

ORGAN FAILURE: ARGUMENTS FOR  
ESTABLISHING AN ORGAN DEDICATED TO  
THE DEFENSE OF THE ACCUSED AT THE  
INTERNATIONAL CRIMINAL COURT

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*The International Criminal Court (ICC) is the world's first permanent international criminal court, empowered by an international treaty, the Rome Statute, to investigate and try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity, and the crime of aggression. The ICC is composed of four permanently established organs: the Presidency, Judicial Divisions, the Office of the Prosecutor, and the Registry. However, despite there being an entire organ dedicated to the prosecution of the accused, there is no organ dedicated to the defense of the accused, which raises serious questions about fairness to the accused.*

*This note will discuss normative arguments, structural arguments, and jurisprudential arguments for establishing an organ dedicated to the defense of the accused at the ICC. A framework for ensuring adequate and equal representation of the accused before the ICC already exists at the Special Tribunal for Lebanon (STL). Though the STL's Defense Office could be used as a model for the ICC, there are certain issues related to its implementation.*

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## I. INTRODUCTION

The International Criminal Court (ICC) was established in 1998 by the Assembly of States Parties (the Assembly) to the Rome Statute “to exercise its jurisdiction over persons for the most serious crimes of international concern.”<sup>1</sup> The ICC was the first permanent tribunal trying and convicting individuals of war crimes, crimes against humanity, and genocide, and was given a broader mandate than its contemporaries—the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). Unlike the ICTY, ICTR, or SCSL, the ICC’s scope is not backward-looking nor limited by territory or time frame. Instead, it is focused on crimes committed after its establishment, to end impunity and also act as a deterrent from such criminal activity. The only actual limits to the ICC’s mandate are the types of crimes it may try and how a case may come before the Court to begin with.<sup>2</sup> Still, the structure of the ICC resembles that of the other *ad hoc* international criminal tribunals. The ICC is composed

1. Rome Statute of the International Criminal Court art. 1, Jul. 17, 1998, 2187 U.N.T.S. 91-92 [hereinafter Rome Statute].

2. Compare Rome Statute, *supra* note 1, at arts. 5, 11, 13 (stating that the ICC has jurisdiction limited to: (1) only the crimes of war crimes, crimes against humanity, genocide, and aggression; (2) only if those crimes are committed after the entry into force of the Rome Statute or after a State Party has signed on to the Statute; and (3) if the situation arises by referral to the ICC by a State Party, referral to the ICC by the UN Security Council, or by initiation of an investigation by the ICC Prosecutor), with S.C. Res. 827 (adopted May 25, 1993, last amended Jul. 7, 2009), *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, ¶ 1 [hereinafter *ICTY Statute*] (stating that the ICTY has jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991), S.C. Res. 955 (Nov. 8, 1994), *Statute of the International Tribunal for Rwanda*, art. 1 (stating that the ICTR has jurisdiction persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994), and S.C. Res. 1315 (Jan. 16, 2000), *Statute of the Special Court for Sierra Leone*, art. 1 [hereinafter *SCSL Statute*] (stating that the SCSL has jurisdiction to prosecute persons who bear greatest responsibility for serious violations of international

of four “organs”: (1) the Presidency; (2) an Appeals Division, a Trial Division, and a Pre-Trial Division; (3) the Office of the Prosecutor; and (4) the Registry.<sup>3</sup> Notably, despite there being an entire organ dedicated to the prosecution of the accused, there is no organ dedicated to the defense of the accused. This stands in stark contrast to the organization of another *ad hoc* international criminal tribunal: the Special Tribunal for Lebanon (STL). Like the ICC, the STL has four organs but with one key difference: (1) the Chambers, comprising a Pre-Trial Judge, a Trial Chamber, and an Appeals Chamber; (2) the Prosecutor; (3) the Registry; and (4) the Defence Office.<sup>4</sup>

This note will discuss normative arguments, structural arguments, and jurisprudential arguments for establishing an organ dedicated to the defense of the accused at the ICC. Finally, this note will review issues related to the implementation of a defense organ at the ICC.

## II. NORMATIVE ARGUMENTS

### A. *Legal Defense as a Human Right*

In its founding document, the ICC was meant to have a close relationship with the United Nations (U.N.)<sup>5</sup> and “reaffirm[ ] the Purposes and Principles of the Charter of the United Nations.”<sup>6</sup> The “applicable law” of the Court is first and foremost the Rome Statute itself, followed by the Elements of Crimes and the Rules of Procedure and Evidence.<sup>7</sup> Next, the Court applies international treaties and the principles and rules of international law and armed conflict, before resorting to general principles of law derived by the ICC from the national laws and legal systems that would ordinarily have jurisdiction over the crime.<sup>8</sup> Nevertheless, the ICC must interpret and apply the law “consistent with internationally recognized

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humanitarian law and Sierra Leonean law committed in territory of Sierra Leone since 30 November 1996).

3. Rome Statute, *supra* note 1, art. 34 (Organs of the Court).

4. See S.C. Res. 1757, art. 7, U.N. Doc. S/RES/1757 (May 30, 2007), *Statute of the Special Tribunal for Lebanon* [hereinafter *STL Statute*] (describing the composition of the Tribunal).

