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FIXING THE PROBLEM OF INCOMPETENT DEFENSE COUNSEL BEFORE THE INTERNATIONAL CRIMINAL COURT

*Matthew Catallo**

I. INTRODUCTION: THE TRAJECTORY OF INTERNATIONAL CRIMINAL LAW

Since the establishment of the Nuremburg and Tokyo tribunals, the international order has searched for an adjudicatory mechanism to penalize humanity's worst offenders consistent with modern notions of procedural equity.¹ The international order strives to do so by processing the accused through a system respectful of the fundamental due process rights prioritized by most modern societies.² While the evolution of substantive international criminal law is certainly a cause for celebration, these procedural developments are equally deserving of praise. The procedural law—which is derived from identified human rights norms—ensures that the substantive criminal code can be applied with fairness and integrity, and, by doing so, gives legitimacy to the imposition of international criminal law.³ This legitimacy, however, depends on the system's ability to adequately safeguard the right to competent defense counsel.

* Notes Editor, *Michigan Journal of Law Reform*; J.D. Candidate, University of Michigan Law School, 2019. I would like to start off by thanking everyone with the *Michigan Journal of International Law* who helped me produce this note. For my editing team—especially Chloe Roddy, Annemarie Smith-Morris, and Lindsay Bernsen Wardlaw—all your thoughtful feedback was indispensable throughout this process. Also, a special thanks to my former Notes Editor from the *Journal of Law Reform*, Nicholas Hazen. Last, but certainly not least, thank you to my parents for absolutely everything. I would be nothing without you. 1. See Jackson Maogoto, *Early Efforts to Establish an International Criminal Court*, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT* 4–22, 71–74 (José Doria et al. eds., 2009) (discussing the trajectory of international criminal law regimes leading up to the establishment of the ICC).

2. See 3 GIDEON BOAS ET AL., *INTERNATIONAL CRIMINAL PROCEDURE* 13 (2013); see, e.g., KAI AMBOS, *ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY XIII* (Otto Triffterer & Kai Ambos eds., 3d ed. 2016) (“[T]he [Nuremberg Tribunal] embodied the modern conviction that individuals should only be punished through a fair trial which safeguards the rights of the accused.”); Rome Statute of the Int’l Crim. Ct., 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. See BOAS ET AL., *supra* note 2, at 13; KARIN N. CALVO-GOLLER, *THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT: ICTY AND ICTR PRECEDENTS 2* (2006) (“The [ICC] is expected to play an exemplary role in the field of criminal justice and consequently to apply the highest, rather than the minimum internationally recognized[,] standards of human rights.”).

In the wake of early attempts to provide a forum for international criminal law, the international order arguably attained its greatest achievement: the ratification of the Rome Statute and the subsequent establishment of the International Criminal Court (“ICC”). Receptive to many of the critiques and shortcomings of its predecessors, particularly those relating to how the *ad hoc* tribunals provided defense counsel for the accused, the Assembly of States Parties strove to depart from the design flaws endemic to the *ad hoc* tribunals.⁴ By ratifying the Rome Statute in 2002 and creating a permanent international criminal court replete with a codified body of criminal law, the States Parties attempted to end impunity for the perpetrators of the gravest international crimes.⁵ One of the strongest developments in that regard was the ICC’s principle of equality of arms.⁶

The equality of arms is “[a]nalogous to fair trial guarantees in domestic jurisdictions . . . a fair trial requirement that is intended to uphold the adversarial nature of criminal proceedings.”⁷ The principle should mean that “no party to criminal proceedings, be it defense or prosecution, is put in a procedurally disadvantaged position vis-à-vis the other.”⁸ Yet underlying political realities complicate attaining the equality of arms, for the pressures on the ICC to convict offenders are arguably among the highest any court faces.⁹ During her term as President of the ICC, Judge Silvia Fernández de Gurmendi noted that these pressures have only intensified during the first two decades of the twenty-first century.¹⁰

To ensure the equality of arms, an accused must be given a fair trial.¹¹ It is axiomatic that, to have a fair trial, an accused must have competent defense counsel.¹² But while defense counsel competence is a core component

4. See Maogoto, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, at xix; Stuart Ford, *The Impact of the Ad Hoc Tribunals on the International Criminal Court*, in *THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW* 313–23 (Milena Sterio & Michael Scarf eds., 2019).

5. See Maogoto, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, at xv (“The state parties committed to put an end to impunity for the most serious crimes of concern to the international community and to contribute to the prevention of such crimes.”).

6. See Michael A. Newton, *Evolving Equality: The Development of the International Defense Bar*, 47 *STAN. J. INT’L L.* 379, 387 (2011) (opining that, without the guarantee of equality of arms, the international criminal justice system would not be able to secure convictions).

7. JARINDE P. W. TEMMINCK TUINSTRRA, *DEFENSE COUNSEL IN INTERNATIONAL CRIMINAL LAW* 153 (2009).

8. *Id.*

9. AMBOS, *supra* note 2, at XVI.

10. See *id.* (discussing the ICC’s increasing jurisdiction and the associated problems this will pose to the ICC’s legitimacy).

11. TUINSTRRA, *supra* note 7, at 153.

12. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (elucidating this principle in the context of U.S. law).

of the equality of arms, it has been puzzlingly neglected by ICC legislators and scholars, just as it was when the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for Yugoslavia (“ICTY”) were active.¹³ While much of the framework, statutory law, and jurisprudence from these *ad hoc* tribunals carried over to the ICC, it is currently unclear whether, or if, the phenomenon of incompetent defense counsel manifests in the ICC to the same overt degree that it did in the two tribunals.¹⁴

To date, no ICC proceeding nor any scholarship has addressed this issue. Failing to seriously consider this topic risks condemning the ICC to path dependence, due to its predecessors’ jurisprudential and structural shortcomings. Luckily, since the nascent ICC is not bound by ICTY or ICTR precedent, the issues of defense attorney competence that plagued the *ad hoc* tribunals do not have to be repeated.¹⁵ Unfortunately, an analysis of the ICC’s structure and practice reveals that this institution is also derelict in guaranteeing adequate, competent, and independent defense counsel for the accused.¹⁶ Therefore, in order to safeguard and promote the equality of arms, significant reform to the ICC’s regulatory framework is needed.

Such reform may be available through the *ReVision* Project, a recently proposed program that would “reorganise and rationalise the structure” of the ICC’s Registry.¹⁷ As of now, *ReVision* aims to diminish the institutional autonomy held by defense counsel at the ICC. This note proposes, however, that many of the issues relating to defense counsel at the ICC could be ameliorated by restructuring the Registry to give defense counsel more independence. Consequently, this note proposes using *ReVision* to instead create a retooled Registry, giving the defense an office within the ICC more autonomy and an external administrative bar association that is able to seriously address pressing defense matters. This reform represents a significant departure from the ICC’s predecessors’ jurisprudence, but this note argues that such a departure is necessary given the distinct nature of the ICC and its role in the international order.

Part II of this note will examine the phenomenon of incompetent defense counsel at the ICC’s adjudicative predecessors—the *ad hoc* tribunals for Rwanda and Yugoslavia—to determine how and why this problem manifested. Part III will then analyze how the ICC strives to depart from the procedures of the *ad hoc* tribunals and ensure competent defense counsel by

13. The ICTR and ICTY will frequently be referred to as simply the *ad hoc* tribunals herein.

14. See Ford, *supra* note 4, at 313–23.

15. See CALVO-GOLLER, *supra* note 3, at 1–2 (stating that the ICC is not bound by these precedents, but that they can be significantly persuasive authority).

16. See *infra* Part III.

17. Audit Report on the *ReVision* Project of the International Criminal Court’s Registry, ICC-ASP/15/27, ¶ 6 (Nov. 9, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-27-ENG.pdf.

assessing the ICC's current rules, regulations, and relevant case law. Part IV will conclude with recommended reforms.

II. INEFFECTIVE DEFENSE COUNSEL IN THE *AD HOC* TRIBUNALS

The lessons the international community learned from the *ad hoc* tribunals directly influenced the crafting of the ICC's structure, procedures, and substantive criminal laws.¹⁸ Consequently, examining the competence of defense counsel at the ICC necessitates a preliminary examination of how the antecedent *ad hoc* tribunals treated this phenomenon.¹⁹ An analysis of tribunal scholarship, court regulations, and case law reveals that the accused at the *ad hoc* tribunals frequently received incompetent representation, a result likely due to a combination of the structural neglect of defense counsel's needs and a reticent, non-interventionist judiciary.

There were deep structural and systemic inequalities between the defense and prosecution at the ICTY and ICTR.²⁰ Defense teams operated with systematic underfunding,²¹ less time to investigate charged offenses,²² far fewer staff compared to the prosecution,²³ limited ability to gather evidence,²⁴ lack of an established defense office,²⁵ and a significant lack of parity in access to state cooperation during investigations.²⁶ In short, therefore, the tribunals' structural design meant that the defense was dealt a losing hand at the outset of the proceedings.

Stemming from this lopsided structural and regulatory playing field, there was a notable disequilibrium between the competency of the prosecu-

18. Ford, *supra* note 4, at 313.

19. *See id.* at 315–25 (describing how the drafters of ICC used the experiences of the *ad hoc* tribunals to influence how to structure the Rome Statute).

20. *See, e.g.*, Gabrielle McIntyre, *Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT'L L. 269, 319–20 (2003) (concluding that the balance of powers at the ICTY was fundamentally skewed in favor of the prosecution).

21. Newton, *supra* note 6, at 391.

22. *See, e.g.*, Prosecutor v. Callixte Kalimanzira, Case No. ICTR-05-88-A, Appeals Chamber Judgment, ¶ 36 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010) (finding no violation of equality of arms despite the contrast between the “large team” of thirty-five investigators who worked from 1999 to 2008 on behalf of the prosecution and the two investigators available to the defense for a two and a half month period in 2008).

23. *Id.*

24. Newton, *supra* note 6, at 392.

25. Brianne McGonigle, *De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia*, 13 HUM. RTS. BRIEF 10, 10 (2005). In contrast, the prosecution operated out of a dedicated office. TUINISTRA, *supra* note 7, at 73 (noting that, at the *ad hoc* tribunals, the prosecution enjoyed a formal, independent Office of the Prosecutor).

26. Newton, *supra* note 6, at 390 (“The difference in access to international pressure/leverage arguably represents the most significant structural limitation on equality of arms in the system of international justice.”).

tion and defense counsel.²⁷ In various instances, the defense counsel's performance was not on par with any objective standards of competence.²⁸ For example, as Professor Sonja B. Starr of the University of Michigan Law School indicates, tribunals frequently characterized defense motions and briefs as "incoherent or incomprehensible, or deemed them too unclear to merit consideration."²⁹ As the President of the International Center for Transitional Justice, David Tolbert, notes, defense counsel at the ICTY were "generally unfamiliar with the adversarial system on which the ICTY's procedure's [were] modeled and . . . thus had difficulty with cross-examination and other aspects of advocacy."³⁰ This led to both subpar representation in certain cases and "delays in the proceedings, as these lawyers . . . struggled in an unfamiliar system."³¹

Analyzing why incompetent defense counsel pervaded the *ad hoc* tribunals informs both why the problem of incompetent defense counsel occurs at the ICC, as well as why the judicial framework for dealing with this problem is so inadequate. Both topics—the structural flaws that create the problem and the lack of meaningful judicial intervention in response—will be addressed seriatim.

A. Structural Factors Begetting Defense Counsel Incompetence

There are four causal factors that explain why the accused commonly received incompetent representation at the *ad hoc* tribunals: (1) the lack of a structural defense organ at the tribunals, (2) disadvantageous employment

27. See, e.g., Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. Doc. A/54/634, ¶ 210 (1999) (characterizing the performance of a significant amount of defense counsel before the *ad hoc* tribunals as very poor); Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, 14 UCLA J. INT'L L. FOREIGN AFF. 169, 174–88 (2009) (listing several tribunal proceedings that evince ineffective assistance without directly addressing the topic).

