regulations accordingly.[154] To take account of their experiences, the ICC should adopt a procedure for the assignment of counsel similar to the current practice of the *ad hoc* Tribunals. In this connection, on account of the context in which it will operate the criteria that accused should satisfy in order to qualify for legal aid should be formulated in general terms. The Directives of the *ad hoc* Tribunals both provide that "in accordance with the facts of the individual case, a suspect or an accused shall be considered to be indigent if he does not have sufficient means to retain counsel of his choice."[155] In the authors' opinion, such a general definition would be appropriate. The national appreciation of the indigence of criminal defendants should not be used in an international setting since legal representation before an international criminal tribunal entails much greater financial liability. Accused persons who have sufficient means to retain counsel in their country of residence may be adjudged to be indigent on the basis that they do not have the necessary finances available to meet the costs and expenses associated with the international nature of the trial, in particular the high travel and accommodation costs.

When determining whether they satisfy the aforementioned criteria, the ICC Registrar should only take into account the disposable income and capital of suspects or accused who request the assistance of counsel. However, it is recommended that persons who are supported by them or towards whom they have financial obligations are not adversely affected by a determination that they have sufficient means to retain counsel privately. Accordingly, when calculating disposable income, alimony payments and reasonable expenses incurred in respect of the maintenance of the spouse of or any dependent child or relative with whom they habitually reside should be deducted.[156] Similarly, when calculating disposable capital, household furniture, personal clothing and tools and equipment of trade should be excluded.[157] Following the practice of the *ad hoc* Tribunals, the ICC Registrar should also exclude any State benefits (family and social welfare payments) to which suspects or accused may be entitled.[158] However, any income derived from life insurance policies or private pension schemes should be included, especially as, in the case of suspects or accused holding high ranking governmental or military positions, such income may be significant.

In order to satisfy the ICC Registrar that they lack the financial means to retain counsel, suspects or accused requesting legal aid should either complete a declaration of means which must be certified by the relevant domestic fiscal authorities of the State in which they reside, or submit a certificate of indigence issued to them by

154. Ellis, *supra* note 62, at 529-532.
155. ICTY Directive, *supra* note 24, Art. 6; ICTR Directive, *supra* note 24, Art. 5.
156. Further Explanation, *supra* note 85.
157. *Id.*
158. ICTY Directive, *supra* note 24, Art. 7; ICTR Directive, *supra* note 24, Art. 6.

such authorities previously.[159] One of difficulties faced by the *ad hoc* Tribunals is that the relevant domestic fiscal authorities have been unable, and sometimes unwilling to certify that the declaration of means signed by suspects or accused requesting legal aid are true and correct. To ensure that the ICC does not encounter similar difficulties, a provision should be introduced which allows the ICC Registrar to request the co-operation of the relevant domestic authorities to certify that the information contained in the declaration of means is accurate. Such a provision should also enable the Chambers to issue binding orders against the relevant national authorities should they choose to deliberately ignore the Registrar's request.

Although the provision of legal aid should be withdrawn if indigent suspects or accused come into means which would enable them to pay counsel privately, the ICC should not try to recover the costs of any legal aid provided as such a policy would have serious repercussions on their fair trial rights. The fear of financial consequences should never force indigent suspects or accused to choose between accepting legal aid and representing themselves in person.[160]

Since the Rome Statute guarantees the provision of legal aid in almost the same terms as the ICCPR, indigent suspects or accused will only be entitled to receive legal representation at the expense of the ICC "where the interests of justice so require." Accordingly, in line with the jurisprudence of the *ad hoc* Tribunals and various international human rights bodies, in order to determine whether this requirement is satisfied, account should be taken of the seriousness of the offence with which they are charged and the severity of the penalty threatened, the complexity of the legal and factual issues involved, and the personal circumstances of the suspects or accused concerned.[161] However, considering that all persons who will be tried by the ICC will be charged with the most serious crimes of international concern – namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression – it is hard to envisage a scenario where this requirement will not be satisfied.

