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The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court

KENNETH S. GALLANT*

The Rome Statute of the International Criminal Court (ICC Statute) is designed to create a fair and effective means to bring to justice the worst offenders against international criminal law: persons who commit genocide, crimes against humanity, war crimes, and, when and if a definition is agreed upon, aggression.¹ The model of criminal procedure in the ICC Statute is a hybrid, including elements of both civil and common-law procedures. Procedure is also strongly influenced by rights-based thinking (concerning individual protections) that comes from modern national constitutionalism and international human rights standards.²

The model of defense services in the ICC Statute is based upon an enforceable right to counsel. A second key element is a set of provisions by which the judiciary supervises investigations by the prosecutor in order to assure fairness to the defense. The availability of defense counsel is an important part of these provisions.

Yet, questions remain about the role and functioning of defense counsel in this system. The ICC Statute omits provisions guaranteeing sufficient funding for fair defense investigation of the facts of a case. Additionally, the ICC Statute omits a clear determination of privileges and immunities of defense counsel and staff to investigate the facts of cases in the states in which evidence is or may be located or in which the alleged crimes occurred.

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1. Rome Statute of the International Criminal Court, at arts. 5–9, U.N. Doc. A/CONF.183/9, (adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) [hereinafter ICC Statute]. The current text has been subject to technical revision through a “no objection” procedure, and may be subject to another round of technical revisions.

2. See Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni et al. ed., 1999).

These are to be established in an agreement on the privileges and immunities of the court. This agreement is scheduled to be drafted by the Preparatory Commission for the International Criminal Court for submission to the Assembly of States Parties for adoption by the Assembly, and eventual adoption by the states that are parties to the ICC Statute.³ Additionally, many of the functions of defense counsel will depend on the Rules of Procedure and Evidence, also scheduled to be drafted by the Preparatory Commission for submission to the Assembly of States Parties for its eventual adoption.⁴

I. Scope and Attachment of Rights to Counsel

The right to counsel is a cornerstone of fair criminal justice. It is recognized internationally as vital to protecting the human rights of the accused.⁵ It is prominent in the scheme of protections in the ICC Statute, both in the investigatory stage and after an accusation has been made.

A. COUNSEL DURING THE INVESTIGATORY STAGE

Counsel, including appointed counsel for those who cannot afford a lawyer, is available to certain persons for certain events during an ICC investigation. The ICC Statute thus provides for protection of defense rights early in an investigation, when it is not usually available in common-law jurisdictions. There is, however, no general right to counsel during the investigative stage, as there is after a specific person has been accused.

During an investigation, whenever “there are grounds to believe that a person has committed a crime within the jurisdiction of the court, and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 of this Statute [concerning international cooperation and judicial assistance],” that person has a right to “have legal assistance of that person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.”⁶ Questioning is to occur in the presence of counsel “unless the person has voluntarily waived his or her right to counsel.”⁷ This

3. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, secs. 5(f), 9 (Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) [hereinafter Final Act]. The naming of this document as an “Agreement” indicates that this will be an agreement among the Court and the States Parties to the ICC Statute, rather than an act of the Assembly of States Parties (to which it is presented after drafting by the Preparatory Commission). See, e.g., *Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea*, U.N. Doc. SPLOS/25 (June 5, 1997), arts. 27–29 [hereinafter *ITLOS Agreement*] (providing for signature, ratification, and accession procedures). This may well create complexities for implementing the ICC Statute, if one or more States Parties refuse to ratify the Agreement as finally adopted in the Assembly.

4. See ICC Statute, *supra* note 1, art. 51; Final Act, *supra* note 3, secs. 54(h), 9. The Rules of Procedure and Evidence will not be submitted to States Parties for ratification, but will be created by the ICC as an international organization.

5. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) available at <http://www.unhchr.ch/html/menu3/b/h_comp44.htm>.

6. ICC Statute, *supra* note 1, art. 55(2)(c).

7. *Id.* art. 55(2)(d).

effectively means that the person must be informed of his or her right to counsel before it is determined that the person waived this right. The essential right that is protected is the right “[t]o remain silent, without such silence being a consideration in the determination of guilt or innocence.”⁸ There is also the right to be informed, prior to being questioned, that there are grounds to believe that one has committed a crime.⁹ This procedure looks similar to the British common-law system of allowing counsel for a suspect during interrogation.¹⁰

Another issue that may arise here is whether there are sufficient grounds to believe a person has committed a crime in order to trigger this right during an interrogation. No formulation is given in the ICC Statute. It may be that the drafters believed that persons being questioned would be informed of the right to counsel whenever the prosecutor believed that the person would be charged or whenever there was any evidence indicating that the person may have committed a crime within the jurisdiction of the court. It is hoped that the Rules of Evidence and Procedure will address this issue and will provide counsel liberally. Additionally, practice in states with similar systems may inform the determination of when the right to counsel will be afforded.¹¹