28. Starr, *supra* note 27, at 171 n.4.

29. *Id.* at 171. Professor Starr proceeds to note that "tribunals have frequently observed that counsel have failed to raise potentially valid objections or arguments at the proper time, and simultaneously often chastised counsel for raising frivolous motions and arguments." *Id.* (internal citations omitted).

30. David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENGLAND L. REV. 975, 979 (2003); see also John E. Ackerman, *Assignment of Defense Counsel at the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE* 167, 170 (Richard Mary et al. eds., 2001) ("To some extent, at least, trials are lengthened by the lack of experience and training of defence counsel appearing before the Trial Chambers. Many have no experience whatsoever with criminal law. Many have no experience whatsoever with the adversary nature of trial proceedings before the ICTY. Many are unfamiliar with the Statute and Rules of Procedure and the practice before the Tribunal that has developed through the case law that has interpreted and applied the provisions of the Statute and Rules.").

31. Tolbert, *supra* note 30, at 979.

terms, (3) insufficient reimbursement of counsel, and (4) ineffective hiring qualifications.³²

The predominant explanation for defense incompetence is that neither the ICTY nor the ICTR had a unified defense organ.³³ The tribunals were each structured with three formal organs: the Chambers, the Office of the Prosecutor, and the Registry. All matters pertaining to defense counsel were subsumed within the “overburdened Registry,” which was simultaneously tasked with administrative responsibilities and judicial support services.³⁴ The Registry was not in a position to advocate for defense issues or the rights of the accused.³⁵ While the Office of the Prosecutor was run by legally trained counsel, the Registry staff members, who had substantial powers over court-appointed defense counsel, were not required to have any legal training whatsoever, let alone any background as defense counsel.³⁶ Assigning the unequipped Registry responsibility for all defense-related matters resulted in four distinct consequences.

The lack of a centralized office, like the Office of the Prosecutor, severely limited the voice of defense counsel and stripped them of the ability to lobby for their interests.³⁷ Whereas prosecutors could impact the mechanisms of the *ad hoc* tribunals via the Office’s formal voting privileges on regulatory matters, defense counsel had no way to impart their perspectives on these matters, which typically included funding issues, amended court

32. For a more comprehensive exposition of these factors, see generally Tolbert, *supra* note 30, at 979; Newton, *supra* note 6; and Starr, *supra* note 27. Another relevant factor is that defense recruitment at the *ad hoc* tribunals was “hampered by a comparative lack of prestige and moral appeal relative to prosecution work, given the nature of the cases.” Starr, *supra* note 27, at 176.

33. McGonigle, *supra* note 25, at 10; see Starr, *supra* note 27, at 176; see also Isabel Dürstehöft & Dominic Kennedy, *How to Manage the Defence—Experiences from the ADC-ICTY*, in *THE DEFENCE IN INTERNATIONAL CRIMINAL TRIALS: OBSERVATIONS ON THE ROLE OF THE DEFENCE AT THE ICTY, ICTR AND ICC 227, 228* (Mayeul Hiéramente & Patricia Schneider eds., 2016) (“[The] apparent lack of [] a crucial ‘fourth organ’ in the majority of international courts and tribunals undermines the importance of Defence in international justice.”).

34. McGonigle, *supra* note 25, at 10.

35. Till Gut et al., *Defence Issues*, in *INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1203, 1225–29* (Goran Sluiter et al. eds., 2013) (“[T]he internal defense offices within the Tribunals fall squarely under the responsibility of the Registrar, and are responsible for implementing legal aid and defence-related logistical support in a neutral and impartial manner.”).

36. See TUINSTRÁ, *supra* note 7, at 73–74 (“The Registry administers the assignment of legal aid to the accused and issued the Directive on the Assignment of Defence Counsel; establishes whether or not lawyers or other defence team members fulfil the necessary qualification requirements; provides resources to the defence; drafted a Code of Professional Conduct for Defence Counsel; and, monitors defence counsel’s professional behaviour.”).

37. *Id.* at 159 (noting that, at the *ad hoc* tribunals, “[d]efense counsel [had] limited opportunities for mentoring and limited negotiating and lobbying power”).

rules, ethical and procedural regulations, and hiring criteria.³⁸ Compounding these disadvantages, defense counsel lacked adequate facilities³⁹ and received substantially less in the way of support staff.⁴⁰ Unlike the prosecution, who did not need to pay for office facilities, court-appointed defense counsel were required to pay for their own office spaces near the Hague.⁴¹ At the same time, because defense counsel were only assigned to work for the tribunal on a case-by-case basis, many defense attorneys also had to maintain their domestic offices.⁴² Consequently, defense attorneys generally incurred double the expenses of prosecution attorneys, since most of them had to maintain domestic offices along with their offices near the seat of the tribunals.⁴³

Second, defense counsel frequently had to endure disadvantageous employment terms, which diminished the role's attractiveness.⁴⁴ For example, defense counsel were employed on a contractual basis.⁴⁵ In contrast, prosecutors were full-time employees with consistent salaries and dependable job security.⁴⁶ Without the same benefits or job security posed by a career track, there was little incentive for possible defense counsel applicants to enter the role.⁴⁷

Moreover, most of the defense attorneys at the *ad hoc* tribunals were "first timers," as defense counsel seldom represented subsequent clients af-

38. Gut et al., *supra* note 35, at 1225–29; see McGonigle, *supra* note 25, at 10 ("A conflict of interest became apparent in 1997 when the Registry attempted to reduce costs by restricting the maximum number of hours per month Defense Counsel could bill for fees and greatly limiting the number of investigators and consultants they could hire. Lacking the status of an independent organ, at that time [defense counsel] had no structured defense association to lobby against such changes.").

39. TUINISTRA, *supra* note 7, at 166.

40. *Id.* at 152–53 ("The OTP [at the *ad hoc* tribunals] always had more staff members than the defence. . . . At the *ad hoc* Tribunals, a maximum of two defense counsel can be assigned to an accused under the legal aid scheme: one lead counsel and one co-counsel. In addition, a maximum of three support staff members . . . may be assigned at the ICTR and a maximum of five under the lump sum system of the ICTY.").

41. See TUINISTRA, *supra* 16, at 158.

42. Starr, *supra* note 27, at 176.

43. *Id.*

44. *Id.*

45. *Id.* ("Because defense teams work on a contract basis, they lack job security provided to prosecution and Chambers attorneys, who are professional-track employees.").

46. See *id.*

47. TUINISTRA, *supra* note 7, at 160 ("Defense counsel are appointed to any particular case, only if the accused has chosen them. Having been appointed to one case, an appointment to a next case does not necessarily follow."); Starr, *supra* note 27, at 176 ("[D]efense counsel tend to be less integrated in the tribunal's social community; they are physically housed outside the tribunal buildings, and some are actually based in other countries. By undermining quality of life and professional satisfaction, this isolation risks hurting retention of counsel as well as initial recruitment.").

ter their initial case.⁴⁸ Unlike for the prosecutors, there was no natural process for defense counsel to learn from one another and pass on their knowledge; their work was solitary in nature, and, because defense counsel rarely worked on more than one case at the *ad hoc* tribunals, there was little opportunity for mentorship.⁴⁹ As a result, there was no sense of unity in the practice, and defense counsel lacked a “collaborative community with institutional memory.”⁵⁰

Third, there was a stark difference in the remuneration schemes for, and allocation of resources between, the prosecution and court-appointed defense counsel. Prosecutors could count on a fixed UN salary,⁵¹ and they were automatically remunerated throughout the duration of their assignment to a case.⁵² In contrast, due to both their lack of steady employment and a different compensation scheme, defense counsel were paid less than the prosecution, and they lacked the same salary protections.⁵³ Moreover, defense counsel were “only paid 70 to 80 percent of the[ir] monthly allotment [based on defense counsel’s contract], with the remainder being provided at the end of the stage [of litigation] in question.”⁵⁴ Unlike their counterparts, defense counsel were not entitled to additional funds if the phase of litigation in question lasted longer than the initial estimate in their employment contract, regardless of the cause of delay.⁵⁵ Additionally, the Trial Chambers at the *ad hoc* tribunals could withhold the remuneration for defense counsel for filing “frivolous or vexatious motions,” but could not withhold payment to prosecutors.⁵⁶

Fourth, the qualifications required to be hired onto a tribunal’s list of appointable counsel were notoriously maladaptive.⁵⁷ To practice as defense counsel at the ICTY, for example, counsel had to have “at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some

48. TUINSTR, *supra* note 7, at 161–62 (explaining that most defense attorneys practicing in front of the *ad hoc* tribunals had no previous experience working with international criminal law and that these attorneys rarely returned to the *ad hoc* tribunals after the conclusion of their cases).

49. *Id.*

50. Starr, *supra* note 27, at 176.

51. TUINSTR, *supra* note 7, at 165.

52. Gut et al., *supra* note 35, at 1226.

53. *Id.*; Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT’L L. 519, 530–32 (1997). Note that this assessment only applies to situations relating to indigent defendants. However, as Professor Starr notes, “[b]ecause of the enormous cost of defense at the international level, nearly every defendant qualifies for appointed defense counsel, even though many defendants are not poor in absolute terms.” Starr, *supra* note 35, at 171 n.3.

54. Gut et al., *supra* note 35, at 1226.

55. *Id.*

56. *Id.* at 1225.

57. Starr, *supra* note 27, at 177–79.

other capacity, in criminal proceedings,”⁵⁸ along with established competence in criminal, international criminal, international humanitarian or international human rights law.⁵⁹ As Professor Starr duly remarked, these criteria did nothing to ensure someone was competent in the laws of the tribunal, because the quantitative durational prerequisites did not necessarily correlate with qualitative competency metrics.⁶⁰ That is, “established competence” was not defined, and “seven years of relevant experience” did not ensure that one would have established competence as defense counsel in the international criminal law context. Such competence was necessary to navigate the legal framework in the *ad hoc* tribunals, where cases were both factually and legally complex⁶¹ and procedurally idiosyncratic due to a hybridization of the civil and common law systems.⁶² The ICTR fared no better, as it had, by 2007, virtually identical hiring criteria.⁶³

B. *Judicial Failure to Redress Issues Caused by Incompetent Defense Counsel*

The judiciary of the *ad hoc* tribunals failed to ameliorate the systemic harms of incompetent defense counsel. Unlike judiciaries in various domestic jurisdictions that provide, expound on, and sometimes enforce standards of competent representation,⁶⁴ the chambers at the *ad hoc* tribunals provided virtually zero judicial oversight for counsel’s competence after appointment.⁶⁵ Whereas domestic courts frequently define adequate levels of competence and enforce them, the judiciary at the *ad hoc* tribunals rarely addressed incompetency.⁶⁶ From the little case law available on incompetent assistance of counsel,⁶⁷ however, we can glean insight into how the tribunals responded to parties alleging incompetent counsel.

58. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.50, Rule 45(B)(iii) (July 8, 2015); *see also* TUINSTRAS, *supra* note 7, at 40.

59. ICTY Rules of Procedure and Evidence, *supra* note 58, Rule 45(B)(ii); *see* ICTY Directive No. 1/94, IT/73/REV.11, art. 14(A)(iii), https://www.icty.org/x/file/Legal%20Library/Defence/Assignment_of_counsel_july2006.pdf.

60. Starr, *supra* note 27, at 178–79. This duration requirement is likely arbitrary with little basis in empirical fact. *See* TUINSTRAS, *supra* note 7, at 42–43.

61. Mark Harmon, *Plea Bargaining: The Uninvited Guest at the International Criminal Tribunals for the Former Yugoslavia*, in *THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT* 163, 174 (José Doria et al. eds., 2009).

62. Starr, *supra* note 27, at 178 n.40.

63. *See* ICTR Rules of Procedure and Evidence, Rule 45(A), (June 15, 2017), <https://unictr.irmct.org/sites/unictr.org/files/legal-library/070615-rpe-en-fr.pdf>; *see also* Starr, *supra* note 27, at 177–78 (“[M]ost ICTR defense counsel have little experience with international criminal cases.”).

64. Starr, *supra* note 27, at 186.

65. *Id.* at 181.

66. *See id.* at 181–83.