5. Rome Statute, *supra* note 1, art. 2 (Relationship of the Court with the United Nations).

6. *Id.* at preamble.

7. *Id.* at art. 21(1) (Applicable Law)

8. *Id.*

human rights.”<sup>9</sup> The Universal Declaration of Human Rights (UDHR) itself acknowledges that “[e]veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had *all the guarantees necessary for his defence*.”<sup>10</sup> The UDHR does not define these “guarantees,” but the United Nation’s Human Rights Committee clarified that this includes “adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.”<sup>11</sup> Article 67 of the Rome Statute outlines minimum guarantees of a fair hearing conducted impartially, which includes the right to “conduct the defence in person or through legal assistance of the accused’s choosing.”<sup>12</sup> This is evocative of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), which states that everyone is entitled “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.”<sup>13</sup>

Despite the decree in the Rome Statute that the ICC must follow internationally recognized human rights, which include a legal defense, early drafts of the Rome Statute did not contemplate the rights of the accused.<sup>14</sup> Even when protections of the rights of the accused were eventually added, only months before the 1998 Rome Conference itself,<sup>15</sup> the protections did not establish a dedicated organ of the court to provide a struc-

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9. *Id.* at art. 21(3) (Applicable Law).

10. Universal Declaration of Human Rights (1948), G.A. Res. 217 A (III), art. 8 [hereinafter *UDHR*] (emphasis added).

11. H.R.C. Gen. Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 32 (Aug. 23, 2007).

12. Rome Statute, *supra* note 1, art. 67(1)(d) (Rights of the Accused).

13. International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

14. Kenneth S. Gallant, *Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done About One of Them*, 14 CRIM. L. F. 317, 319 (2003) (“The early drafts of the Rome Statute of the International Criminal Court, through to the 1994 International Law Commission proposal, contained virtually no references to protection of rights of the accused or other individuals whose interests may be affected by international criminal courts.”).

15. *Id.* at 319 (“Indeed, until after the ‘Zutphen draft’ of the Rome Statute, some months before the 1998 Rome Conference, there was no general requirement that the Court apply internationally recognised human rights as part of its law.”).

tural approach to protecting those rights.<sup>16</sup> It seems antithetical to the purported aims of the ICC that there are no explicit guarantees of the protection of the rights of the accused—as established by the UDHR and the ICCPR—through a dedicated organ for the defense. The ICC appears to be created with every mechanism necessary to prosecute individuals, but not to defend against the prosecution.

Supporters of the current structure of the ICC argue that while the Rome Statute does not create an independent organ for the defense, there is nevertheless a permanent establishment in the ICC that is dedicated to serving and protecting the interests of the defense: the Office of Public Counsel for the Defence (OPCD), an independent office within the Registry, established pursuant to Regulation 77, that is charged with administrative aspects of defense for the accused.<sup>17</sup> Xavier-Jean Keïta, the former Principal Counsel of the OPCD, describes the function of the office as creating “an institutional presence of the Defence . . . to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials.”<sup>18</sup> Six years after the OPCD’s creation in 2012, the role of the OPCD was reviewed. The report found that the role of the OPCD “should be not only preserved, but strengthened.”<sup>19</sup> Keïta and others thought this indicated “a step toward one day seeing a Defence Organ at the ICC.”<sup>20</sup> It seemed that the ICC had finally heard the calls for institutional equity between the prosecution and defense and was truly working toward solidifying that ideal. However, not only has Keïta’s hope not come to fruition on this point, despite clear support for such a change, but also in 2014, Keïta mentioned a “recent review in a Registry restructuring project,” which “suggested to remove the independent OPCD altogether, merging the OPCD’s substantive assistance

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16. Rome Statute, *supra* note 1, art. 34 (Organs of the Court).

17. *Defence*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about/defence> [<https://perma.cc/5P62-KCCM>].

18. Xavier-Jean Keïta, *Evolution or Revolution: The Defence Offices in International Criminal Law*, ICTR LEGACY SYMPOSIUM: EVOLUTION OF DEFENCE SYSTEMS IN INTERNATIONAL TRIBUNALS, at 4 (Nov. 2014) (internal citation omitted).

19. *Id.* at 6.

20. *Id.*

with the existing Counsel Support Section's administrative assistance to create one neutral Registry office while creating an outside association of counsel to take on the role of representation of Defence needs to the Court as an institution."<sup>21</sup> This proposal to absorb the OPCD within the Registry office and outsource any defense needs, demonstrates the inequity between the defense and prosecution at the ICC. As part of the Registry, the OPCD is constantly at risk of being dissolved for any number of reasons, unlike the Office of the Prosecutor. The OPCD being created under the Regulations rather than the Rome Statute puts it on uncertain footing, which in turn leaves the protection of the rights of the accused without security.

In sum, the current structure of the ICC does not successfully guarantee and protect the indisputable human right of every accused person to have adequate legal defense, as the OPCD falls short of guaranteeing truly equitable representation.