Additionally, judges of the Pre-Trial Chamber are allowed or required to appoint counsel to represent the interests of the defense in certain cases, even if no person has yet been accused of a crime and even if the suspect is not being interrogated. The Pre-Trial Chamber may authorize “counsel for a person who has been arrested or has appeared before the court in response to a summons” to participate with the prosecutor in “a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for purposes of a trial.”¹² The language provides for appointment of defense counsel to participate in the proceeding “where there has not been such an arrest or counsel has not been designated.”¹³ This is not stated in the statute as an absolute right of the person, but is within the control of the Pre-Trial Chamber, and the prosecutor has a duty to inform the Pre-Trial Chamber of such an opportunity.¹⁴

Where counsel is appointed in the absence of an arrest or choice of counsel by a possible suspect, “defense” counsel may have no actual client. That is, under the ICC Statute it appears that counsel may be appointed in a situation where the prospective accused may be unavailable for interview and counseling or to give instructions to counsel. The matter may be complicated further by the fact that several persons, some with conflicting defenses, may have evidence given against them during a single “unique investigative opportunity.” Where

8. *Id.* art. 55(2)(b).

9. *See id.* art. 55(2)(a).

10. The protection in the ICC Statute is broader than the *Miranda v. Arizona*, 384 U.S. 436 (1966), protections in the common-law system of the United States, because *Miranda* only applies when a person is in custody. The British system may allow for silence during police questioning to be considered in some circumstances if a criminal defendant later testifies at trial.

11. *See* ICC Statute, *supra* note 1, art. 21(1)(c). In the absence of definitive rules in the ICC Statute, documents adopted pursuant to the statute, and international law, the court may look to general principles of law derived from national laws of legal systems of the world.

12. ICC Statute, *supra* note 1, art. 56(1), (2).

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

14. *See id.* art. 56(1), (3). No specific standard for defense counsel participation or other measures concerning unique investigative opportunities is specified, other than necessity “to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defense.” *Id.* art. 56(1)(b).

the targets of the investigation are clear, separate counsel may be appointed for each potential accused. The court, however, may not know in advance the identity of those against whom evidence will be given. For this reason, "defense" counsel may be placed in the position of attempting to protect the interests of more than one potential accused, who at later stages may try to blame each other for the alleged crimes. On the other hand, if the accused has been arrested or the suspect is available for interview by counsel, the situation resembles one familiar to defense counsel in many national systems.

The model here is heavily influenced by the civil law tradition of judicial supervision of criminal investigations. The Pre-Trial Chamber supervises the prosecutor closely in determining when counsel should be appointed to protect the interests of the defense or other measures should be taken.¹⁵ In most common-law visions of the role of counsel, the appointment of counsel without a client with whom counsel could consult would be seen as highly anomalous. Nonetheless, even to this author, who practices and teaches in the common-law tradition, this procedure holds out great promise for improving the fairness of criminal proceedings by providing a device for discovery and preservation of testimony or evidence by the defense early in the criminal process.

The appointment of counsel where, as here, it is possible that the interest of more than one person may require representation would be seen as a conflict of interest requiring appointment of more than one counsel. By hypothesis, however, cases where the conflict is known in advance can be dealt with by appointing separate counsel. In general then, the possible conflict will not be known until the time of the actual search or interview constituting the unique investigative opportunity. As an initial suggestion, the appropriate course of action for "defense" counsel that are not appointed to represent the interests of a specific potential accused would be to attempt to preserve evidence that could be useful to any potential accused.

In both of these devices, the ICC Statute recognizes the need for defense counsel to operate under the court's authority to participate in proceedings involving national authorities. The right to have defense counsel present at questioning requested by the court includes situations when the interrogation is done by national authorities. As will be seen below, the statute presents issues of the duty of states to allow defense counsel to operate in their territory.¹⁶

B. COUNSEL FOR "THE ACCUSED"

The right to counsel after accusation is set forth in more comprehensive terms. The following language specifies the right:

In the determination of any charge, the accused shall be entitled to . . . the following minimum guarantees, in full equality;

. . .

(b) To have adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in confidence; . . .

(d) . . . [T]o conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal

15. See *id.* art. 56(2), (3). Judicial supervision during the investigative phase of investigations and its relation to the role of defense counsel is discussed further in Part III *infra*.