67. *Id.* at 171 n.4 (listing several tribunal proceedings that evince ineffective assistance without directly addressing the topic).

At the *ad hoc* tribunals, defendants could request relief from incompetent counsel in two ways. First, the accused could request the withdrawal of counsel. In order to achieve this, the accused had to prove the existence of “exceptional circumstances” such as the complete breakdown of communication with the accused’s attorney.⁶⁸ However, the tribunals were markedly reluctant to accede to such requests,⁶⁹ likely due to concerns that an accused was intentionally attempting to force delay.⁷⁰ Even if a claim was meritorious, it would be categorically denied if the accused’s argument was that the amount of time or resources allocated to the case was insufficient and that this insufficiency precluded effective representation.⁷¹

Second, an accused could move the tribunal for relief, such as the appointment of new counsel or relief from a tribunal’s holding, if they could prove counsel was incompetent.⁷² When confronted with such a motion in the *Tadić* case, the Appeals Chamber of the ICTY recognized that ineffective representation by counsel was a valid appellate argument if the appellant could establish the existence of “gross professional negligence,”⁷³ but noted that there was a strong presumption in favor of counsel’s due diligence absent any clear demonstration of gross incompetence.⁷⁴ This became

68. See, e.g., Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Counsel, ¶ 12 (Int’l Crim. Trib. for Rwanda Nov. 23, 2006).

69. See, e.g., Prosecutor v. Nyiramasuhuko and Ntahobali, Case No. ICTR-97-21-T, Decision on Ntahobali’s Motion for Withdrawal of Counsel, ¶¶ 13–25 (Int’l Crim. Trib. for Rwanda June 22, 2001).

70. Gut et al., *supra* note 35, at 1219.

71. See Prosecutor v. Milutinović et al., Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, ¶ 22 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 13, 2003) (“Counsel for the Appellant claim that they may be ethically required to withdraw from representing the Appellant because they do not have adequate resources to defend him. The Appeals Chamber observes that the assigned counsel agreed to represent the Appellant, aware of the system of remuneration for assigned counsel, and are bound thereby. There has been no change in the terms of representation or in the initial agreement, and counsel are required to fulfil their obligations to the International Tribunal.”).

72. Gut et al., *supra* note 35, at 1219; TUINISTRA, *supra* note 7, at 48.

73. Prosecutor v. D. Tadić, Case No. IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence ¶¶ 46–50 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 15, 1998).

74. Prosecutor v. D. Tadić, *supra* note 73, at ¶¶ 48-50; Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Decision on the Admission of Additional Evidence, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia April 11, 2001) (“[T]here is a strong presumption that counsel at trial acted with due diligence, or putting it another way, that the performance of counsel fell within the range of reasonable professional assistance. In assessing whether trial counsel were ‘grossly negligent,’ the Chamber examining the allegation applies an objective standard of reasonableness. In determining whether the performance of counsel actually fell below that standard, an assessment must be made of counsel’s conduct in the circumstances as they stood at that time.”).

referred to as the “gross incompetence” standard.⁷⁵ As the ICTR Appeals Chamber in *Akayesu* explained, to prove an accused’s trial counsel was ineffective, the accused needed to further show that counsel’s “gross incompetence” resulted in a miscarriage of justice.⁷⁶ This was too onerous a standard for the accused to meet. As Professor Starr observed, in no explicit instance did an accused succeed in gaining relief due to an attorney’s poor performance.⁷⁷ After she gathered the relevant cases, Professor Starr found that the chambers did not remove counsel or provide relief for the accused even when counsel submitted subpar pleadings, behaved negligently, or filed frivolous motions.⁷⁸

Further, the ICTY Appeals Chamber in *Tadić* declared that “[i]f counsel acted despite the wishes of the Appellant, in the *absence of protest at the time*, and barring special circumstances . . . the latter must be taken to have acquiesced, even if he did so reluctantly.”⁷⁹ In contrast, in most domestic jurisdictions, ineffective assistance of counsel claims are not predicated on the defendant raising a motion during their counsel’s ineffective representation.⁸⁰ Such claims are preserved for appeal regardless of whether or not the accused raises an objection *sua sponte*.⁸¹ But at the tribunals, the accused needed to meet the extremely onerous standard that “his counsel’s incompetence was so manifest as to oblige the Trial Chamber to act *sua sponte*, and that the Trial Chamber’s failure to do so occasioned a miscarriage of justice.”⁸² It is incredibly unrealistic and unfair to foist the burden of making an objection on the accused, who often have little understanding—if any—of the law or procedure of the tribunal, independent of their counsel’s advice.⁸³

The record left by the *ad hoc* tribunals indicates that the problem of incompetent defense counsel was prolific, yet rarely addressed.⁸⁴ One of the most telling examples comes from the *Erdemović* case. There, defense counsel’s poor understanding of the guilty plea concept and of international

75. See CALVO-GOLLER, *supra* note 3, at 165 n.724.

76. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 77 (Int’l Crim. Trib. for Rwanda June 1, 2001).

77. Starr, *supra* note 27, at 181–82. However, Professor Starr added that “it is possible that some could have taken place confidentially.” *Id.* at 182 n.57.

78. See *id.* at 182.

79. Prosecutor v. D. Tadić, *supra* note 73, ¶ 65 (emphasis added).

80. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 700 (1984).

81. See, e.g., *id.*

82. Starr, *supra* note 27, at 181 (quoting the ICTR Appeals Chamber in Prosecutor v. Nahimana et al., the so-called *Media Case*).

83. *Id.* (“[The Chamber did not] explain how the non-lawyer defendant is expected to recognize his counsel’s failings at the trial stage, or to identify the appropriate procedural stage to raise an objection.”).

84. Professor Starr lists various examples where counsel was acting in an objectively incompetent manner. *Id.* at 171 n.4. Throughout the numerous cases she gathered, Starr discovered instances where counsel’s submissions were incoherent, illegible, or immaterial. *Id.*

humanitarian law ultimately caused counsel to advise the accused to plead guilty to the charge of crimes against humanity, which poses a much higher sentence and stigma than the charge of war crimes to which he was entitled to plead.⁸⁵ Though it allowed Erdemović to vacate his former plea, enter a plea to the lesser offense, and receive a lesser sentence, the Appeals Chamber was conspicuously silent regarding whether counsel's conduct was grossly incompetent, even as it indicated that this issue stemmed directly from counsel's miscomprehension of plea deals.⁸⁶

In sum, the structure of the *ad hoc* tribunals permitted, indeed even fostered, the incompetence of defense counsel. In fashioning the unattainable "gross incompetence" standard and then turning a blind eye to the reality of incompetent defense counsel, the judiciary failed to counteract these systemic flaws. Consequently, the accused were left with little recourse when their legal advocates failed to provide adequate representation. This problem denigrated the accused's right to a fair trial and the tribunals' equality of arms, tarnishing the credibility and integrity of the *ad hoc* tribunals.⁸⁷

III. DEFENSE COUNSEL COMPETENCE AT THE INTERNATIONAL CRIMINAL COURT

While largely modeled after the *ad hoc* tribunals,⁸⁸ the ICC is and has been free to avoid many of the pitfalls that prompted incompetent defense counsel in those contexts.⁸⁹ Yet, after seventeen years of existence, the ICC's track record in this regard is mixed. Although the international community took a proactive role in ameliorating some of the tribunals' defects in drafting the Rome Statute, others were retained in the ICC's framework from the outset.⁹⁰ Unfortunately, the positive gains made by the ICC to date fail to fully offset the design flaws the ICC inherited from the *ad hoc* tribunals. As a result, the record already reveals the systemic presence of incompetent defense counsel at the ICC.

In assessing the ICC, the first section of this part will cross-analyze the ICC's structural framework against the structural flaws of the *ad hoc* tribunals discussed in Part I. This part will conclude with an examination of how

85. Prosecutor v. Erdemović, Case No. IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 15–16 (Oct. 7, 1997).

86. *Id.* at ¶ 16 (“[I]t appears to us that defence counsel consistently advanced arguments contradicting the admission of guilt and criminal responsibility implicit in a guilty plea. If the defence had truly understood the nature of a guilty plea, it would not have persisted in its arguments which were obviously at odds with such a plea.”).

87. See Wolfgang Schomburg, *The Role of the International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT’L HUM. RTS. 1, 1 (2009).

88. Ford, *supra* note 4, at 313–23.

89. See Gut et al., *supra* note 35, at 1229.

90. See *infra* Part III.

the ICC Chambers' polices continue to foster defense counsel incompetence.

A. *Comparing the ICC's Structural Treatment of Defense Counsel to the Ad Hoc Tribunals*

Of the four predominant issues with the *ad hoc* tribunals—(1) the lack of a structural defense organ at the tribunals; (2) disadvantageous employment terms; (3) reimbursement of counsel; and (4) ineffective hiring qualifications⁹¹—only one was successfully ameliorated at the ICC: the payment of counsel.⁹² Unfortunately, the other three flaws still remain.

From its outset, the ICC was carefully designed to avoid some of the pitfalls exemplified by the *ad hoc* tribunals. In the context of incompetent defense counsel, the Court successfully dealt with the problem of inadequate payment of defense counsel using two mechanisms.⁹³ First, by giving defense counsel at the ICC what is essentially a salary: They are remunerated on a fixed monthly basis, regardless of any unexpected extension in the case.⁹⁴ This is a considerable improvement from the remuneration schemes at the *ad hoc* tribunals.⁹⁵ Second, taking inspiration both from the equality of arms and the defective compensation system at the *ad hoc* tribunals, the payment scheme at the ICC is required to “maintain[] equilibrium between the resources and means of the accused and those of the prosecution.”⁹⁶ Consequently, under the current legal aid policy, the defense and prosecution receive equal pay.⁹⁷ All in all, the ICC has achieved “the most progressive balance between the income of prosecution and defence staff” of all the international criminal courts.⁹⁸

The other three design flaws—the lack of a structural defense organ at the tribunals; disadvantageous contract-based employment terms; and ineffective hiring qualifications—are still present at the ICC.

91. See *supra* Part II.

92. See TUINSTR, *supra* note 7, at 165.

93. Ford, *supra* note 4, at 313. At the ICTY, for example, if a phase of a proceeding lasted longer than originally estimated, there was no provision for automatic remuneration. Gut et al., *supra* note 35, at 1238–39.

94. Gut et al., *supra* note 35, at 1241; Interim Report on Different Legal Aid Mechanisms Before International Criminal Jurisdictions, ICC-ASP/7/12, ¶¶ 21–22 (Aug. 19, 2008), https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-7-12_English.pdf.

95. See *supra* text accompanying notes 51–56.

96. ICC Assembly of State Parties, 3rd Sess., Report to the Assembly of States Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons, ICC-ASP/3/16, ¶ 16 (Aug. 17, 2004) [hereinafter Report on Adequate Defense], https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf.

97. Gut et al., *supra* note 35, at 1241–42; William St-Michel et al., *Strengthening the Role of Defense at the International Criminal Court: Reflections on How Defense Is and Can Be Supported for Greater Effectiveness and Efficiencies*, 18 INT'L L. J. 517, 525–26 (2018).

98. TUINSTR, *supra* note 7, at 165.

Just like its predecessors, the ICC was designed without a defense organ.⁹⁹ Instead, responsibility to support and promote the rights of the accused and defense counsel was vested in the head of the Registry.¹⁰⁰ Like the *ad hoc* tribunals' Registries, the ICC's Registry maintains a list of external defense counsel from which the accused may "freely choose."¹⁰¹ Once selected, defense counsel are assigned to clients on an *ad hoc*, contractual basis without any long-term assurances of job stability; they are, essentially, external consultants.¹⁰²

Moreover, the criteria for inclusion on the Registry's list are comparable to those of the *ad hoc* tribunals. To qualify, an applicant must possess "established competence in international *or* criminal law and procedure."¹⁰³ According to the Regulations of the Court, "established competence" is measured purely by the number of years one has worked in *either* a criminal *or* international law capacity (which must be more than ten).¹⁰⁴ The disjunctive formulation of this criterion misses the mark, as there is no guarantee that counsel who meet it will have any familiarity with international criminal law and the ICC's *sui generis* makeup. Furthermore, just as under the tribunals' criteria, quantitative requirements concerning years of experience do not necessarily correspond to the qualitative requirement of "established competence."¹⁰⁵ Counterintuitively, the ICC does not mandate any prior criminal defense experience to serve as defense counsel—even for lead defense counsel. Defense counsel possessing "the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings" may be appointed.¹⁰⁶ The omission of a requirement for prior service as defense counsel is striking.