In their report, the Preparatory Commission indicated that, in certain situations, the provision of legal aid may be based on the interests of justice criteria alone. The report proposed that where accused persons fail to nominate counsel or indicate that they will defend themselves in person counsel should be assigned to them.[162] In such a situation, where the ICC Registrar receives information – for instance, during the course of the court's proceedings – which indicates that accused have sufficient means to retain counsel privately, the assignment should be withdrawn and the Registrar should be authorised to seek an order from the Chamber to recover any legal aid costs provided to them. Such a procedure should also be utilised when the Registrar comes into information that demonstrates that accused falsely indi-

159. Further Explanation, *supra* note 85.
160. *See* Luedicke, Belkacem and Koc *v.* Federal Republic of Germany, Judgement of 28 November 1978, 2 EHRR 149 (1979-1980), para. 42.
161. Harris, O'Boyle & Warbrick, *supra* note 8, at 262; *see also* Further Explanation, *supra* note 85.
162. PrepCom Proposals, *supra* note 63, at 198.

cated on their declaration of means that they were indigent where in actual fact they had sufficient financial means to retain counsel privately, or submitted forged documentation supporting their application. In this connection, however, it has been the experience of the *ad hoc* Tribunals that once legal aid has been provided, it is extremely difficult for their respective Registrar – on whose shoulders rests the burden of proof – to establish that the recipient is no-longer indigent.[163]

4.2.2. Effectiveness of legal aid: free choice of counsel

Despite not being specified in the Rome Statute, it is expected that the ICC will introduce measures, which will guarantee to indigent suspects or accused the right to receive effective legal representation. Although the ICC Registrar should be given the authority to select counsel for indigent accused whenever they fail to nominate a particular counsel, the question of free choice of assigned counsel must be taken into careful consideration. In the authors' opinion, indigent accused who request a particular counsel will be better represented for several reasons. Indigent accused are far more likely to place their trust and confidence in counsel whom they have specifically requested, a factor which would increase the rapport and facilitate the communication between them, thus leading to better representation.[164] Moreover, indigent accused will be in a better position to choose a more able counsel than the Registrar[165], who may take into account considerations unrelated to the ability of counsel to provide an adequate and effective defence, such as their uncooperative attitude towards the Registry or their political allegiance.[166] In this connection, one of the main arguments against permitting indigent accused to select their own counsel, is that by allowing them to do so the even handed distribution of assignments will be disrupted.[167] Without assessing the merits of the claim[168], in the case

163. *See* Kupreskić Decision and Cerkez Decision, *supra* note 109.

164. *See* P. Tague, *An Indigent's Right to the Attorney of his Choice*, 27 Stanford Law Review 73, at 80 (1974). It has been pointed out that in the United States of America where indigent accused are not entitled to select the attorney who will represent them: "Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is 'processing' and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship." *See* S. Schulhofer & D. Friedman, *Rethinking Indigent Defence: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for all Criminal Defendants*, 1993 American Law Review 73, at 86 (1993).

165. *Id.*, Tague.

166. *See* Schulhofer & Friedman, *supra* note 164.

167. *See* W. Lafave & J. Israel, Criminal Procedure: Second Edition 547 (1992).

168. Although this concern stems from the belief that accepting defendant's choice will impose a substantial burden on the more experienced attorneys, it has been noted that "in the 'even-handed distribution' argument, appointment may be seen as a plum that particular attorneys should not be permitted to horde. But remuneration is seldom too generous, and if it is, inequitable distribution is far more likely when judges or other court officials control the procedure than when its distribution results from choices by individual defendants pursuing their own self interest. Indeed, defendant choice would tend to force attorneys to compete away excess profits by offering better services to attract clients." Schilhofer & Friedman, *supra* note 164, at 107-108.

of the ICC such a concern can be easily overcome. In order to avoid particular counsel monopolising assignments, the Preparatory Commission should consider adopting a rule specifying that at any given time no counsel shall be assigned to more than one suspect or accused: such a provision being contained the ICTR Directive.[169]