16. See Part II(A), *infra*.

assistance assigned by the court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

...¹⁷

The right to appointment of counsel if the accused does not have sufficient funds is not stated as an absolute, but is only required by the text “where the interests of justice so require.” In the context of crimes against humanity, genocide and war crimes, it is difficult to imagine a situation in which an accused was unable to pay the costs of defense counsel but the interests of justice did not require appointment of counsel. This language is taken from the International Covenant on Civil and Political Rights (ICCPR).¹⁸ This ICCPR provision defines internationally recognized protections in all criminal cases, even those that are relatively minor, where the interests of justice may not be seen to require the appointment of counsel in all cases. Though awkwardly phrased for its context, this provision of the ICC Statute should be read to make the indigent accused’s right to counsel absolute, as is the right to counsel of interrogees who are suspected of crime.¹⁹ On the other hand, it is possible to imagine a few situations in which the interests of justice require appointment of counsel even when unrequested by the accused. This would especially be the case when the court questions the accused’s competency to conduct his or her own defense, or if an unrepresented accused became so disruptive as to require removal from the courtroom.²⁰

The time when this right to counsel attaches is not specifically set forth in the ICC Statute. The right operates “in the determination of any charge” and in favor of “the accused.” The term “accused” is generally used in the statute to refer to a person against whom a charge has been made and not to a person who is merely being investigated.²¹ There is, however, no specific definition of when a person becomes an “accused.”

At the very least, a person is an accused at or after the confirmation hearing on the charges that is to be held promptly after a person against whom an arrest warrant or a summons is served appears in court.²² The word “accused” denotes the person charged throughout the part of the ICC Statute concerning trial.²³ The term “accused” does not appear in article 61, describing the confirmation hearing, but the hearing “shall be held in the presence of the Prosecutor and the person being charged, as well as his or her counsel.”²⁴ The assumption of the presence of counsel here suggests that the right to counsel set out in article 67, concerning rights of the “accused,” has already attached at this stage, at least where the accused has submitted to or has been brought within the jurisdiction of the court.²⁵ While

17. ICC Statute, *supra* note 1, art. 67(1).

18. ICCPR, *supra* note 5, art. 14(3)(d).

19. ICC Statute, *supra* note 1, art. 55(2).

20. *See id.* art. 63(2) (removal of disruptive accused from courtroom “only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required”). *Id.*

21. Compare ICC Statute, arts. 53, 55, 58 (discussing “persons” being investigated or against whom warrants are being sought), with arts. 62, 65, 66, 67, 68(2) (discussing “the accused” who is being brought to trial).

22. *See* ICC Statute, *supra* note 1, art. 61 (defining the confirmation hearing procedure, the stage at which a three-judge Pre-Trial Chamber makes a judicial determination whether there is “substantial grounds to believe that the person committed each of the crimes charged”). *Id.*

23. *See id.* at pt. 6.

24. *Id.* art. 61(1).

25. If the person has not been found, and “all reasonable steps have been taken to secure his or her appearance before the Court, and to inform the person of the charges and that a hearing to confirm those

counsel may have entered the case at an earlier stage,²⁶ this will not necessarily have happened, suggesting that the reference to counsel at the confirmation hearing is linked to the right to counsel in article 67.

This view is supported by the language of article 67, where the right to counsel applies to “the determination of any charge.”²⁷ This indicates that the right should apply to any proceeding after accusation that has the potential to affect the determination of the charge, that is, whether the accused will be punished and what that punishment will be. The confirmation hearing, at which the court may determine that there is or is not a basis for bringing a charge, affects “the determination of [the] charge.” It occurs only after the issuance of a warrant or summons, which must contain the name and other relevant identifying information concerning the person sought, a reference to crimes within the jurisdiction of the court alleged against the person, and “[a] concise statement of the facts which are alleged to constitute those crimes.”²⁸ The warrant or summons is thus in ordinary English an “accusation” and a person named in such a document has been “accused.”²⁹

After a person surrenders to the court, or voluntarily appears pursuant to summons, “the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under the statute, including the right to apply for interim release pending trial.”³⁰ Presumably, the rights to be communicated include the right to counsel. Further, the ordinary language argument concerning the meaning of “accused” applies here. A summons or warrant has already been issued, making an accusation based upon a finding by the Pre-Trial Chamber that there is reasonable cause to believe that the person has committed a crime within the jurisdiction of the court.

The ICC Statute also recognizes that the person facing a confirmation hearing needs to prepare for that hearing. The person has the right to know the charges that the prosecutor

charges will be held,” the Court may, on its own motion or the Prosecutor’s motion, hold a confirmation hearing without the accused’s presence. *Id.* art. 61(2)(b). “In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.” *Id.* (There is a typographical ambiguity in the document in English, French and Spanish as to whether this provision is part of subsection (b).)