Still, the ICC was not blind to these structural inequities. The drafters of the Rome Statute tried to mitigate its defense-related shortcomings by bestowing a limited amount of independence for defense counsel: While it does not have a fully independent defense organ, the ICC *does* have an office for defense counsel.¹⁰⁷

99. St-Michel et al., *supra* note 97, at 518–19.

100. ICC Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, rule 20(1) (Nov. 2, 2000) [hereinafter ICC RPE].

101. *Id.* rule 21(2).

102. Gut et al., *supra* note 35, at 1229.

103. ICC RPE, *supra* note 100, rule 22(1) (emphasis added).

104. See ICC Regulations of the Court, U.N. Doc. ICC-BD/01-05-16, reg. 67(1) (Nov. 15, 2018) [hereinafter ICC RC].

105. See Gut et al., *supra* note 35, at 1294; see Starr, *supra* note 27, at 177 ("[The year requirement] does not ensure that counsel will have gained relevant experience or skills, and may actually exclude counsel who do have relevant skills.").

106. ICC RPE, *supra* note 100, rule 22(1).

107. ICC RC, *supra* note 104, reg. 77.

B. *The ICC's Chief Improvement:
The Office of Public Counsel for the Defense*

During and directly after the creation of the ICC, there were calls for the new court to mimic the Sierra Leone Special Court (“SLSC”) by including an independent public defense organ.¹⁰⁸ The SLSC is a hybrid international court established by the government of Sierra Leone and the United Nations to prosecute international criminal law offenses that occurred during the Sierra Leone Civil War.¹⁰⁹ Uniquely, the SLSC created an independent “Office of the Principal Defender” with the intention that the office “become as independent as the Office of the Prosecutor.”¹¹⁰ Tellingly, the ICC Committee on Budget and Finance conceded that a fourth organ for the defense at the ICC would solve many of the issues facing defense counsel, yet it refrained from seriously considering this proposal.¹¹¹ Ultimately, the ICC summarily dismissed this proposal because of fears of unmanageable conflicts of interest in related cases¹¹² and unnecessary cost increases.¹¹³

Instead, the ICC took a half-step forward by establishing the Office of Public Counsel for the Defense (“OPCD”) within the Registry in 2004.¹¹⁴ In contrast to the organization of the *ad hoc* tribunals, the OPCD provides the defense with an institutional presence at the ICC. The OPCD’s primary responsibility is to “represent[] and protect[] the rights of the defence during the initial stages of an investigation” and to “provid[e] support and assistance to Defence Counsel and to persons entitled to legal assistance.”¹¹⁵

108. Report on Adequate Defense, *supra* note 96, ¶¶ 7–12.

109. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT’L L. 395, 398 (2011).

110. TUINSTRA, *supra* note 7, at 79.

111. Report on Adequate Defense, *supra* note 96, ¶ 9.

112. *Id.* (“Given ICC’s specificities as compared to the Sierra Leone Special Court and any national jurisdiction, a public defender office at the ICC would only be able to assist all accused and co-accused persons without any risks of conflict of interest if a new public counsel was recruited and assigned for every accused person. Otherwise, since the number of situations before the Court is likely to be limited, and the cases might be closely interrelated, this would ultimately result in conflicting interests for the public defender representing more than one accused person.”).

113. *Id.* (“[A] public defender office providing full representation of the accused person would not be cost-effective in the long term, as ultimately support team members, such as legal assistants and investigators, would have to be recruited so as to ensure effective preparation of the defence case. This would necessarily entail a significant increase in staff costs, including not only the salary but also all other allowances to which the staff of the Court is entitled.”).

114. Dominic Kennedy & Isabel Düsterhöft, *Proper Role for Defense Counsel Organizations*, in DEFENSE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 137, 141 (Colleen Rohan & Gentian Zyberi eds., 2017).

115. Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, in DEFENSE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 204, *supra* note 114, at 222.

The OPCD is a laudable attempt at promoting the equality of arms. The OPCD is allowed to independently perform a number of duties that the ICC Rules of Procedure and Evidence (“ICC RPE”) accord to the Registrar.¹¹⁶ These duties include (1) direct representation and (2) assistance to defense teams.¹¹⁷ Regarding the first responsibility, the OPCD counsel may “represent and protect the ‘rights of the defence’ during the initial stages of an investigation,” which may include making “submissions on behalf of a person entitled to legal assistance when defence counsel has not been secured.”¹¹⁸ For the second, Regulation 77 of the ICC Regulations of the Court (“ICC RC”) permits the OPCD to provide “general support and assistance” to defense teams.¹¹⁹ This may include, for example, “legal research and advice on/assistance with the detailed factual circumstances of the case.”¹²⁰ This support is intended to compensate for the “lack of resources and time” granted to defense counsel “while ensuring the development of an institutional memory.”¹²¹ By permitting the OPCD to conduct these functions independently, the ICC grants the defense a baseline institutional stature from which it can manage and internalize issues directly relating to providing effective representation. In this way, and in contrast with the *ad hoc* tribunals, the OPCD represents a “milestone in improving the work of defence.”¹²²

C. *Where the OPCD Falls Short: Independence and Scope of Representation*

Unfortunately, however, a deeper examination into how the OPCD operates, both internally and in relation to other institutions within the ICC, reveals that the defense still lacks meaningful independence at the ICC. While the OPCD purports to be a “wholly independent office,” it still falls within the remit of the Registry, which significantly reduces the OPCD’s autonomy.¹²³ The Registrar, through the Counsel Support Section (“CSS”), appoints counsel after an accused selects them off the Registry’s list of appointable counsel,¹²⁴ and the Registry controls what sort of substantive duties the office may independently perform.¹²⁵ This contrasts poorly with the Office of the Prosecutor (“OTP”), which is a completely independent office,

116. ICC RC, *supra* note 104, reg. 77; TUINSTR, *supra* note 7, at 79.

117. St-Michel et al., *supra* note 97, at 532.

118. *Id.* at 532–33.

119. ICC RC, *supra* note 104, reg. 77(4)(b).

120. St-Michel et al., *supra* note 97, at 533.

121. *Id.*

122. *Id.*

123. ICC RC, *supra* note 104, reg. 77(2); *see* Kennedy & Dusterhöft, *supra* note 114, at 170.

124. Kennedy & Dusterhöft, *supra* note 114, at 142.

125. *Id.*

unbound by Registry oversight.¹²⁶ Specifically, the OTP, as one of the three formal organs of the court, is on par with, rather than subsumed within, the Registry, and it has “an effective voice in revising the Rules of Procedure and Evidence, the regulations of the court, the ongoing budgetary process, and other issues of overall policy and day-to-day operations.”¹²⁷ Defense counsel, on the other hand, “do not have an institutional voice.”¹²⁸

Additionally, while the Registrar is tasked with “ensur[ing] the professional independence of defence counsel,”¹²⁹ there are no mechanisms to guarantee this mandate is seriously implemented. For example, while ICC regulations require that the Registrar consult with independent representative bodies of counsel regarding matters such as the management of legal assistance and the development of a Code of Professional Conduct,¹³⁰ the Registrar is not required to take any sentiments of these bodies into account after consultation.¹³¹ Defense counsel lack any means to directly manage such matters. Thus, while the OTP has the autonomy to decide how prosecutorial decisions are made,¹³² defense counsel remain confined by the dictates of the Registry.¹³³

There are other ways that defense counsel are not on par with the prosecution. The ICC relies on States Parties to “ensure that their domestic legal arrangements enable them to render a number of forms of cooperation, including the arrest and transfer of suspects, the freezing of assets, the protection of victims and witnesses, and the procuring of documentary and testimonial evidence.”¹³⁴ Unlike the prosecution, which can freely and directly seek state cooperation requests, the defense is forced to seek state cooperation requests by lobbying the formal organs of the ICC.¹³⁵ As this process usually entails appealing to either the Registrar or the OTP and then the Chambers, some have criticized this approach as cumbersome, expensive,

126. See TUINISTRA, *supra* note 7, at 83.

127. Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L L. 21, 42 (2000).

128. *Id.*

129. ICC RPE, *supra* note 100, Rule 20(2).

130. ICC Regulations of the Registry, U.N. Doc. ICC-BD/03-03-13, regs. 119, 120 (Aug. 1, 2018) [hereinafter ICC RR].

131. See TUINISTRA, *supra* note 7, at 81.

132. *Id.* at 73.

133. Report on Adequate Defense, *supra* note 96, ¶ 12 (“[The OPCD] will neither be involved in the administrative and financial management of the legal aid programme, nor be responsible for the logistic or administrative support to defence and victims’ representatives teams.”).

134. *Id.*

135. See *e.g.*, Prosecutor v. Katanga et al., ICC Doc. ICC-01/04-01/07-444, Partly Dissenting Opinion of Judge Anita Usacka Attached to the Decision on the “Defence’s Application Pursuant to Article 57(3)(b) of the Statute to Seek Cooperation of the Democratic Republic of Congo (DRC),” ¶ 6 (Apr. 25, 2008).

and inefficient.¹³⁶ Additionally, the OPCD lacks the ability to decide how to apportion and manage the legal aid dedicated to any particular litigation as well as to broader defense matters.¹³⁷ In contrast, the Office of the Prosecutor can determine how its resources are spent.¹³⁸

The interplay between the CSS and the OPCD is particularly bureaucratic, cumbersome, and problematic. While the Court directs the OPCD to provide legal advice, it mandates the CSS to provide practical and operational support and assistance.¹³⁹ All administrative and logistical matters relating to the defense go through the CSS, which is meant to assist “defence teams in liaising with the other relevant sections within the ICC.”¹⁴⁰ In other words, while the OPCD is tasked with performing specific defense functions, such as representing the accused during pre-trial proceedings,¹⁴¹ the CSS governs *how* the OPCD carries out those functions. Since proceedings usually move quickly, the presence of an additional bureaucratic layer that requires lengthy, formal, and substantiated requests impedes the defense’s efficiency and effectiveness.¹⁴² Moreover, with defense support and assistance split between the OPCD and the CSS, “[t]he overall provision of assistance to counsel is fragmented and responsibilities are unclear.”¹⁴³ In practice, the OPCD performs part of the CSS’s role, resulting in “duplication and lack of clarity between CSS and OPCD [leading] to conflict and . . . confusion as to which office is responsible for the provision of which service.”¹⁴⁴

Some examples highlight just how problematic and inefficient this interplay can be. For instance, both the CSS and the OPCD arrange office space for defense *and* victim counsel.¹⁴⁵ Additionally, both the CSS and the OPCD provide annual educational meetings for both victim and defense counsel.¹⁴⁶ Yet these meetings have not sufficiently addressed issues impact-

136. INT’L BAR ASS’N’S HUMAN RIGHTS INST., FAIRNESS AT THE INTERNATIONAL CRIMINAL COURT 36, 40 (2011).

137. Report on Adequate Defense, *supra* note 96, ¶ 6 (“[T]he Registrar is responsible for the management of legal assistance. This includes the management of public funds used to pay legal aid.”).

138. TUINSTRA, *supra* note 7, at 85.

139. ICC Assembly of State Parties, 13th Sess., *Report on the Review of the Organizational Structure of the Registry*, ICC-ASP/12/26, ¶ 7(e) (Oct. 28, 2014), https://asp.iccdpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-26-ENG.pdf.

140. St-Michel et al., *supra* note 97, at 531–32.

141. ICC RC, *supra* note 104, reg. 77(4)(a).

142. See St-Michel et al., *supra* note 97, at 531–33.

143. ICC Assembly of State Parties, *Report on the Review of the Organizational Structure of the Registry*, *supra* note 155.