#### B. *Equality of Arms*

The *ad hoc* tribunals of the late twentieth century were far more concerned with the rights of the accused than earlier examples of international criminal tribunals, namely the Nuremberg and Tokyo tribunals.<sup>22</sup> As a result, these *ad hoc* Tribunals "quickly adopted the principle of equality of arms, equating the recognised principle of fair trial in their own Statutes as equal to the intent as established in the [European Convention on Human Rights] and ICCPR."<sup>23</sup> Unfortunately, there is an *inequality of arms* at the ICC that arises from the lack of a structural approach to ensuring fairness between the prosecution and the defense. As mentioned above, there is no dedicated organ at the ICC for the defense, despite there being

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21. *Id.*

22. Gallant, *supra* note 14, at 318 ("The Statutes of the Nuremberg and Tokyo Tribunals stated the crimes within their jurisdiction and set up a prosecution and judicial system. Except for guaranteeing a right to counsel, however, they paid very little attention to the rights of the accused."). See also Jacob Katz Cogan *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 112 (2002) ("There has been relatively little interest in the rights of the accused before international criminal courts.").

23. Keita, *supra* note 18, at 2. See also *infra* note 54 and accompanying text (discussing equality of arms at the ICTY).

one for the prosecution. The language and structure of the Rome Statute itself demonstrates that “building the judiciary and the prosecution has taken priority over the defence.”<sup>24</sup>

Particularly troubling is how the lack of a structural approach to equality between the prosecution and defense can lead to inequities in the relationship between State Parties and defense counsel requesting evidence, witnesses, or access to the site of the alleged crimes. “Indeed, the legal frameworks of the ICTY and ICTR, as well as those of the [Extraordinary Chambers in the Courts of Cambodia] and the SCSL, do not have express provisions stipulating that states must comply with requests of the defence.”<sup>25</sup> The Defence Office at the STL, on the other hand, has equal standing with the Prosecutor,<sup>26</sup> which allows the Defence Office to request cooperation from State Parties just as the Office of the Prosecutor can.<sup>27</sup> To ensure this cooperation, the STL entered into a Memorandum of Understanding with Lebanon, in which the parties stipulated how Lebanon was to assist the Defence Office in the exercise of its duty, and to “afford the defence the ability to carry out their investigations freely and independently without interruption.”<sup>28</sup> By contrast, the ICC has entered into no such memoranda, nor is there an institutional duty for the Assem-

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24. Gallant, *supra* note 14, at 327 (“The lack of strong defence institutions in the Rome Statute (following the texts of the Statutes of the ad hoc tribunals in this respect) makes the inequality of arms between prosecution and defence more striking.”).

25. Daryl Mundis, *The Cooperation Regime of the Special Tribunal for Lebanon*, U.N. INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, A COMPENDIUM ON THE LEGACY OF THE ICTR AND THE DEV. OF INT’L LAW, 4 (2014), <https://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/iv-cooperation-regime-stl-mundis.pdf> [https://perma.cc/8SGE-L8TE].

26. William Harris, *Investigating Lebanon’s Political Murders: International Idealism in the Realist Middle East?*, 67 MIDDLE EAST J. 9, 20 (2013) (describing how the STL “improves on” the other international criminal tribunals by, among other things, incorporating an independent defense office of equivalent standing to the prosecution office).

27. Mundis, *supra* note 25, at 4 (stating that drafters of STL Statute wanted to avoid issues of equality of arms and “empowered the Defence to request cooperation on equal standing to the Prosecutor”).

28. *Id.* at 8.

bly to contribute funds or resources for indigent defendants.<sup>29</sup> While the Office of the Prosecutor is able to assign budget resources to pay for highly trained attorneys, a staff of investigators, and world-wide experts,<sup>30</sup> there is no option for defense counsel to do the same. This imbalance of resources may lead to unfairness in the trials if the accused is not financially capable of hiring experts of their own to introduce counter evidence or cross-examine the opinions of the prosecution's experts. While the Prosecutor's investigators enjoy years and generous funds to gather physical evidence and witness testimony, the accused have no means—besides the extent of their own funds—to seek out exculpatory evidence. Furthermore, over the years that the Prosecutor takes to build their case, any evidence or witnesses helpful to the defense may be spoiled or lost over time. The mismatch in resources awarded to the Office of the Prosecutor versus the defense of the accused demonstrates that an organ dedicated to serving the needs of defense counsel is needed if there is to be true equality of arms in legal representation at the ICC.

### III. STRUCTURAL ARGUMENTS

#### A. *Judicial Oversight*

The Rome Statute contemplates judicial oversight of investigations, in order to ensure fairness, before an accused is indicted and the process for the assignment of defense counsel commences.<sup>31</sup> In fact, the ICC's Chambers exert a considerable amount of control over the proceedings not just by monitoring the actions of the Prosecutor, but also by taking an active role in the investigative stage,<sup>32</sup> including giving "direc-

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29. Gallant, *supra* note 14, at 328 ("There is no one who has the institutional duty to inform the Assembly of States Parties concerning the funding needs for indigent defence.").

30. *Id.* ("The Prosecutor will have a standing staff of investigators and access to experts from around the world. As the International Criminal Court is currently structured, no such investigative team will be assembled for the defence.").

31. Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 30 THE INT'L LAW. 21, 21 (2000) (noting "set of provisions" in Rome Statute "by which the judiciary supervises investigations by the prosecutor in order to assure fairness to the defense").

32. Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT'L L. 321, 331 (2012) ("The ICC's



tions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner.”<sup>33</sup>

Nevertheless, the judicial oversight approach to ensuring equity between the prosecution and defense at the ICC falls short of truly ensuring equality of arms. When the ICC Prosecutor “considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial,”<sup>34</sup> meaning that counsel for the defense will have no opportunity to cross-examine or impeach the testimony, statement, or evidence, the Pre-Trial Chamber “may, *upon request of the Prosecutor*, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.”<sup>35</sup> According to the Rome Statute, these special measures may include: “[a]uthorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence.”<sup>36</sup> Again, the Prosecutor wields far more power over the proceedings than its counterpart. If the Prosecutor does not request such intervention from the Pre-Trial Chamber, there seems to be no mechanism for the Chamber to invoke these “special measures” unilaterally. There are two significant reasons why this procedure fails to meet prescriptive standards of equality between the prosecution and defense.

First, the additional step of requiring the Prosecutor to request that the Pre-Trial Chamber take special measures adds unnecessary delay to the administration of justice. The Prosecutor will need to follow procedures to effectuate such a request, and the Pre-Trial Chamber will need to consider the

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Pre-Trial Chamber, for instance, is not limited to streamlining its cases and facilitating communication between the parties, but also has some investigative authority that is reminiscent of pretrial judges in certain Continental jurisdictions.”).

33. Rome Statute, *supra* note 1, art. 64(8)(b) (Functions of Powers of the Trial Chamber).

34. Rome Statute, *supra* note 1, art. 56(1)(a).

35. *Id.* art. 56(1)(b) (emphasis added).

36. *Id.* art 56(2)(d).

request and also determine among themselves the appropriate measure to take from the list of no fewer than six measures suggested in the Statute.<sup>37</sup> In fact, the catch-all provision of Article 56(2)(f) could lead to any number of possible approaches the Pre-Trial Chamber may take. Not only will these deliberations by the Chamber take time, but also any decision they come to is subject to review or appeal. This impedes the expeditious administration of justice that the accused is entitled to under Article 14(3)(c) of the ICCPR.<sup>38</sup>

Second, and perhaps more convincingly, even the most fair-minded Prosecutor will have an incentive not to request intervention from the Pre-Trial Chamber for the accused. This procedure presents an unacceptable opportunity for bias to enter the legal framework, with no procedural safeguards in place to prevent the prosecutorial prejudice against requesting an intervention. The only requirement in place is that the Office of the Prosecutor act “independently.”<sup>39</sup> Shockingly, the Rome Statute does not include a reference to what might lead to disqualification or removal of the Prosecutor from their role.<sup>40</sup> The requirements in the Rome Statute to qualify for the role are that the Prosecutor “be of high moral character,” “be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases,” and “have an excellent knowledge of and be fluent in at least one of the working languages of the Court.”<sup>41</sup> The Prosecutor and their deputy are elected for a term of nine years, “unless a shorter term is decided upon *at the time of their election*.”<sup>42</sup> This means that unless the Assembly has reason to shorten the prosecutorial candidate’s term at the outset, a Prosecutor

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37. *Id.* art. 56(2).

38. International Covenant on Civil and Political Rights, art. 14(3)(c) (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) *entered into force* 28 Mar. 1979] (stating that everyone is entitled to the minimum guarantee, *inter alia*, “to be tried without undue delay”). *See also* U.N. Human Rights Committee, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, 8, U.N. Doc. CCPR/C/GC/32, (Aug. 23, 2007) (“An important aspect of the fairness of a hearing is its expeditiousness.”).

39. Rome Statute, *supra* note 1, art. 42(1) (The Office of the Prosecutor).

40. *Id.* art. 42 (The Office of the Prosecutor).

41. *Id.* art. 42(3) (The Office of the Prosecutor).

42. *Id.* art. 42(4) (The Office of the Prosecutor) (emphasis added).

could spend nearly a decade acting without sufficient checks to their impartiality. In contrast, the excusing and disqualification of ICC judges is contemplated by the Rome Statute in Article 41, providing a constant check on the power of judges who do not adequately serve the interests of justice. Said another way, there are more checks on the impartiality of the Judges of the ICC than on the Prosecutor.

While judicial oversight of the fairness of proceedings may curb *some* of the inequality in treatment between the defense and the prosecution, this approach is far from perfect. As currently structured, much of the Chambers' review of the proceedings requires cooperation from the Office of the Prosecutor, which raises questions of bias and transparency. Furthermore, a judge who has been involved with a case in the pre-trial stages might be biased themselves, or have their impartiality influenced by the nature of the pre-trial proceedings that required their intervention. This could be just as prejudicial to the prosecution's case as to the defense's. Therefore, the best advocate for the accused's rights would be the accused themselves, through their legal counsel.

#### B. *External Oversight*

In 2005, the International Bar Association (IBA) created a separate program dedicated to monitoring issues of fairness and equality of arms at the ICC.<sup>43</sup> The ICC program at the IBA includes "thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice."<sup>44</sup> This kind of external, independent oversight of the legal framework is important and serves a vital role in holding the international tribunal accountable, but falls short of providing actual guarantees of equality of arms between the prosecution and the defense. The IBA does not have any power to intervene on behalf of the accused in a trial before the ICC, or to propose amendments to the Rome Statute or the ICC's Rules of Procedure and Evidence. The framework established

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43. *About the IBA ICC & ICL Programme*, INT'L BAR ASSOC., [https://www.ibanet.org/ICC\\_ICL\\_Programme/About.aspx](https://www.ibanet.org/ICC_ICL_Programme/About.aspx) [https://perma.cc/9HXB-VKDW].