26. ICC Statute, *supra* note 1, arts. 55, 56(2), at 1030–33, discussed in section I(A) *supra*.

27. ICC Statute, *supra* note 1, art. 67(1), at 1040.

28. ICC Statute, *supra* note 1, art. 58(3) (warrant) and (7) (summons: but substitute “the crime” for “those crimes”) at 1033–34. Under this section, the warrant or summons itself contains more information than it does in many jurisdictions, where the facts underlying the case are stated in an affidavit, complaint, indictment or other document accompanying the warrant, and on which the warrant is based. In the Statutes of the International Criminal Tribunal for the Former Yugoslavia [ICTFY] and the International Criminal Tribunal for Rwanda [ICTR], as well as earlier drafts of the ICC Statute, an indictment has been the usual document on which an arrest warrant has been issued. ICTFY Statute, art. 19, Annex to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 U.N. Doc. S/25704 & Add.1 (1993), approved by S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993); ICTR Statute, art. 18, Annex to S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994); Report of the International Law Commission, G.A. Res. 10, U.N. GAOR, 49th Sess., Supp. No. 10, at 94, U.N. Doc. A /49/10 (1994) (Draft statute for an international criminal court, art. 27).

29. *Cf.* Vienna Convention on the Law of Treaties, art. 31 (interpretation according to “ordinary meaning to be given to the terms of the treaty”), done May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT]. Note that this treaty will not apply of its own force to the ICC Statute if some states that ratify the statute are not parties to VCLT. *See* VCLT, art. 4. Much of VCLT, however, including the substance of article 31, is considered to be customary international law.

30. ICC Statute, *supra* note 1, art. 60(1), at 1035.

seeks to confirm and the evidence on which the prosecutor intends to rely, object to the charges, challenge the prosecutor's evidence, and present evidence.³¹ Additionally, as discussed below, the Pre-Trial Chamber has the authority, at the request of the person, to issue orders or seek cooperation of states to produce defense evidence.³² The structure of the statute suggests that it recognizes the need to collect evidence in preparation for the confirmation hearing. All this indicates that the right to counsel established by article 67 begins early enough to allow for preparation for the confirmation hearing.

Whether the right to counsel set out in article 67 applies to proceedings before the Pre-Trial Chamber prior to the confirmation hearing (and the time and proceedings needed to prepare for it) is unclear from the ICC Statute's language. Weighing against such a right is the fact that counsel is not mentioned as a matter of right in proceedings before the Pre-Trial Chamber, except for the confirmation proceeding.³³ Moreover, article 67 is in part 6 of the ICC Statute, entitled "The Trial." While activity after the confirmation hearing generally occurs in the Trial Chamber,³⁴ preliminary activity occurs in the Pre-Trial Chamber.

Whether the right to counsel attaches as soon as a person is surrendered or voluntarily appears before the court is an issue that can be made moot if the Assembly of States Parties adopts a Rule of Procedure and Evidence³⁵ requiring that counsel be appointed for any person who cannot afford counsel immediately upon surrender or voluntary appearance. The hope is that the Assembly of States Parties will adopt such a rule.

The right to counsel should also include, either as a matter of interpretation of the ICC Statute, or by rulemaking act of the Assembly of States Parties, matters that do not necessarily go to the "determination of [a] charge," but affect the rights of a person while charges are pending. Specifically, the right to apply for interim release pending trial can be exercised most effectively by most persons through counsel rather than on their own behalf, and it would be in the interests of justice to have this matter handled by counsel, as is generally the case in national criminal courts.³⁶

Even this analysis leaves open the question of whether the ICC Statute guarantees that persons arrested by national authorities will have a right to counsel in national courts before they surrender to the ICC. This is the most difficult question considered here. Speaking in favor of such a right is the ordinary language argument above, which asserts that the person has already been "accused" through the warrant that led to arrest. At least one issue that is arguably relevant to the "determination of [the] charge" is to be addressed by the

31. *See id.* art. 61(3&6), 37 I.L.M. at 1036.

32. *See id.* art. 57(3)(b), 37 I.L.M. at 1032.

33. *See id.* art. 60, 37 I.L.M. at 1035 (initial appearance before the court); *cf. id.*, art. 59 (arrest proceedings in the custodial state). Neither of these mention the right to counsel specifically. *See also id.* art. 55, 37 I.L.M. at 1030-31 (separate right to counsel during questioning; no general requirement that this be in court); art. 56, 37 I. L. M. at 1031-32 (proceedings involving "unique investigative opportunity"; counsel may be appointed but is not generally a matter of right).

34. *See id.* art. 61(11), 37 I.L.M. at 1037.

35. *See id.* art 51, 37 I.L.M. at 1028 (providing for authority to make rules).