144. *Id.*

145. *Id.*

146. *Id.*

ing defense counsel,¹⁴⁷ and the ICC does not provide independent defense-specific training.¹⁴⁸ Dividing these responsibilities, while simultaneously obligating both offices to provide for defense and victim counsel matters, diminishes the defense's institutional capacity.¹⁴⁹ That is, mandating the OPCD to undertake non-defense related matters diverts funding and attention that could otherwise be dedicated to defense matters.

Ultimately, the OPCD's lack of independence is a symptom of broader restrictions on its ability to fulfill its seminal mandates: representing and protecting the rights of the defense during the initial stages of an investigation.¹⁵⁰ For example, in the *Lubunga* case, a judge requested that the OPCD temporarily replace a defense counsel, modify a defense application for leave to appeal, and file its redacted version.¹⁵¹ The OPCD refused, considering this to be outside the scope of its abilities.¹⁵² The OPCD was not mistaken in this regard: The OPCD is precluded from functioning as defense counsel for an accused who is already provided with counsel, from replacing counsel, or from becoming part of an accused's litigation team.¹⁵³ Thus, the OPCD must unfortunately contend with a substantial limitation on its ability to assist the accused during a crucial state of pretrial litigation.

The issues facing defense counsel are further complicated by their bar association's inability to effectively represent them at the ICC.

D. *The Lack of Sufficient Collective Representation and Self-Administration at the ICC*

Until the creation of the International Criminal Court Bar Association ("ICCBA") in 2016, defense counsel lacked not only a bona fide, independent structural organ, but formalized collective representation.¹⁵⁴ Per its constitution, the ICCBA is mandated to facilitate defense counsel's efforts to obtain support, assistance, and information from the various organs of the Court, including establishing channels of communication and holding consultations with the Registrar on matters related to counsel and their support

147. See, e.g., TUINSTRA, *supra* note 7, at 83 (describing one such meeting where "neither time, nor the assistance of an interpreter, had been made available to counsel to discuss any issues between themselves.").

148. Kennedy & Düsterhöft, *supra* note 114, at 142.

149. See Rupert Skilbeck, *Building the Fourth Pillar: Defence Rights at the Special Court for Sierra Leone*, 1 ESSEX HUM. RTS. R. 66, 85 (2004) ("[I]t has to be acknowledged that it is absolutely essential for the defence to be considered on an equal basis to the prosecution from the very start, in terms of legal capacity, administrative support, investigations, public relations, media coverage and outreach. Without this, there cannot be a fair trial.").

150. See ICC RC, *supra* note 104, reg. 77(4)(a).

151. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-815, Corrigendum to Decision on the Defense Request for Extension of Time Limits, at 4 (Feb. 12, 2007).

152. *Id.*

153. TUINSTRA, *supra* note 7, at 79.

154. Kennedy & Düsterhöft, *supra* note 114, at 142–43.

staff.¹⁵⁵ Moreover, the ICCBA aims to enhance the qualifications of defense counsel through mandatory training on substantive and procedural international criminal law, advocacy, and information technology systems.¹⁵⁶

Like the OPCD, the ICCBA falls short of its potential. Most notably, the ICCBA, unlike conventional domestic bar associations, is only a representative body, not an administrative one.¹⁵⁷ The ICCBA patently lacks many other abilities that many domestic bar associations have. The latter routinely exercise control over who is permitted to practice within a given jurisdiction, and they have adjudicatory bodies that enforce—by means of sanctions, monetary fines, and even the stripping of one’s authority to practice law—their ethical rules.¹⁵⁸ This is because tasks that administrative bar associations typically perform, such as determining an applicant’s inclusion on the list of appointable counsel or legal assistants, remain within the remit of the Registry.¹⁵⁹ Furthermore, since ICCBA membership is not mandatory to practice at the ICC,¹⁶⁰ the ICCBA has little influence over the Registrar’s appointment decisions.¹⁶¹ The ICCBA also lacks a disciplinary adjudicatory body to enforce its putative mandate of promoting the highest professional standards and ethics.¹⁶² In sum, the absence of such powers means that the ICCBA is, in effect, a purely lobbying body. While the ICCBA was established to give the defense counsel at the ICC a representative bar,¹⁶³ it lacks many of the abilities required to address the issue of incompetent defense counsel.

E. *The Lack of Meaningful Judicial Oversight over Defense Counsel at the ICC*

At the *ad hoc* tribunals, “structural flaws that reduce[d] the effectiveness of defense counsel may [have] conspire[d] against defendants without regard to factual guilt.”¹⁶⁴ While the *ad hoc* tribunals’ chambers turned a blind eye to the issue,¹⁶⁵ the ICC Chambers need not, since the ICC is not

155. Constitution of the International Criminal Court Bar Association art. 2 (June 29, 2018) [hereinafter ICCBA Constitution].

156. *Id.* art. 35.

157. St-Michel et al., *supra* note 97, at 536.

158. See generally Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL’Y REV. 193, 199 (1996).

159. *Id.*

160. See ICCBA Constitution art. 3(2) (“All persons who are on the ICC List of Counsel practicing as independent counsel are eligible to be Full Members.”).

161. St-Michel et al., *supra* note 97, at 536.

162. Cf. ICCBA Constitution art. 2(2).

163. See St-Michel et al., *supra* note 97, 536.

164. Note, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 2001 (2001) (author unattributed).

165. See *supra* Part II.B.

bound by *ad hoc* precedent.¹⁶⁶ So, while the ICC has many of the same structural flaws as the *ad hoc* tribunals, they could be resolved, at least in part, by active judicial monitoring of defense counsel competence, and by provisions shielding the accused against incompetent counsel. Unfortunately, as this section shows, the ICC Chambers apply the same laissez-faire policy to the actions of incompetent defense counsel that the tribunals' chambers did.

The lack of meaningful oversight happens at two stages. First, the ICC has no mechanism to adequately vet whether qualifying counsel may be appointed to a particular case—the accused are free to select any counsel off of the ICC's list. Second, as in the *ad hoc* tribunals, the judiciary fails to provide meaningful consequences for counsel, and relief to the accused, when counsel evinces incompetence.

1. Appointment of Defense Counsel

Once a counselor is added to the Registrar's list of appointable counsel, "or meets the criteria to be added to the list," the "ICC Registrar is not empowered to refuse to assign or appoint a counsel to a defendant . . ."¹⁶⁷ This is true even if counsel ceases to be qualified or was never actually competent to begin with. Instead, the ICC "has adopted a self-regulatory system so that counsel are responsible for verifying the accuracy of information contained in the application themselves."¹⁶⁸

Article 13 of the ICC's "Code of Professional Conduct for Counsel" ("CPCC") provides that "[c]ounsel has a duty to refuse an agreement where . . . (c) Counsel does not consider that he or she has the requisite expertise."¹⁶⁹ Yet this safeguard is inadequate for three reasons. First, by putting the onus on counsel instead of the Registry, the OPCD, the ICCBA, or any other body of the Court, the ICC leaves the fair trial guarantee of competent representation to the individual counselor's possibly self-serving evaluations. Second, and as stressed above, the Registry's criteria for appointment are ineffective at best and deleterious at worst.¹⁷⁰ Third, and relatedly, it is doubtful whether any given counselor could proactively establish whether she possesses the adequate experience and knowledge to work in this complex legal context, especially since expertise on the workings of the ICC is not a prerequisite.¹⁷¹

166. See CALVO-GOLLER, *supra* note 3, at 1–2.

167. Gut et al., *supra* note 35, at 1222.

168. *Id.*

169. ICC Assembly of State Parties, Code of Professional Conduct for Counsel, U.N. Doc. ICC-ASP/4/Res.1, art. 13(2)(c) (Dec. 2, 2005) [hereinafter ICC CPCC].

170. *Supra* notes 45–47 and accompanying text.

171. See Gut et al., *supra* note 35, at 1292 (noting that an international criminal bar exam could be required for appointed defense counsel).

The *Kony* case demonstrates how this self-regulatory framework can engender undesirable results.¹⁷² There, a counselor requested translations of English documents even though, in her application to the Registry, she claimed she was fluent in English.¹⁷³ When defense counsel received documents in English relating to the victims' participation in the proceedings, she requested "translations into French of all documents [because] her knowledge of the English language [was] insufficient."¹⁷⁴ In rejecting this request out of a concern that translation would unduly delay the proceedings, the Pre-Trial Chambers left the accused without recourse from counsel's misrepresentation—or her actual inability to comprehend material documents.¹⁷⁵ In fact, there was no mention of whether counsel was competent to handle the litigation.¹⁷⁶

Kony in fact exemplifies each of the flaws in the self-regulatory system discussed above: Low appointment standards create a risk that counsel will not be adequately competent or adequately able to gauge her own competence.¹⁷⁷ After appointment, the Chambers and the Registry will hardly oversee the performance of counsel to ensure her competence; they are content with summarily bypassing the issue to promote a "fair and expeditious trial."¹⁷⁸ This has the potential to be particularly harmful, and indeed unfair, if, like in *Kony*, counsel's mis-estimation of her competence leads to deficits in representation which the Chambers fail to rectify.¹⁷⁹ But relevant ICC stakeholders (the Chambers, Registry, and ICCBA) are unwilling to even discuss the competency of counsel when presented with a situation where counsel's incompetence is plausibly impugning the fairness of the proceedings.¹⁸⁰ It seems likely that because they, like the *ad hoc* tribunals, do not possess proportional modes of relief for procedural violations, they simply ignore instances of incompetent defense counsel.¹⁸¹

172. Gut et al., *supra* note 35, at 1222.

173. Prosecutor v. Kony et al., ICC-02/04-01/05-211, Decision on "Requête de la Défense en Extension de Délai Afin de Répondre aux 'Observations de la Défense sur les Demandes de Participation à la Procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06,'" 6–7 (Feb. 23, 2007) (English language decision with French title).

174. *Id.* at 5.

175. *Id.* at 7–8.

176. See Prosecutor v. Kony et al., ICC-02/04-01/05-211, *supra* note 173.

177. TUINSTRAL, *supra* note 7, at 49 ("But even if counsel meets the necessary minimum requirements [to be included on the Registrar's list of defense counsel], this does not guarantee his competence in conducting an international criminal case.")

178. See *id.* at 7.

179. Prosecutor v. Kony et al., ICC-02/04-01/05-211, *supra* note 173.

180. See Gut et al., *supra* note 35, at 1222.

181. See Starr, *supra* note 27, at 181–83 (discussing "remedial deterrence").

2. Judicial Oversight and Remedies for Defendants After Appointment of Incompetent Counsel

Like the chambers of the *ad hoc* tribunals, the ICC Chambers fail to provide any beneficial or effective oversight for defense counsel's competence after counsel has been appointed to a case. Essentially, the ICC Chambers grant defense counsel carte blanche to litigate cases notwithstanding clear indications that particular counselors fail to comprehend mandatory ICC processes. As the Appellate Chamber avowed in *Lubanga*,

[a]s a rule, counsel is best placed to appreciate the needs of a case, especially the time needed for going into matters at issue in the way expected of counsel. The Appeals Chamber has no reason to doubt duty counsel's estimation of the time required for the filing of the documents under consideration.¹⁸²

In *Lubanga*, the Chamber granted the defense's motion for an extension to file "the relevant documents" because counsel arrived to the Hague and interviewed her client for the first time just one day before the original due date to file the "Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute."¹⁸³

The Chambers' expectation that counsel act with due diligence throughout the representation is paired with considerable deference to the defense, a level of deference reminiscent of the *ad hoc* tribunals.¹⁸⁴ If defense counsel abuse their widely-allotted discretion, the Chambers may impose consequences against them, but unfortunately these consequences routinely fail to provide sufficient recourse for the accused.

Counsel's failure to act with due diligence may result in the Chambers refusing to consider motions filed by counsel, even if they are necessary to secure vital rights for the accused.¹⁸⁵ For example, in *Katanga and Ngudjolo*, defense counsel attempted to challenge the lawfulness of the arrest and detention of the accused, which must be done in a motion filed in the Pre-Trial Chamber.¹⁸⁶ However, despite "the various opportunities afforded," counsel inexplicably filed the motion in the Trial Chamber, which is not equipped to adjudicate such claims.¹⁸⁷ As a result, the Trial Chamber

182. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-903, Decision of the Appeals Chamber on the Defense Application for an Extension of Time of 9 May 2007, ¶ 3 (May 4, 2007).