44. *Id.*

in the Rome Statute as currently drafted—with the emphasis on the judiciary and the prosecution—has been described as lacking a “Third Pillar”, the role of the defense, by former Executive President of the International Criminal Bar, Elise Groulx.<sup>45</sup> However, “[b]ecause it is not solely an organisation devoted to advocacy for the defence, the International Criminal Bar can be part of the Third Pillar of international criminal justice, but cannot be the entire pillar on which a fair defence will rest.”<sup>46</sup> The influence of these external bar associations is at best a court of public opinion, and at worst an academic endeavor. The rights of the accused cannot depend on the subjective views of an amorphous group of legal scholars who have no *codified* duties to protect those rights.

The bar associations of other countries also ensure oversight of the quality of legal representation of the accused. Per Rule 22 of the ICC’s Rules of Procedure and Evidence and Regulation 67 of the ICC’s Regulations of the Court, assigned defense counsel “should have more than ten years of relevant experience with established competence in international criminal law and procedure and must be practicing criminal law as a lawyer, prosecutor or judge.”<sup>47</sup> This puts much of the responsibility for quality control of attorneys practicing before the ICC on to the bar associations of the State Parties. State Parties have every interest in maintaining high standards for the quality of lawyers practicing within their jurisdictions, and thus this may be an effective means of ensuring that assigned counsel for the accused meets the appropriate level of competence for the defense. On the other hand, these requirements do very little to ensure that the list of legal counsel available to the accused at the ICC actually have *relevant* experience.<sup>48</sup> An

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45. Gallant, *supra* note 14, at 327 (“As Elise Groulx, now the first Executive President of the International Criminal Bar, has stated, the Rome Statute lacks the ‘Third Pillar’ of defence institutions to go along with the Judicial and Prosecution pillars.”) (citation omitted).

46. *Id.* at 334.

47. Kimsan Soy and Vandanet Hing, *Upholding the Right to Lawyer: Lessons Learned from the Extraordinary Chambers in the Courts of Cambodia*, in Cambodia Working Paper Series, 17-18 (Bernath & Ly eds. Swisspeace, 2019); International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, R. 22 (2013); International Criminal Court, Regulations of the Court, ICC-BD/01-05-16, Reg. 67 (2016).

48. Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, 14 UCLA J. INT’L L. & FOR. AFF. 169, 177 (2009) (arguing

attorney may be in good standing for many years in the bar of their home country but may have never defended an alleged criminal at trial, or at least before an international tribunal. This attorney would still be eligible to be assigned as defense counsel. In contrast, the “hiring requirements for Prosecution and Chambers positions are subject to a highly competitive selection process based on resumes, recommendations, and interviews.”<sup>49</sup> Good standing in the bar of another country is a poor metric for ensuring the quality and quantity of lawyers, especially when one considers that “[t]he Office of the Prosecutor possesses substantial expertise and institutional memory regarding international criminal law that many defense lawyers do not possess.”<sup>50</sup>

Furthermore, though defense counsel is required to have fluency in at least one language of the tribunal,<sup>51</sup> there is no guarantee that the language in which that lawyer is fluent is the same language the accused speaks. To be sure, the accused is entitled to select their counsel themselves from the list provided by the Registry,<sup>52</sup> thus making it unlikely that an accused will select an attorney who is unable to converse with their client, but the attorney who might be linguistically most capable of representing their client may not be the same lawyer who has the right experience for that client. Professor Sonja Starr of the University of Chicago Law School notes that although there might be merit to the presumption in favor of an accused’s choice of counsel in a domestic criminal trial, “defend-

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that length of practice requirement “does not ensure that counsel will have gained relevant experience or skills”); see also Mark Ellis, *Symposium: Justice In Cataclysm Criminal Trials In The Wake Of Mass Violence: Comment: Achieving Justice Before The International War Crimes Tribunal: Challenges For The Defense Counsel*, 7 DUKE J. COMP. & INT’L L. 519, 523 (“The repertoire of skills used in a ‘domestic’ criminal case, while extremely relevant, does not necessarily include the legal background required in an international war crimes case. The average attorney simply is not schooled in this practice.”).

49. Starr, *supra* note 48, at 178.

50. James Meernik, *Defining and Delivering Justice: The Work of the Ad Hoc International Criminal Tribunals*, in ETHICS, NATIONALISM, AND JUST WAR: MEDIEVAL AND CONTEMPORARY PERSPECTIVES 290, 312 (Henrik Syse et al. eds., Catholic Univ. of Am. Press, 2007).