36. *Cf. id.* art. 21(1)(c), 37 I.L.M. at 1015 (reference to national laws of legal systems of the world in deciding cases). In many systems, conditions of pre-trial release are automatically set at the initial appearance in court of the accused, whether or not the defendant has counsel. If the defendant does not meet these conditions, counsel may generally request their modification upon appearance or appointment. Something resembling this system might be appropriate for the Rules of Evidence and Procedure.

competent national judicial authorities:³⁷ whether the person arrested is the person sought by the warrant.³⁸ To this extent, the national court proceeding may invoke the right of criminal defendants to counsel under the parallel provision of the ICCPR,³⁹ either because the state has ratified the ICCPR, because its provisions have passed into customary international law, or because the ICC is required to have states apply internationally recognized human rights.⁴⁰ Additionally, under the ICC Statute, the national authority is required to respect the rights of an arrested person, though without specifying those rights.⁴¹ Elsewhere in the system established by the ICC Statute, States Parties are expected to comply with the rights of persons under investigation, at least with regard to questioning.⁴²

Speaking against the right to counsel is the fact that this right is not specified in the ICC Statute. It can, therefore, be argued that the inclusion of other rights against states that are parties to the statute is an exclusion of this right. Moreover, the argument that national courts should apply parallel provisions of the ICCPR to require counsel in their transfer proceedings is weak. State practice in extradition cases, analogous to transfer cases under the ICC Statute, does not clearly recognize a right to counsel in those cases.⁴³

Finally, states might be expected to resist extending the right to counsel here, as a matter of law under the ICC Statute, as an infringement on sovereignty concerning internal proceedings.⁴⁴ Sovereignty concerns over creating a right to counsel in transfer proceedings can be somewhat ameliorated, but not eliminated, by insisting that counsel in the courts or administrative agencies of any state be qualified under the law of that state rather than (or in addition to) the rules for admission to the bar of the ICC. This would at least allow the state to retain control of the practice of law in its courts and agencies, though it would not

37. *Id.* art. 59(2), 37 I.L.M. at 1034. This excludes a pure administrative process for dealing with those arrested.

38. *Id.* This does not include the question whether the person sought by the warrant in fact committed the crime, but merely whether the person is the one wanted by the warrant. Nonetheless, this is part of the "determination" of whether there is a valid charge against the person arrested. This provision probably grows out of a case of mistaken identity in the ICTFY.

39. ICCPR, *supra* note 5, art. 14(3), at 176, phrased in language followed closely by ICC Statute, art. 67(1).

40. This argument that the ICC is required to apply all internationally recognized human rights is based on ICC Statute, *supra* note 1, art. 21(3), at 1015, and is set out in Gallant, *supra* note 2. *But see* note 41 *infra*.

41. ICC Statute, *supra* note 1, art. 59(2), 37 I.L.M. at 1034. The court is to determine if proper process has been followed in making the arrest, though the consequences of an improper arrest are not specified.

42. *Id.* art. 55(2), 37 I.L.M. at 1031 (persons suspected of crimes within ICC's jurisdiction have the right to remain silent and to counsel during questioning regardless of whether questioning is done by the prosecutor or by national authorities pursuant to request).

43. See INTERNATIONAL LAW ASSOCIATION COMMITTEE ON EXTRADITION AND HUMAN RIGHTS, SECOND REPORT, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SEVENTH CONGRESS: HELSINKI, at 214, 228-29 (1996); THIRD REPORT: TAIPEI CONFERENCE, at 14-16 (1998). The committee recommended that such a right be recognized. See SECOND REPORT, at 236 (recommendation 3); THIRD REPORT, at 15-16. The author was an alternate member of the committee.

44. In the law of interpretation of the constituent documents of international organizations, the rule of effectiveness (that an international organization has the authority to achieve its purposes) often prevails over the canon of construction that, in cases of doubt, infringements of sovereignty are not to be read into treaties. See, e.g., INGRID DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATIONS 24-26 (1965) (citing cases of the International Court of Justice and the Permanent Court of International Justice). This principle is not, however, a talismanic rejection of the principle of sovereignty, and therefore it cannot be used to reject out of hand a claim that state sovereignty over procedure in its own courts and administrative agencies should prevail over a claim that the International Criminal Court may dictate procedures in national courts that are ancillary to an ICC proceeding.

eliminate the problem of an international authority without a clear mandate in a treaty or in customary international law imposing a right to counsel on a national system.⁴⁵

Here, the ability of the Assembly of States Parties to moot this question through a Rule of Procedure and Evidence is not so clear. If the argument that the right to counsel in the courts of States Parties does not exist because of sovereignty concerns is accepted, it is difficult to see how a rule would make the intrusion more acceptable. It may be beyond the authority of the Assembly of States Parties to expand the rights of persons described in the ICC Statute, where the expansion would create new obligations for states that are parties to the statute.

Finally, the statute does not make provision for a right to counsel for persons making claims of unlawful arrest, detention or wrongful conviction.⁴⁶ Given that the person who makes such a claim has been exonerated and is no longer “accused,” and the proceeding occurs after the “determination of [a] charge,” it is difficult to see how the right to counsel of article 67 can be stretched to cover a claim proceeding.