183. *Id.*

184. *See supra* Part II.B.

185. Gut et al., *supra* note 35, at 1222.

186. *See* Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-2259, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings," ¶¶ 16–18 (July 12, 2010).

187. *See id.* ¶¶ 18–19.

flatly denied the defense's motion on unlawful detention and stay of proceedings.¹⁸⁸

And while improper filings also occur in domestic courts, where they also sometimes harm defendants, negligent mistakes in domestic courts can provide the basis for valid ineffective assistance of counsel claims on appeal.¹⁸⁹ Unfortunately for the accused at the ICC, such negligence is unlikely to be found sufficient to support a gross incompetence claim.¹⁹⁰

In *Situation in Darfur*, the ICC Pre-Trial Chamber appointed *ad hoc* counsel from the Registrar's list¹⁹¹ to enable the defense to respond to *amicus* briefs relating to the protection of victims and the preservation of evidence.¹⁹² The Chamber did this pursuant to ICC Rules of Procedure and Evidence Rule 103, which permits the Chamber to appoint counsel for the limited purpose of respond to amicus briefs.¹⁹³ Violating the limited authorization of RPE 103, the counselor in *Darfur* took it upon himself to address virtually everything relevant for the case, save for the actual *amicus* briefs:¹⁹⁴ While he indicated an awareness of Rule 103's scope, the counselor's legal submissions mainly related to jurisdiction and the admissibility of evidence.¹⁹⁵ Apparently, defense counsel relied on articles 5¹⁹⁶ and 6¹⁹⁷ of the Code of Conduct as a justification for bypassing ICC RPE 103, despite having been explicitly instructed about the clear limits of his mandate.¹⁹⁸

Thankfully, the Chamber swiftly chastised counsel's behavior as being "misconceived [in its] flagrant disregard of the provisions of the Statute, the

188. *Id.* ¶ 19.

189. *See, e.g.,* Kimmelman v. Morrison, 477 U.S. 365, 383–85 (1986) (holding that failure to timely file an evidentiary suppression motion may support a finding of ineffective assistance of counsel under the *Strickland* standard).

190. Of course, this has never been tested before at the ICC. However, such claims have overwhelmingly failed before the *ad hoc* tribunals. *See* Starr, *supra* note 27, at 171–83.

191. Situation in Darfur, ICC-02/05-12, Decision of the Registrar Appointing Mr. Hadi Shalluf as Ad Hoc Counsel for the Defence, at 3 (Aug. 25, 2006).

192. Situation in Darfur, ICC-02/05-10, Decision Inviting Observations in Application of Rule 103(2) ICC REP, 4–6 (July 24, 2006).

193. ICC RPE, *supra* note 100, Rule 103; *see* Situation in Darfur, ICC-02/05-66, Decision on the Request for Review of the Registry's Decision of 13 February 2007, 7 (Mar. 15, 2007).

194. *See* Situation in Darfur, ICC-02/05-66, Decision on the Request for Review of the Registry's Decision of 13 February 2007, 7 (Mar. 15, 2007).

195. TUINSTRAL, *supra* note 7, at 228–29.

196. ICC CPCC, *supra* note 169, art. 5 (setting forth a mandatory oath to be taken by appointed defense counsel that they represent the accused "with integrity and diligence, honourably, *freely, independently . . .*") (emphasis added).

197. *Id.* art. 6 (stating that "[c]ounsel shall act honorably, independently and freely. Counsel shall not permit his or her independence, integrity or freedom to be compromised by external pressure . . .").

198. Situation in Darfur, ICC-02/05-66, Decision on the Request for Review of the Registry's Decision of 13 February 2007, 3 (Mar. 15, 2007).

Rules of Procedure and Evidence and the Regulations of the Court.”¹⁹⁹ As one would expect, it did not take the Pre-Trial Chamber in *Darfur* much effort to find that counsel’s submissions were “frivolous and vexatious,”²⁰⁰ and, as such, beyond the scope of counsel’s mandate.²⁰¹ On this basis, the Chamber discharged counsel of his duties and, as a sanction, withheld reimbursement for counsel’s work.²⁰² In isolation, this may have been an adequate remedy. But it failed to account for the burden of further litigation and the ultimate risk of serious fair trial violations which this slip-up foisted upon the accused. Representation in *Darfur* was delayed for months, and no associated remedy was provided to the accused, irrespective of the speedy trial implications caused by counsel’s error.²⁰³

The lopsided structural organization of the Court, along with a lack of administrative or judicial oversight, permits the phenomenon of incompetent counsel to exist without much recourse. Chambers’ unwillingness to earnestly and explicitly adjudge counsel’s conduct as incompetent—and provide corresponding remedies to harmed defendants—is especially alarming. No discussion, as of this writing, has taken place about what standards the ICC will employ when confronting egregiously inept defense counsel. If reform is not seriously considered, the structural inequalities between the defense and prosecution will continue to jeopardize the accused’s right to competent representation and a fair trial, compromising the equality of arms and impugning the ICC’s legitimacy.

IV. STRENGTHENING THE DEFENSE AT THE ICC: PROPOSALS FOR REFORM

The ICC is stuck in a state of uneasy uncertainty. On the one hand, the ICC’s treatment of defense counsel is an improvement over the *ad hoc* tribunals’, principally because of the remuneration parity between the prosecution and the defense and the partial institutionalization of the defense within the OPCD and the CSS. On the other hand, defense counsel still lack meaningful institutional autonomy and are subject to overtly bureaucratic frag-

199. Situation in Darfur, ICC-02/05-52, Decision on the Ad Hoc Counsel for the Defence’s Request for Leave to Appeal the Decision of 2 February 2007, 7 (Feb. 21, 2007).

200. Situation in Darfur, ICC-02/05-10, Decision Inviting Observations in Application of Rule 103(2) ICC REP, 6–7 (July 24, 2006) (finding that *ad hoc* counsel had “completely disregarded the precise and clear scope of his mandate by adopting his own interpretation of the mandate.”).

201. *Id.* at 7 (“[G]iven the fact that the *ad hoc* Counsel has been acting beyond the scope of his mandate, the Chamber is of the view that he is in no position to demand payment of fees for the vexatious and frivolous claims instituted before this Chamber for the said period.”).

202. *Id.*

203. See TUINSTRAS, *supra* note 7, at 240; see also INTERNATIONAL CRIMINAL PROCEDURE, *supra* note 35, at 217–22 (describing speedy trial rights of the accused at the ICC and mechanisms the ICC has employed to increase the speed of trial).

mentation and minimization. Despite repeated calls to establish a discrete fourth organ for the defense, the ICC seems loath to seriously consider this option.²⁰⁴ Even as it rejects this idea, the ICC fails to analyze the effects of incompetent defense counsel in practice, depreciating the accused's right to a fair trial and tarnishing both the efficacy of the Court's fact-finding function and its socio-cultural legitimacy.²⁰⁵

Ameliorating the relatively ignored, yet pernicious, phenomenon of incompetent defense counsel necessitates a restructuring of the OPCD. Any reform must endow the OPCD with more authority in regulating defense matters while simultaneously reducing bureaucratic redundancies, namely eliminating the bifurcation of defense responsibilities between the OPCD and the CSS. The most straightforward option is to establish the OPCD as a formal defense organ at the ICC.²⁰⁶ Yet the States Parties have consistently denied this proposal, and nothing indicates this will change in the immediate future.²⁰⁷

Reconfiguring the *ReVision* Project presents a more immediate and effective solution. While the project in its original form aims to strip the OPCD of independence, its regulatory framework can be amended to endow the OPCD with more autonomy, even as it remains under the Registry. The remainder of this note will turn to how this can be achieved.

A. *The Infeasibility of Establishing an Independent Defense Organ*

As many have indicated, establishing a fourth defense organ at the ICC would largely remedy and “counterbalance” the ICC's structural bias towards the prosecution.²⁰⁸ Per Professor Kenneth Gallant of the University of Arkansas Law School, “the [ICC's] structure could be greatly strengthened by the creation of a Bureau of Defense Counsel, analogous to the Office of the Prosecutor.”²⁰⁹ It would permit defense counsel to enjoy career-based instead of contractual employment.²¹⁰ Such an organ would also permit the defense to “maintain the list of approved attorneys, train them in the specialized procedures, redress institutional bias and generally ‘go far toward guaranteeing that the right to counsel truly means the right to adequate and ef-

204. See, e.g., Report on Adequate Defense, *supra* note 96, ¶ 6.2 (“The costs of establishing an independent body could be substantial. Not only would there be no gains in terms of efficiency but there would only be a shift in terms of workload and no savings in terms of staff costs.”).

205. See *id.*; Schomburg, *supra* note 87, at 1.

206. See, e.g., *Fair Trials and the Role of International Criminal Defense*, *supra* note 164, at 2004–05 (2001).

207. See e.g., Report on Adequate Defense, *supra* note 96, ¶ 6.2.

208. *Fair Trials and the Role of International Criminal Defense*, *supra* note 164, at 2005.

209. Gallant, *supra* note 127, at 42.

210. See Starr, *supra* note 27 at 190.

fective counsel.”²¹¹ To be entirely clear, if the States Parties are willing to create this formal fourth organ at the ICC for the defense, they should.

Unfortunately, it is increasingly unlikely that such a reformulation of the ICC’s structure will happen in the immediate future. This type of restructuring would require an amendment to the Rome Statute,²¹² initiated by a State Party.²¹³ Adopting this amendment would then require a two-thirds majority of States Parties.²¹⁴ Such a formal amendment is unlikely to succeed, let alone be proposed in the first place, because there is general “discontent with [the OPCD’s] work and doubts whether funds granted to the Office are well-invested”²¹⁵ Put simply, the Registrar’s current focus is not with giving the defense more autonomy, but less.²¹⁶ An independent Bureau of Defense becomes even more improbable after observing the hostility this proposal encountered in the past.²¹⁷ Therefore, it is unlikely the issues outlined in this note could be resolved by establishing an independent defense organ at the ICC.

B. *Augmenting the OPCD’s Independence Under a Reformulated ReVision Project*

Simply because establishing a formal fourth organ at the ICC for defense is unlikely does not condemn the defense to institutional inferiority and systemic inefficacy. The OPCD can be improved without necessarily increasing the OPCD’s funding. By refining the framework of the *ReVision* Project, many of the structural flaws plaguing the defense may be resolved.

An amendment to the Regulations of the Court or the Regulations of the Registrar—either by judicial members of the Presidency or the Registrar itself—could streamline the rules governing the OPCD, while instilling the defense with more institutional autonomy. Such an amendment, essentially keeping the OPCD as an administrative office, would not require formal

211. *Fair Trials and the Role of International Criminal Defense*, *supra* note 164, at 2005 (quoting Gallant, *supra* note 127, at 42).

212. Philipp Müller, *Promoting Justice Between Independence and Institutional Constraints: The Role of the Office of the Public Counsel of the Defence at the ICC*, in *THE DEFENCE IN INTERNATIONAL CRIMINAL TRIALS: OBSERVATIONS ON THE ROLE OF THE DEFENCE AT THE ICTY, ICTR AND ICC* 245, 268 (Mayeul Hiéramente & Patricia Schneider eds., 2016).

213. Rome Statute, *supra* note 2, art. 122.

214. *Id.*

215. Müller, *supra* note 212, at 268 (explaining that the OPCD has never been able to entirely fulfill its mandate due to lack of adequate funding, which has, in turn, spurred more doubt about the necessity of a stronger institutional capacity for the defense at the ICC).

216. See ICCBA, International Bar Association Comments on Draft Registry Revision Project Paper: ‘Basic Outline of Proposals to Establish Defence and Victims Offices’ 2–6 (Jan. 12, 2015) [hereinafter ICCBA, International Bar Association Comments], <http://9bri.com/iba-comments-on-draft-registry-revision-project-paper>.