51. Rome Statute, *supra* note 1, art. 42(3) (The Office of the Prosecutor).

52. Starr, *supra* note 48, at 177 (“Hiring is done by an office within the Registry, which puts together a list of officially qualified counsel from which defendants may choose.”).

ants at the international criminal tribunals are ill-equipped to choose wisely or judge the quality of assistance they are receiving after they have made an initial choice.”<sup>53</sup>

There is a stark contrast between the care given to ensure the quality of the attorney representing the prosecution and that given to the attorney representing the accused. The ICC must ensure that every lawyer permitted to represent the accused at the ICC has relevant experience in the international criminal defense field (not just any criminal defense experience), institutional knowledge of the ICC itself, and a common language with the accused. The best method to ensure that defense counsel meets these high standards of legal skills is to follow the example set by the STL and create an independent organ within the ICC dedicated to regulating and enforcing defense counsels’ qualifications.

#### IV. JURISPRUDENTIAL ARGUMENTS

##### A. *Legal Precedent*

While structural equity between the prosecution and defense is preferable, it is not the only way to establish equity. Other international criminal tribunals, such as the ICTR and ICTY, “attempted to lessen this inequity between the Prosecutor and the Defence in the rules regarding State cooperation through jurisprudence.”<sup>54</sup> At the ICTY, the Appeals Chamber ruled that:

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53. Starr, *supra* note 48, at 179.

54. Mundis, *supra* note 25, at 4. The ICTY established that equality of arms requires “every practicable facility [the Court] is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case,” Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgement, ¶ 52 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999). The ICTY also interpreted art. 30(4) of the ICTY Statute, *supra* note 2, holding that functional immunity for the defense team as well as defense investigators with respect to acts falling within the fulfillment of their official functions before the ICTY is “necessary for the proper function[ ] of the Tribunal.” Prosecutor v. Gotovina, Case No. IT-06-90-AR73.5, Decision On Gotovina Defence Appeal Against 12 March 2010 Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia, ¶ 27 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 14, 2011). For the ICTR’s jurisprudential approach to establishing equity of arms, see Bagosora et al. v. Prosecutor, Case No. ICTR 98-41-A, Decision on Alyos Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, ¶¶ 19, 26 (Int’l Crim.

[T]he principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.<sup>55</sup>

Undoubtedly, there are many benefits for establishing legal rights through precedent. Particularly in common law jurisdictions, precedent can be a strong means to ensure rights that are not as easily reviewable or amendable, like a rule or regulation. Once the precedent is established in international criminal law, it is often recycled by other *ad hoc* tribunals that are subsequently created and turn to the same issue.<sup>56</sup> In such a new field of law, the more international criminal tribunals follow a particular legal principle, the more firmly it is established as part of customary international law and more likely it will be applicable to all future *ad hoc* tribunals that apply international law.

However, Daryl Mundis, Registrar at the Special Tribunal for Lebanon, did not consider the jurisprudential approach to equity between the prosecution and defense as resulting in a

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Trib. for Rwanda Oct. 6, 2010), and *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-A, Appeals Judgement, ¶ 67 (Int'l Crim. Trib. for Rwanda Jun. 1, 2001).

55. Meernik, *supra* note 50, at 310.

56. See, e.g., Bruce Zagaris, *Introductory Note To The International Criminal Tribunal For The Former Yugoslavia: Prosecutor v. Gotovina, Decision On Gotovina Defence Appeal Against 12 March 2010 Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia*, 50 INT'L LEGAL MATERIALS 873, 874 (2011) (arguing that the ICTR in *Prosecutor v. Gotovina*, Case No. IT-06-90-AR73.5, Decision On Gotovina Defence Appeal Against 12 March 2010 Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 14, 2011) relied on the ICTR's decision in *Bagosora et al. v. Prosecutor*, Case No. ICTR 98-41-A, Decision on Alyos Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, ¶¶ 19, 26 (Int'l Crim. Trib. for Rwanda Oct. 6, 2010), to find a "derivative right to the necessary protections through the defense counsel," without which defense counsel's ability to represent their client would be frustrated).

fairer trial for the accused.<sup>57</sup> Even though it is good that the principle of equality of arms is firmly established by jurisprudence, it is unfortunate that the accused must wait until their rights are questioned or jeopardized before they have standing to challenge their treatment. Granted, the fact that a defendant must wait until an investigation has proceeded to a case and come before Chambers in order for key questions about fairness to be resolved will only be a concern for the first few accused to come before a tribunal, as the accused in later cases will have the benefit of the precedent set in these earlier cases. Still, this is far from true equity, as there is disparate treatment between those accused earlier in the life of a tribunal than those accused later. To firmly establish its legitimacy, an international criminal tribunal should not treat defendants differently from one case to another. The jurisprudential approach to equality of arms does just that, and thus does more damage to the legitimacy of the court than it lends credibility to the court by intervening in individual cases.

Additionally, the accused's rights are implicated long before a situation has reached Chambers, such as when the Office of the Prosecutor begins their investigation. In these circumstances, judges of the Pre-Trial Chamber may appoint counsel to represent the interests of the defense, even when no one has been accused or interrogated yet.<sup>58</sup> While this may seem like a reasonable solution to protecting the interests of the accused during the investigative stage, the reality is that counsel appointed to this role, but with no actual client yet, might in actuality be representing the interests of many subsequent defendants. If the case eventually comes to trial, these multiple defendants might seek to place the "blame on each other" as a defense strategy,<sup>59</sup> creating a conflict of interest for

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57. Mundis, *supra* note 25, at 4 ("The ICTR and the ICTY attempted to lessen this inequity between the Prosecutor and the Defence in the rules regarding State cooperation through jurisprudence. However, this did not necessarily result in a fairer outcome for the defence.").