4.2.3. Effectiveness of legal aid: withdrawal of counsel

Just like the Directives of the *ad hoc* Tribunals, the ICC should permit indigent suspects or accused to request the withdrawal of counsel should they loose confidence in them. Furthermore, if a request is refused, the suspects or accused concerned should be permitted to seek the review of ICC President of the decision. Moreover, the Judges of the ICC should take a proactive approach to the effectiveness of representation and should intervene in the defence and order the replacement of counsel if it is manifest to the court that their behaviour is incompatible with the interests of justice.[170]

4.2.4. Effectiveness of legal aid: resources provided to assigned counsel

Since the material and financial resources that have been provided to assigned counsel by the *ad hoc* Tribunals have enabled indigent accused to receive an adequate and effective defence, similar resources should be provided to assigned counsel appearing before the ICC. In this connection, given the complexity of cases to be heard by the ICC and the logistical problems associated with their preparation, assigned counsel should be permitted to request the assistance of co-counsel and sufficient support staff – such as investigators, interpreters and translators, legal researchers and consultants – necessary for the preparation of the defence.

Counsel who elect to represent indigent suspects or accused generally acknowledge the financial constraints inherent in the provision of legal aid and thereby accept that the remuneration they will receive for their services will be less than that received from privately paying clients. Nevertheless, it is opined that the rate at which the ICC remunerates assigned counsel should be reasonable and comparable to the rates paid to assigned counsel by the *ad hoc* Tribunals. At a minimum, assigned counsel must be paid at an equivalent rate to their prosecutorial colleagues and should be reimbursed for any expenses, including transportation and accommodation costs that they reasonably and necessarily incur in the defence of their clients.

169. Art. 15 provides "no counsel shall be assigned to more than one suspect or accused." ICTR Directive, *supra* note 24.

170. *See* Michael Adams *v.* Jamaica, ICCPR, Comm. No. 607/94 (1994).

5. CONCLUDING COMMENTS

In order to fully respect international obligations regarding the rights to a fair trial, the drafters of the Rome Statute went to great lengths to ensure that the rights of persons suspected, accused and convicted of the most serious crimes of concern to the international community would be respected. However, the integrity and success of the ICC – an institution whose primary purpose is to ensure that justice is done – will be judged not on the existence of these provisions but in their application. It is therefore clear that the failure to include provisions within the Rome Statute on the qualifications and conduct of counsel, the criteria suspects and accused must satisfy in order to receive legal aid and the adequacy and effectiveness of the legal representation provided was a serious oversight.

Given the lengthy and cumbersome process that must be undertaken in order to amend the ICC Rules, in order to ensure that the right to be defended in person or through legal assistance is fully respected it is imperative that the Preparatory Commission closely examines, and where appropriate follows the practice of the *ad hoc* Tribunals, especially as both have taken a 'defence-orientated' approach to the right. The *ad hoc* Tribunals not only guarantee the right to suspects and accused but also to persons detained under their authority. In addition, to ensure that such representation is provided with the necessary competence, skill, care, honesty and loyalty required the *ad hoc* Tribunals have both promulgated codes of ethical conduct governing the behaviour of counsel. The rights of indigent suspects and accused are further protected by the fact that it is the practice of the *ad hoc* Tribunals to afford them the opportunity to nominate counsel who will represent them on legal aid and to request the withdrawal of the assignment of counsel should the relationship between them and their counsel deteriorate. The *ad hoc* Tribunals further guarantee the adequacy and effectiveness of legal aid by ensuring that assigned counsel are provided with the resources necessary to prepare the defence of their clients.

The results achieved by the *ad hoc* Tribunals demonstrate that the approach taken towards the right to be defended in person or through legal assistance – which not only conforms with international obligations relating to the right but also, in many respects, goes beyond that required by international human rights law – is justified. Since their inception, in addition to acquitting two accused and dismissing the indictment against a third with prejudice to the prosecution, the *ad hoc* Tribunals have, in several cases, found a number of charges not to be proven. It is, therefore, crucial that the framers of the ICC Rules listen to the experience of the *ad hoc* Tribunals and adopt similar, if not identical, rules and regulations relating to the qualifications, conduct and assignment of counsel. Failure to do so may result in loss of public confidence in the ICC, as a court valuing human rights of all individuals – including those charged with the most abhorrent crimes known to humankind.