217. See, e.g., Report on Adequate Defense, *supra* note 96, ¶ 6.2

States Parties' ratification.²¹⁸ A similar process could revitalize the ICCBA, essentially transforming this bar association into an administrative body analogous to many domestic bar associations.

1. Exploring the Initial *ReVision* Project

Herman von Hebel, the current Registrar, had a similar goal in mind when he initiated the *ReVision* Project in 2014.²¹⁹ This project is intended to “provide[] a structural framework that will optimize the Registry’s performance in terms of efficiency, effectiveness, and sustainability[;] not to generate immediate significant cost savings but rather, to achieve much more efficient results with existing resources”²²⁰ The project takes particular aim at the defense. Per von Hebel, “some of [the defense’s] functions are not performed adequately, there is fragmentation, unnecessary bureaucracy, inefficiency, and a lack of clarity in relation to the performance of Defence-related functions.”²²¹ Specifically, because the OPCD and the CSS do not have clearly delineated obligations, von Hebel noticed that these two offices performed many of the same tasks, which resulted in a “lack of cooperation, duplication and conflicts.”²²² As this note has demonstrated, von Hebel was correct to lob these critiques at the defense.

However, von Hebel’s *ReVision* Project sought to remedy these issues with a superficially enticing, yet ultimately flawed approach: by synthesizing the OPCD with the CSS into a “single Defence Office.”²²³ The Defense Office was envisioned as assuming the CSS’s logistical duties—which include dealing with requests for IT equipment, offices, travel, and interpretation²²⁴—but not the OPCD’s existing substantive duties, such as representing the accused during pre-trial proceedings or attending to defense interests

218. See ICC RC, *supra* note 104, reg. 6; see also Hirad Abtahi & Shehzad Charania, *Expediting the ICC Criminal Process: Striking the Right Balance Between the ICC and States Parties*, 18 INT’L CRIM. L. REV. 383, 410–17 (2018) (observing that the ICC’s Regulations of Court may be amended through the Presidency or the Registrar without requiring formal Rules’ amendments).

219. Müller, *supra* note 212, at 142.

220. Int’l Criminal Court Assembly of State Parties, Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10, ¶ 294 (Sep. 2, 2015).

221. International Criminal Court Registry, Registrar *ReVision* Project: Basic Outline of Recent Proposals regarding the Defence, at 1 (Sep. 15, 2014), <http://michaelgkarnavas.net/files/140954-outline-defence-proposals.pdf>.

222. *Id.* at 2.

223. Registrar *ReVision* Project: Basic Outline of Recent Proposals Regarding the Defence, *supra* note 221, at 2; see Müller, *supra* note 212, at 263 (“Only an office [OPCD] independent from the Registry will be entrusted by counsel with requests for assistance potentially revealing confidential information, impending motions, or aspects of case strategy, or be granted direct access to potentially confidential material.”).

224. St-Michel et al., *supra* note 97, at 531–32.

during the investigatory stage.²²⁵ Moreover, departing from the current organizational structure—wherein the OPCD reports directly to the Registrar—the *ReVision* Project’s new “Defence Office” would be further relegated as a sub-office of the Registry’s newfound “Division of Judicial Services.”²²⁶ Effectively, the new Defense Office would, counterintuitively, strip the defense of the little institutional autonomy it currently possesses.

In fact, under *ReVision*, the ICC would cease any representation of the accused.²²⁷ Instead, much like at the *ad hoc* tribunals, representation of defendants would reside solely with duty counsel appointed on an *ad hoc* basis.²²⁸ The *ReVision* Project envisioned that a formal “independent self-governing Association of Defence Counsel” would manage the representation of all clients receiving court-appointed counsel.²²⁹ This body would serve as the defense’s administrative liaison with the ICC.²³⁰

2. The Failure of the *ReVision* Project’s Approach to the Defense

The portion of the *ReVision* Project designed to strip the ICC of its capacity to provide court-appointed support to defendants was not well-received outside the ICC. Defense counsel, bar associations, and judges were principally concerned that recalibrating the structure of the defense would diminish the defense’s institutional independence by taking away the defense’s ability to represent the accused and assist defense teams during the pre-trial stage.²³¹

Yet von Hebel considered this consolidation to be one of the strengths of *ReVision*.²³² Specifically, he thought reducing the bureaucratic inefficiencies between the CSS and the OPCD would “strengthen the support and assistance to the defence, which will benefit the conduct of the proceed-

225. *Report on the Review of the Organizational Structure of the Registry*, *supra* note 143, at 8; St-Michel et al., *supra* note 97, at 533 (noting the OPCD’s current functions); Registrar *ReVision* Project: Basic Outline of Recent Proposals Regarding the Defense, *supra* note 221, at 3–4; Müller, *supra* note 212, at 261.

226. Registry of the Int’l Criminal Court, Comprehensive Report on the Reorganisation of the Registry of the ICC, 1–2 (Aug. 2016). [hereinafter Reorganization of the Registry of the ICC]; *Report on the Review of the Organizational Structure of the Registry*, *supra* note 143, at 8.

227. ICCBA, International Bar Association Comments, *supra* note 216, at 4.

228. Müller, *supra* note 212, at 261.

229. Registrar *ReVision* Project: Basic Outline of Recent Proposals Regarding the Defense, *supra* note 221, at 3.

230. *Id.*

231. *See, e.g.*, ICCBA, International Bar Association Comments, *supra* note 216, at 2–6. *See generally* Müller, *supra* note 212, at 261–66.

232. *Report on the Review of the Organizational Structure of the Registry*, *supra* note 143, at 4.

ings.”²³³ From von Hebel’s perspective, this benefit is so worthwhile that it justifies stripping the ICC of some of its existing defense capacities.²³⁴

Unfortunately, disbanding the OPCD as an independent office would have two major negative effects.²³⁵ First, since the Defence Office will not represent clients, the accused would not have access to “swift and focused assistance and representation” when in “immediate need of legal advice.”²³⁶ Instead, the accused would receive *ad hoc* representation by external counsel, who may not have the same expertise and whose appointment may result in delayed pretrial assistance relative to assistance from OPCD’s counsel. Worryingly, since all defense counsel would be appointed on an *ad hoc* basis, the defense would lose any institutional memory gained by virtue of having employed attorneys habitually working on similar cases with similar legal issues.²³⁷ As a result, the same issue that plagued the *ad hoc* tribunals may manifest again in full: the perpetual recycling of “first timers” to take on extremely complicated cases governed by a *sui generis* procedural framework.²³⁸

Second, the defense would lose its internal, institutional voice to advocate for defense matters within the ICC.²³⁹ Defense counsel, as employees of the Defence Office, would instead need to fully conform to the dictates of a subdivision of the Registry, a step further removed from being able to adequately influence defense matters than they were when reporting to the Registry itself.²⁴⁰ The proposed Association of Defence Counsel (or, as discussed below the ICCBA), as an external representative body, could ameliorate these concerns to some degree, but it is no replacement for defense counsel’s missing internal leverage.

Fortunately, the portion of *ReVision* merging the OPCD and the CSS into a single Defence Office is on indefinite hold due in large part to international backlash.²⁴¹ While both the CSS and the OPDC now report to the Division of Judicial Services, which reports to the Registry, the two bodies continue to function separately.²⁴² The rest of *ReVision* has proceeded as

233. *Id.*

234. ICCBA, International Bar Association Comments, *supra* note 216, at 3.

235. *See, e.g.*, Müller, *supra* note 212, at 261–66.

236. *Id.* at 262.

237. *See* Starr, *supra* note 27, at 176.

238. *Supra* text accompanying note 33.

239. ICCBA, International Bar Association Comments, *supra* note 216, at 6–7.

240. Müller, *supra* note 212 at 263.

241. Reorganization of the Registry of the ICC, *supra* note 226, at 12 (in describing the newly formed Division of Judicial Services, the Registry report states that the proposal to amend the Regulations of Court to synthesize the OPCD and the CSS into the Defense Office has been put on “hold”).

242. *Id.* at 5.

planned.²⁴³ The Registrar implemented the massive overhauls of *ReVision*—such as merging all field operations into the Division of External Operations—while maintaining the presence of the OPCD.²⁴⁴ While this state of transitional irresolution is inefficient, since the Registry is not operating under one unified plan, it presents the ICC with an opportunity to correct the mistakes of *ReVision* and to tailor the project in a manner that properly responds to the issues afflicting defense counsel and the representation of the accused. A middle ground that would resolve the most divisive aspects of *ReVision* is achievable.

C. *Re-establishing the OPCD as a Division Under the Registrar*

Instead of replacing OPCD with a Defence Office within the Division of Judicial Services as *ReVision* originally planned, this note proposes that the OPCD should become the fourth major division serving directly under the Registrar, retaining its current responsibilities and assuming some of the responsibilities of the CSS. Thus, while the OPCD would still be under the Registry, it would have considerably more formal institutional authority and independence.

In affecting this change, regulation 77 of the ICC RC should be amended to grant the OPCD full independence, not just independence in conducting the office's substantive work.²⁴⁵ The Registrar or the ICC President may amend the RC in this fashion without requiring formal Rules' amendments.²⁴⁶ In its current form, regulation 77 states that "[t]he Office of Public Counsel for the defence shall fall within the remit of the Registry solely for administrative purposes, in accordance with article 43, paragraph 2, and it shall function in its substantive work as a wholly independent office."²⁴⁷ The proposed reform would delete the phrase "in its substantive work" within the last clause. Consequently, the OPCD would have a codified mandate to "function as a wholly independent office."

This restructuring would create a unified body for defense counsel that would streamline the inefficiencies that plague the current OPCD-CSS framework. The OPCD would control how it appoints counsel to cases during the investigatory stages of litigation, who it appoints to particular cases, how it apportions and manages legal aid, how it manages the list of appointable counsel, and how it tailors specific defense counsel training—to name just a few responsibilities. It would also assume the logistical defense-

243. See Int'l Criminal Court, Audit Report on the *ReVision* Project of the International Criminal Court's Registry, ICC-ASP/15/27, ¶¶ 1–5 (Nov. 9, 2016).

244. Reorganization of the Registry of the ICC, *supra* note 226, at 48–49.

245. Note that, under the prior framework for the OPCD, the office enjoyed limited autonomy because it was able to have independence in how it conducted certain responsibilities relating to substantive litigation.

246. See Abtahi & Charania, *supra* note 223, at 410–17.

247. ICC RC, *supra* note 104, reg. 77.

team support duties that the CSS currently holds, including managing defense counsel's requests for IT equipment, training, offices, travel, and interpretation.²⁴⁸ The consolidated office would therefore resolve the bureaucratic redundancies that initially provoked *ReVision*, leaving a more efficient and unified defense division—without neutering the ICC's ability to provide counsel when needed.

Notably, the newly empowered OPCD would not be responsible for victim participation and representation. Those duties would be transferred to the Division of Judicial Services, the Detention Section, the Language Services Section, the Information Management Services Section, and the Court Management Section, respectively.²⁴⁹ These sections oversee logistical and administrative functions vis-à-vis court proceedings.²⁵⁰ Keeping victim services largely under the Division of Judicial Services would fit its mission, and the CSS could accordingly be eliminated since all of its prior responsibilities relating to victim matters would be transfer to other sections (and all of its defense responsibilities would be transferred to the OPCD). Consequently, though decreasing spending for defense matters was not a goal of *ReVision*,²⁵¹ it is noteworthy that this proposal is budget-neutral: OPCD's defense representation remains funded due to the ongoing hold on the defense-specific portion of *ReVision*,²⁵² and the money currently allocated to CSS would be re-allocated right alongside its responsibilities.

D. Empowering the ICCBA to Function as an Administrative Bar

When von Hebel proposed the creation of the Association of Defence Counsel to act as an external bar association in 2014, the ICC lacked any similarly structured defense bar.²⁵³ Since 2016 defense counsel at the ICC have had access to an external, independent representational body in the form of the ICCBA.²⁵⁴ While there are problems with the current structure of the ICCBA, these issues would be resolved if the ICCBA became more like a domestic bar association—imposing a mandatory bar exam and regu-

248. St-Michel et al., *supra* note 97, at 532.

249. See Reorganization of the Registry of the ICC, *supra* note 226, at 49.

250. *Id.* at 110–11.