58. Rome Statute, *supra* note 1, arts. 56(1), (2) (discussing Role of the Pre-Trial Chamber in relation to a unique investigative opportunity). *See also* Gallant, *supra* note 31, at 23 ("Additionally, judges of the Pre-Trial Chamber are allowed or required to appoint counsel to represent the interests of the defense in certain cases, even if no person has yet been accused of a crime and even if the suspect is not being interrogated.").

59. Gallant, *supra* note 31, at 24.



the counsel who has a fiduciary duty to their client and thus cannot defend one client at the expense of another. The conflict of interest can be remedied by the defense counsel withdrawing their representation of the accused. However, as mentioned above, this creates an entirely new issue: the lack of institutional knowledge.

The jurisprudential approach to ensuring equal treatment between the defense and the prosecution at the ICC does not appear to be the strongest option. Relying on the outcome of a decision from Chambers still provides opportunities for bias and prejudice to enter the legal framework. Such weaknesses and errors in the administration of justice cannot be accepted from a criminal tribunal on the global stage such as this one and threaten to undermine the aims of the Court entirely.

#### B. *Applicable Law and Procedure*

Another approach to ensuring fairness for the accused at the ICC is a procedural approach, through the Court's rules and regulations. For example, the Rules of Procedure and Evidence (RPE) of the ICC aims to "reaffirm the right to legal assistance for the accused and suspects."<sup>60</sup> The RPE also requires the prosecution to "provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses,"<sup>61</sup> and "permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial."<sup>62</sup> In many regards, adherence to these rules will increase the fairness for the accused. Furthermore, involvement of judges in the proceedings, as described above, may placate some of the concerns that were raised regarding the ICTY's adversarial rules.<sup>63</sup> However, many of the Rules presuppose the existence

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60. Soy and Hing, *supra* note 47, at 16.

61. International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, R. 76 (2013).

62. *Id.* R. 77.

63. Combs, *supra* note 32, at 329-30, describes how earlier ICTY proceedings "were lengthier and costlier than anyone considered optimal," and

of defense counsel with whom to make key disclosures to, or to challenge the Prosecutor's compliance with the RPE. True equity between the prosecution and the defense cannot come as an addendum to the established legal framework but must be an integral part of the administration of justice from the inception of the framework itself.

One limitation to comparing the STL's structure with that of the ICC might be that the nature of the applicable law at the two courts is so different. The STL Statute requires that the law applied at the STL be a hybrid between international law and Lebanese law.<sup>64</sup> The law applied at the STL "is drawn exclusively from Lebanese Penal Code provisions concerning terrorism, offenses against personal integrity, and the crime of illicit association."<sup>65</sup> Additionally, the STL Statute allows for the trying of accused individuals *in absentia*, meaning that the accused themselves need not appear before the court—physically or otherwise—for a trial against them to proceed.<sup>66</sup> In fact, none of the five principal defendants in the case before the STL has appeared before the court thus far.<sup>67</sup> For this reason, some may argue, an additional safeguard for the accused's rights was needed, since the nature of trials *in absentia* means that there is one less layer of protection for the accused—the accused themselves. Without the person being tried present and thus able to advocate for their needs and rights, the STL needed to create an additional structural layer

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many commentators placed a large share of the blame on the adversarial nature of ICTY proceedings." According to Combs, ICTY judges and a United Nations Expert Group, "identified the judges' failure to adequately control proceedings as substantial delay." *Id.*

64. See, e.g., *STL Statute*, *supra* note 4, art. 28 ("[T]he judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.").

65. Beth Van Schaack, *Special Tribunal for Lebanon is Set to Issue Historic Ruling on the Assassination of PM Hariri*, JUST SECURITY (Aug. 17, 2020), <https://www.justsecurity.org/72046/special-tribunal-for-lebanon-is-set-to-issue-historic-ruling-on-the-assassination-of-pm-hariri/> [<https://perma.cc/YN3P-BKEQ>].

66. *STL Statute*, *supra* note 4, art. 22 (Trials in Absentia).

67. See *Accused*, SPECIAL TRIB. FOR LEBANON, <https://www.stl-tsl.org/en/the-cases/stl-11-01/accused> [<https://perma.cc/EXJ8-DVKJ>] ("In February 2012, the Trial Chamber decided to proceed with the trial of Mr Ayyash, Mr Badreddine, Mr Onessi and Mr Sabra in absentia.").

of protection and therefore, established the Defence Office. It would follow that since there are no trials *in absentia* in the ICC, the same layers of protection are not needed within the structure of the court because the accused individuals themselves will be present to raise concerns of fairness as needed. This may be a somewhat convincing argument against comparing the STL and the ICC, but the STL's higher standard of care for the rights of the defense does not apply only in trials *in absentia*. In at least two instances, the STL tried cases against natural persons and legal persons who did appear before the court, yet these defendants were not precluded from using the Defence Office as a resource.<sup>68</sup>

## V. IMPLEMENTATION

Despite the best efforts of international legal minds, true equality between the Defense and Prosecution at the ICC does not exist in the Court's current structure. Still, there exists the possibility that the Assembly could recognize the unfairness in the current structure of the ICC and meet the need for an independent organ dedicated to the defense of the accused with equal standing as the Office of the Prosecutor. Even those within the Court believe that, "nothing short of an institutionally based independent office can best serve the Defence of the ICC—preferably regarded as an organ—to serve the De-