II. Powers, Privileges and Immunities of Defense Counsel and Funding of Defense Services

Under the ICC Statute, “[i]n the determination of any charge, the accused shall be entitled . . . to conduct the defense in person or through legal assistance.”⁴⁷ This is a slight modification from the language of the ICCPR, which states that “[i]n the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance.”⁴⁸

In the ICC Statute, defense counsel and investigators are directly given privileges and immunities distinctly less than those of personnel of the Prosecutor’s and Registrar’s Offices and given powers less than those of prosecutors. The protections that defense counsel will have has been left for an Agreement on Privileges and Immunities that has yet to be negotiated. There is no funding guaranteed for defense investigation. These problems lead to an “inequality of arms” that needs to be addressed by the Preparatory Commission of the International Criminal court, by the Assembly of States Parties and possibly by subsequent amendment of the ICC Statute.

A. POWERS, PRIVILEGES AND IMMUNITIES OF DEFENSE COUNSEL: THE NEED FOR DEFINITION AND PROTECTION IN THE AGREEMENT ON PRIVILEGES AND IMMUNITIES OF THE COURT

Defense counsel and investigators need freedom to operate in the states in which evidence is located. In the ICC Statute as adopted, they are given far fewer powers, privileges and immunities than their prosecutorial counterparts. There is, however, the agreement on the privileges and immunities of the court, which remains to be written. If drafted with sensitivity towards the defense function, the agreement may provide substantial protections for it.

The structure of powers, privileges and immunities in the ICC Statute has four parts.

45. See also notes 58–59 *infra* and accompanying text.

46. ICC Statute, *supra* note 1, art. 85, at 1050; cf. International Covenant on Civil and Political Rights, art. 14(6), G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (1976).

47. ICC Statute, *supra* note 1, arts. 67(1) & (1)(d), at 1040.

48. ICCPR, *supra* note 5, arts. 14(3) & (3)(d), at 177.

There are different protections for “the court” and three different classes of persons that are associated with the court and its functioning.

There is a general immunity for the court: it “shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.”⁴⁹ This deals with the privileges and immunities of the court as an international organization. The court is defined in the part of the ICC Statute concerning composition and administration as including the Presidency; the Appeals, Trial, and Pretrial Divisions; the Office of the Prosecutor; and the Registry.⁵⁰ Defense counsel is not mentioned in this definition. Additionally, the privileges and immunities of persons acting as officers or employees of the court are dealt with in subsequent sections of the article specifying the court’s immunity.⁵¹ Thus, this provision does not appear to grant personal privileges and immunities to defense counsel.

Different officers and employees of the court are treated differently for purposes of privileges and immunities. The highest level of protection is reserved for “[t]he judges, the Prosecutor, the Deputy Prosecutors and the Registrar.” They “shall, when engaged on or with respect to the business of the court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions.”⁵² Defense counsel are not included in this group. Even a minimal immunity for “counsel,” which would have given them immunity from liability for “words spoken or written and acts done by them in the discharge of their functions,” was dropped from the Draft ICC Statute.⁵³

The protection for the two other classes of persons is not fully defined in the ICC Statute. Other operational employees of the court—the staff of the Office of the Prosecutor and the Deputy Registrar and Registry staff—“shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the court.”⁵⁴ Privileges and immunities here are conceived as personal immunities of these employees of the prosecution and registry, akin to the privileges and immunities of the higher officials of the court.⁵⁵ They are not, however, defined in the statute, but left to the Agreement on the Privileges and Immunities of the Court.

The protection for counsel, presumably including defense counsel, is also left for subsequent definition. “Counsel, experts, witnesses or any other person required to be present

49. ICC Statute, *supra* note 1, art. 48(1), 37 I.L.M. at 1027. The entire effect of this provision is beyond the scope of this article.

50. *Id.* art. 34, 37 I.L.M. at 1019–20. The term “Court” is used in other ways elsewhere in the statute. See Gallant, *supra* note 2.

51. ICC Statute, *supra* note 1, arts. 48(2), (3), (4) & (5), 37 I.L.M. at 1027.

52. *Id.* art. 48(2), 37 I.L.M. at 1027.

53. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 49 (bracketed provision), U.N. Doc. A/CONF.183/2/Add.1 (1998), available at <<http://www.un.org/law/icc/docs.htm>>. Similar language concerning all “[a]gents, counsel and advocates” has been included in the *ITLOS Agreement*, *supra* note 3, art. 16(1)(c), available at <<http://www.un.org.depts/los/splos25.htm>>.

54. ICC Statute, *supra* note 1, art. 48(3), 37 I.L.M. at 1027. “[T]he agreement on privileges and immunities of the Court” is not elsewhere defined in the main text of the ICC Statute, but is mentioned in Res. F, sec. 5(f) of Annex I, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10, available at <<http://www.un.org/law/icc/docs.htm>>. It is one of the documents that the Preparatory Commission for the International Criminal Court will prepare.