251. *Report on the Review of the Organizational Structure of the Registry*, *supra* note 143, at 1–2.

252. *Id.* at 24.

253. As stated above, the *ReVision* Project was instituted in 2014. *Proposed Programme Budget for 2016 of the International Criminal Court*, *supra* note 220, at 79. The establishment of the ICCBA came in July 2016 and its recognition by the Assembly of States Parties came in November 2016. INT'L CRIM. CT. BAR ASS'N, *About Us*, <https://www.iccbar-abcpi.org/aboutus> (last visited Jan. 26, 2019).

254. The lack of an external, independent representational body was a major reason animating von Hebel's *ReVision* project. See Registrar *ReVision* Project: Basic Outline of Recent Proposals Regarding the Defense, *supra* note 221, at 3–4. Thus, the ICCBA would satisfy one of von Hebel's desires to create an external body for the representation of defense matters.

lating membership—and if the ICCBA had a codified relationship with the newly elevated OPCD.²⁵⁵

To the first point, the ICC should mandate that, in order to be appointable, defense counsel become members of the ICCBA. The ICCBA could then vet appointable counsel by imposing a required bar examination and application process to ensure adequate employment qualifications for list counsel.²⁵⁶ To effectuate this, regulations 75 and 76 of the ICC Regulations of Court should both be amended to provide that counsel can only be appointed to represent an accused if they are active members of the ICCBA.²⁵⁷

Importantly, the criteria currently imposed by the Registrar in ICC RPE 22 would not be amended themselves, only supplemented.²⁵⁸ Thus, the actual requirements for appointable counsel would still revolve around the criteria stipulated by the Registrar—that counsel have “established competence in international or criminal law.”²⁵⁹ To amend these criteria directly would, unfortunately, require ratifications by the States Parties.²⁶⁰ However, demanding that defense counsel pass a bar exam focusing on international criminal law and procedure would accomplish a similar end, rendering the ICCBA and the OPCD better poised to address the issue of incompetent defense counsel.

An ICCBA bar exam would provide a more effective baseline for determining competency with international criminal law than the Registrar’s current criteria alone, as it would mandate familiarity with the basic procedural concepts underlying the ICC’s adjudicatory process, such as plea bargaining.²⁶¹ Such an exam could, of course, test only basic competence to refrain from discriminating against counsel hailing from jurisdictions completely dissimilar to the ICC, such as those that do not engage in adversarial cross-examination. That said, the procedural and statutory law that

255. It should be noted that creating the Association of Defense Counsel and dissolving the ICCBA would serve the same effect if the former comported with the recommendations proposed in this section.

256. See TUINSTRAN, *supra* note 7, at 46 (arguing that a bar exam “should be introduced” at the ICC to “guarantee[] that [counsel] is abreast of the legal issues involved in international criminal cases upon his assignment to any particular case”).

257. See ICC RC, *supra* note 104, regs. 75, 76.

258. Int’l Crim. Ct., ICC-PIDS-LT-02-002/13_Eng, Rules of Procedure and Evidence Rule 22 (2013).

259. Int’l Crim. Ct., ICC-PIDS-LT-02-002/13_Eng, Rules of Procedure and Evidence Rule 22(1) (2013); Müller, *supra* note 212, at 245–68.

260. Müller, *supra* note 212, at 142–62. As discussed *supra* at 34–36, such an endeavor seems infeasible at present.

261. Without such a procedure, it is foreseeable that counsel may not possess the adequate familiarity with procedural concepts frequently used in international criminal law. Speaking directly to plea bargaining, in *Erdemović*, the defendant was permitted to withdraw his guilty plea because neither his attorney lacked any comprehension about the concept of pleading guilty. *Prosecutor v. Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, *supra* note 85, ¶¶ 16–18.

makes the ICC a *sui generis* court would certainly be fair game, and the exam could predominantly focus on the Rome Statute itself, along with the ICC RPE.

To assuage the inherent disadvantage some counsel may face during the exam due to their domestic legal customs, the OPCD could supplement the exam with alternative screening procedures, following in the footsteps of the Special Tribunal for Lebanon (“STL”). In exceptional situations, this supplemental procedure could even completely supplant the bar exam. The STL’s internal Admission Panel, which resides within a specific defense organ²⁶² conducts interviews to determine whether a defense counsel applicant possesses the requisite “experience and competence in criminal law or international criminal law.”²⁶³ Additionally, as a condition for appointment to any case, the STL mandates that defense counsel undertake compulsory training in certain legal areas, such as international criminal procedure.²⁶⁴ These training requirements could be implemented if regulation 76 of the ICC RC, which provides the criteria governing the appointment of counsel,²⁶⁵ were amended to bestow upon the OPCD the ability to impose additional prerequisites for the appointment of counsel in particular cases.²⁶⁶

While becoming a member of the ICCBA would be more demanding than before, such a shift is necessary to impose meaningful criteria for attorney competence *before* attorneys are appointed to a case.²⁶⁷ As we have seen, the Chambers are loath to provide meaningful supervision of counsel competence.²⁶⁸ Solving this issue at the outset requires more effective standards for vetting who can become appointed as defense counsel.²⁶⁹ Moreover, the obligation to take a bar examination to practice in domestic jurisdictions is an accepted reality.²⁷⁰ Practicing in front of the ICC ought to be treated no less stringently than moving between domestic jurisdictions, and thus imposing a bar exam for attorneys at the ICC is neither a surprising nor an

262. The STL is the only international adjudicative body in which the defense currently has an official organ. Kennedy & Dusterhöft, *supra* note 114, at 139.

263. Special Trib. for Leb., STL/BD/2009/03/REV.5, Directive on the Assignment of Defense Counsel, rule 9(D) (2016).

264. Special Trib. for Leb., STL-BD-2009-01-REV.8, Rules of Procedures & Evidence, rule 58(C) (2016).

265. ICC RC, *supra* note 104, reg. 76.

266. While the ICC RC could be amended without States Parties ratification, the core criteria for the appointment of list counsel would also require an amendment to the ICC RPE, which would require ratification. *See* Müller, *supra* note 212, at 245.

267. *See* Starr, *supra* note 27, at 177–78, 195–205.

268. *See supra* Part III.E.

269. *See* Starr, *supra* note 27, at 177–78, 195–205.

270. *See e.g.* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 143–44 (2004) (discussing the bar exam requirements forced upon practicing lawyers wishing to practice law in other states in the United States, *i.e.*, states for which the lawyers do not possess a bar certification).

overly exacting requirement. As Professor Starr notes, “[g]enerally, domestic bars do not automatically admit foreign lawyers on the basis of admission to practice and experience in their home countries. Instead, most domestic bars demand some showing of competency within the legal system in which the lawyer is seeking to practice.”²⁷¹ Similarly demanding a showing of some competency with the ICC’s complicated legal framework fits comfortably within this tradition.

After an individual gains ICCBA membership, the ICCBA should perform ongoing monitoring to confirm that counsel is providing effective representation to the accused. Such performance reviews would follow the precedent of the STL, looking to an individual’s track record when practicing in front of the ICC,²⁷² and the ICCBA would consult with past clients to consider client satisfaction and seek reviews from other members of the defense team, or even those working for the judiciary. Depending on the results of such reviews, the ICCBA could require individualized legal coursework to address possible deficiencies. In the same vein as rule 57(G) of the STL Rules of Procedure and Evidence,²⁷³ an amended regulation 76 of the ICC RC could provide that the ICCBA is authorized to conduct both pre-appointment and ongoing performance reviews. ICC RC Regulation 76 could mimic STL Rule 57(G), which states that the Head of the Defense Office may impose sanctions on defense counsel if they fail to provide adequate assistance.²⁷⁴ This recalibration would better allow the OPCD and ICCBA to determine the professional caliber and set the professional culture of the defense bar.

Notably, once membership in the ICCBA is mandatory, it would largely be self-funding; since membership at the ICCBA would become mandatory, membership fees should represent a significant source of the organization’s funding.²⁷⁵ By placing the duty to represent the defense in a body that is not subject to the funding pressures at the ICC, the ICC should be able to reallocate the funds currently spent on the internal representation of defense matters to different divisions. This would make the overall proposal more politically appealing.

Making ICCBA membership mandatory would also codify the ICCBA’s institutional significance. While the OPCD would handle all the defense-related legal matters for which it and the CSS are currently responsible in discussions with the Registry, the ICCBA could expand its repre-

271. Starr, *supra* note 27, at 178.

272. Special Trib. for Leb., STL-BD-2009-01-Rev.8, Rules of Procedure & Evidence, rule 57(G) (2016) (mandating that, once counsel is appointed to represent a defendant, the head of the Defense Office conducts ongoing screenings to both assist counsel and determine whether the provided representation meets the governing standards of effectiveness).

273. *Id.*

274. Special Trib. for Leb., STL-BD-2009-01-Rev.8, Rules of Procedure & Evidence, rule 57(H) (2016).

275. INT’L CRIM. CT. BAR ASS’N, *About Us*, *supra* note 253.

sentative role to represent defense counsel interests in front of other organs and committees of the Court. This representative association between the ICCBA and the OPCD should be codified in regulation 77 of the ICC RC, which created the OPCD.²⁷⁶ The regulation could provide that the OPCD shall consult with the ICCBA, and the latter shall have responsibility to advocate for defense matters by lobbying the ICC's rulemaking and administrative organs. Codification would give the ICCBA more institutional authority, which would be valuable when it deals with the other bodies of the ICC.

This proposal is intended as a pragmatic remedy to the current impasse between von Hegel's *ReVision* Project and the OPCD. As such, this proposal cannot address all of the flaws currently present in the ICC's system of defense. Under this reorganization, there would still be no career-tracked defense attorneys.²⁷⁷ After the pre-trial stage, defense counsel would still be appointed on an *ad hoc* basis, even as OTP continues to use a staff attorney model.²⁷⁸ However, list counsel would be further vetted by a required bar exam along with ongoing, individualized performance assessments. This compromise is responsive to budgetary concerns on the one hand—as it would not require the OPCD to depart from the cost-effective *ad hoc* appointment structure—and competency concerns on the other, since the appointment of counsel would depend on both quantitative years of experience and qualitative competency metrics.

V. CONCLUSION

The success of the ICC will not be determined by the number of its convictions but rather by its adherence to fairness in the face of gross violations of international criminal law.²⁷⁹ It is in this pursuit of due process that the professionalism and performance of defense counsel will be the “most determinative dimension for evaluating the overall fairness of what is commonly considered ‘justice’ for grievous atrocities.”²⁸⁰ By pursuing the reformative measures outlined in this note, the ICC will begin to right some of the wrongs of the *ad hoc* tribunals.

276. See ICC RC, *supra* note 104, reg. 77; see also Müller, *supra* note 212, at 246–47.

277. TUINSTRA, *supra* note 7, at 160.

278. *Id.*

279. See Sara Siebert, *The Pull of Criminal Law and the Push of Human Rights: Challenges in the International Criminal Process*, 11 IRISH STUDENT L. REV. 29, 36 (2003) (quoting Richard J. Goldstone, Address before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (Oct. 2, 1996)) (“There is no question that history will judge the Tribunals for the Former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.”).

280. Newton, *supra* note 6, at 380.

While the *ReVision* Project rightly strives to eliminate the bureaucratic inefficiencies hampering the management of defense counsel, its proposals would both further strip the defense of the independence that it needs and denigrate the equality of arms. Relegating the defense to institutional insignificance is simply an untenable option given the Court's permanence. Turning a blind eye to defense matters risks obviation of the ICC's legitimacy in both contemporary society and future generations. However, curing defense counsel incompetence requires a serious attempt at bestowing the OPCD with actual independence. Reconstituting the OPCD as an independent office under the Registry while codifying the ICCBA presents a cost-effective, efficient, and pragmatic manner to do so the will improve the Court's "overall fairness" and protect the equality of arms.