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68. *Contempt Cases*, SPECIAL TRIB. FOR LEBANON, <https://www.stl-tsl.org/en/the-cases/contempt-cases> [<https://perma.cc/8GFZ-FE33>]. In August 2012, the Lebanese television company Al Jadeed TV broadcast five reports entitled "The Witnesses of the International Tribunal," in which Al Jadeed journalists interviewed alleged witnesses about the case. The Judges of the STL's Pre-Trial Chamber ordered materials related to the indictment in the Tribunal's principal case, Ayyash et al., STL-11-01, to be kept confidential, but Al Jadeed and Ms Karma Mohamed Tahsin Al Khayat, and employee of Al Jadeed, did not comply with the STL's order. On 31 January 31, 2014, Ms. Khayat and Al Jadeed S.A.L. were each charged with two counts of contempt for allegedly knowingly and willfully interfering with the administration of justice. The case against Ms. Khayat and Al Jadeed S.A.L. became Al Jadeed S.A.L. & Khayat, STL-14-05. Similarly, in January 2013, the Lebanese newspaper Akhbar Beirut published a list of the Tribunal's witnesses. Akhbar Beirut S.A.L. and Mr. Ibrahim Al Amin were each charged with one count of contempt and obstruction of justice pursuant to Rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence. The case against Akhbar Beirut and Mr. Al Amin became Akhbar Beirut S.A.L. & Al Amin (STL-14-06).

fence and to advocate for the advocates of the Court.”<sup>69</sup> In fact, the notion that subsidiary organs may need to be created in the future was contemplated by the drafters and ratifiers of the Rome Statute.<sup>70</sup> Now, with the successful example of the STL to look to for guidance, there could be a change to the structure of the ICC to allow for this crucial change. Kenneth S. Gallant, the William H. Bowen School of Law Professor Emeritus, outlines the key elements of any such system, were it to be implemented. First, Gallant argues, to ensure equality of arms, the Assembly “must make sufficient monetary sources available,” to ensure that there are resources for experts, lawyers’ fees, and investigators.<sup>71</sup> Second, there must be independence in the oversight of indigent defense work.<sup>72</sup> Third, the State Parties must commit to allowing vigorous defense investigation within their territory, as they do for the prosecution, and the ICC itself should enforce such cooperation by State Parties, with Security Council backup of the Court, if necessary.<sup>73</sup>

Regrettably, Gallant’s 2003 roadmap for establishing an independent defense office organ at the ICC remains unfulfilled. Gallant argued that “[i]n the long run, the Rome Statute needs to be amended to create an independent organ to represent defence interests,”<sup>74</sup> but noted that the Rome Statute was subject to review only seven years after 2002.<sup>75</sup> The opportunity to review the Rome Statute passed twice since Gallant’s recommendations in 2003, but still no independent defense organ exists at the ICC.

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69. Keita, *supra* note 18, at 6.

70. Rome Statute, *supra* note 1, art. 112(4).

71. Gallant, *supra* note 14, at 329 (arguing that “[e]quality of arms does not exist” without sufficient resources sufficient to provide both for lawyers’ time and for access to investigators and experts).

72. *Id.* at 330 (“[O]versight of indigent defence work – whether paid for on an hourly basis, by contract price, or through staff of something resembling a Public Defenders Office – must be independent.”).

73. *Id.* (“[T]he Court . . . must assure that states permit vigorous defence investigations on their territories, in the same way that the Court will seek such cooperation for prosecutors and their investigators.”).

74. *Id.* at 328.

75. *Id.* (“Unfortunately, it will be seven years after 2002 before the Statute is reviewed, and there is no guarantee these issues will be raised.”).

## VI. CONCLUSION

A legal framework that provides far more resources and support to the prosecution than the defense will result in unfairness and may be perceived as little more than a venue for show trials. “If trials are unfair, or perceived to be unfair, international criminal courts . . . might quickly lose their legitimacy.”<sup>76</sup> It follows that if the Assembly wants the ICC to remain a permanent institution with credibility and legitimacy in the international legal world, every effort should be made to mend areas of weakness in equity between the prosecution and the defense. For the reasons stated above, the most effective means to do this would be through a structural approach. Although a “Defence Organ does not wholly eliminate the possibility of conflicts about the Defense . . . it eliminates a great deal of conflict seen in the ICTY, ICTR, and ICC between Registry and defence counsel. Most importantly it makes the overall structure of the Court much fairer.”<sup>77</sup> To honor the ICC’s commitment to human rights, fairness, and ending impunity within the rule of law, an independent organ dedicated to the defense should be created within the structure of the ICC.

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76. Katz Cogan, *supra* note 22, at 114.

77. Kenneth S. Gallant, *Addressing the Democratic Deficit in International Criminal Law and Procedure: Defense Participation in Lawmaking*, in *THE SIERRA LEONE SPECIAL CT. AND ITS LEGACY: THE IMPACT FOR AFR. AND INT’L CRIM. L.* 572, 584 (Charles Chernor Jalloh ed., 2013).