55. The personal nature of the privileges and immunities can be deduced from the waiver provision. ICC Statute, *supra* note 1, art. 48(5), 37 I.L.M. at 1027.

at the seat of the court shall be accorded such treatment as is necessary for the proper functioning of the court, in accordance with the agreement on the privileges and immunities of the court.”⁵⁶ As with the protection for lower employees of the court, the specifics of protection for these persons are left to the Agreement on Privileges and Immunities of the Court. Unlike those employees, however, there is no presumption that the protections for (defense) counsel, experts, witnesses, and others will have the character of personal diplomatic-type privileges and immunities. These persons must simply be guaranteed “such treatment as is necessary for the proper functioning of the court.”

There are at least two reasonable readings of the territorial scope of defense counsel’s right to function under this provision. The first, broader reading of this section does not place too much strain on normal linguistic usage.⁵⁷ This reading applies the phrase “required to be present at the seat of the court” only as a modification of the phrase “any other person,” and not as influencing the meaning of the sentence with regard to “counsel, experts [or] witnesses.” Read in this way, counsel would be “accorded such treatment as is necessary for the proper functioning of the court, in accordance with the agreement on the privileges and immunities of the court,” in all states that are parties to the ICC Statute. The proper functioning of the court may require defense counsel’s presence and operation in states that are parties, and such operation would be protected “in accordance with the agreement on the privileges and immunities of the court.”

This reading is consistent with some other provisions of the ICC Statute. First, it is consistent with the general authority of the court: “The court may exercise its functions and powers, as provided in this statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”⁵⁸ As pointed out above, the court as currently structured has no institutional place for defense counsel. The phrase “its [the court’s] functions and powers,” however, should be read to include the defense function. The defense function is a key element of any fair criminal justice system. Counsel for the defense and their operations are clearly part of the court’s function, as set out in several sections of the ICC Statute, to cover both the investigation and trial.⁵⁹

Second, the two provisions previously mentioned assume the operation of defense counsel in states that are parties, at least for specific purposes. These concern the right to counsel during the investigative phase described above.⁶⁰ Where the prosecutor or national authorities acting at the request of the court interview a person against whom there are grounds to believe the person has committed a crime within the jurisdiction of the court, that person has the right to counsel, including the right to free counsel if he or she cannot afford counsel. Additionally, where the prosecutor has a unique investigative opportunity, the Pre-Trial Chamber may appoint counsel or authorize previously appearing counsel to participate in such an opportunity. The provision for appointment of counsel by the court suggests that appointed counsel must be qualified to practice in the court. The fact that they will be acting as lawyers in the national system of a state suggests that they must be qualified to act within that system, especially in light of sovereignty concerns. Thus, the

56. *Id.* art. 48(4), 37 I.L.M. at 1027.

57. The reading given here to the English version applies as well to the ICC Statute, *supra* note 1, art. 48(4), 37 I.L.M. at 1027, in French and Spanish.

58. *Id.* art. 4(2), 37 I.L.M. at 1003.

59. *Id.* arts. 55, 56(2), 61(1), 65(1), 67, 37 I.L.M. at 1030–42; *see* arts. 57(2), 60(1), 37 I.L.M. at 1032–36.

60. *See supra* notes 42–43 and accompanying text.

Rules of Procedure and Evidence and the Agreement on Privileges and Immunities of the Court need to address cooperation with states that are parties to ensure that there will be lawyers eligible to practice in all relevant systems. In addition, because the ICC Statute contemplates cooperation during investigations with states not party to it,⁶¹ a mechanism, in the rules or otherwise, to provide for ad hoc qualification of counsel (called “appearance pro hac vice” in common-law systems) in such situations will be useful.

The alternate, narrower reading also fits standard English usage fairly naturally. This second reading would give rights to defense counsel only in the host state, or in traveling to reach the host state; that is, the seat of the court. The other named persons in this section would also be given protection to travel to the seat of the court. While this protection is certainly appropriate, it is insufficient to protect defense investigation elsewhere. This reading excludes defense counsel from sharing the diplomatic privileges and immunities accorded the prosecutor and deputy prosecutors or the “privileges and immunities and facilities necessary for the performance of their functions” of prosecutorial staff. These prosecutorial protections do not appear to be limited to operations in (or travel to) the host country, but to extend to all places within the territory of States Parties to the ICC Statute in which prosecutorial staff perform their duties.

For these reasons, the broader reading, requiring that defense counsel be “accorded such treatment as is necessary for the proper functioning of the court”⁶² in all states that are parties, is more in accord with the structure of the statute and its object to provide a fair criminal justice system to deal with those believed to have committed the worst international crimes.⁶³

The question of which of these readings is correct will be liquidated in the process of producing the Agreement on the Privileges and Immunities of the Court.⁶⁴ Effectively, the defense counsel’s authority to investigate and otherwise operate in states other than the host state, particularly states in which crimes are alleged to have been committed and evidence may be found, will be controlled by this document.

Ideally, on an “equality of arms” theory, the rights of prosecution and defense to operate in the territory of a State Party would be equal. This suggests that the Agreement on Privileges and Immunities of the Court should be drafted to create powers, privileges, and immunities for defense counsel and investigators that are equal to those of prosecutors and prosecutorial staff.

It is unlikely, however, that this will be done in the strict sense. The ICC Statute grants the prosecutor and deputy prosecutors “privileges and immunities as are accorded to heads of diplomatic missions.”⁶⁵ Staff of the prosecutor have “privileges and immunities and fa-

61. ICC Statute, *supra* note 1, art. 87(5), 37 I.L.M. at 1051.

62. *Id.* art. 48(4), 37 I.L.M. at 1027.

63. *Cf.* VCLT, *supra* note 29, art. 31(1), 37 I.L.M. at 691.

64. *See supra* note 3. In the *ITLOS Agreement*, *supra* note 3, art. 16, available at <<http://www.un.org/depts/los/splos25.htm>>, counsel appear to have “the privileges, immunities and facilities necessary for the independent exercise of their functions” in all relevant states, not just at the Seat of the International Tribunal for the Law of the Sea. *Cf. ITLOS Agreement*, *supra* note 3, art. 15, available at <<http://www.un.org/depts/los/spics25.htm>>, giving similar rights to experts appointed under the United Nations Convention on the Law of the Sea, Oct. 7, 1982, art. 289, 21 I.L.M. 1761, 1323 (entered into force Nov. 16, 1994), who would naturally have to perform their functions in states other than the host state of the tribunal. These sections may be useful guides in drafting the relevant sections of the Agreement on Privileges and Immunities of the ICC, although the nature of the ICC as a criminal court will require that they not be followed slavishly.

65. ICC Statute, *supra* note 1, art. 48(2), 37 I.L.M. at 1027.

cilities necessary for the performance of their functions.”⁶⁶ By contrast, counsel (presumably including defense counsel) receive only “such treatment as is necessary for the proper functioning of the court. . . .”⁶⁷ The prosecutors and deputy prosecutors have protections defined by international law;⁶⁸ prosecutorial staff and (defense) counsel have protections defined by the Agreement on the Privileges and Immunities of the Court. Many of the privileges accorded to the prosecutor and deputy prosecutors are personal, such as exemption from taxation, immunity from all arrest and so forth, as mentioned above. The distinction between “the privileges and immunities and facilities necessary for the performance of their functions” that should be granted to prosecutorial staff and “such treatment as is necessary for the proper functioning of the court” for (defense) counsel suggests that prosecutorial staff should be accorded personal immunities similar to those of diplomats and prosecutors. Facilities must also be available to the prosecution staff.⁶⁹ These are not necessarily to be afforded to defense counsel.

Prosecutorial or defense counsel rights to operate within a state that is a party to the ICC Statute can, however, be described similarly, even given the differences in wording of the statute. For example, the right of defense counsel or investigators to travel freely in a state can be described in the same words as the rights of prosecutorial officials. If the Preparatory Commission and the Assembly of States Parties were attempting to give force to the distinction between “privileges and immunities” of prosecutorial officials and appropriate “treatment” of defense counsel, they could, for example, deny to the latter immunity from arrest for violations of the travel rules.

The following example shows how this distinction might work. Prosecution officials may need to travel to examine without modification a public site at which events relevant to a case occurred and are allowed to do so under circumstances defined by the statute.⁷⁰ The defense may also need to make such an inspection and is entitled to ask the court for an order or request for the assistance of the state where the site exists.⁷¹ Fairness and equality of arms would suggest that the rights of prosecution and defense counsel to operate in a state in fulfillment of such an order or request for assistance should be the same under the Agreement on the Privileges and Immunities of the Court. In the case of the prosecutors or deputy prosecutors, however, diplomatic immunity will protect them from arrest for alleged violations of the terms of the order or grant of assistance. Immunity from arrest, whether absolute or conditional, for staff of the Office of the Prosecutor remains to be defined in the Agreement on Privileges and Immunities of the Court. There is, under the ICC Statute, no necessity for defense counsel or investigators to be given any such personal immunity from arrest for alleged violations.

This does not mean, however, that the Agreement on the Privileges and Immunities of the Court cannot be drafted to provide for such privileges and immunities for defense counsel, but merely that it does not have to be so drafted. There may be arguments made

66. *Id.* art. 48(3), 37 I.L.M. at 1027.

67. *Id.* art. 48(4), 37 I.L.M. at 1027.

68. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 24, 1964, 500 U.N.T.S. 95.

69. *Cf.* ICC Statute, *supra* note 1, art. 100, 37 I.L.M. at 1060. This article provides for allocation of costs associated with execution of requests for cooperation. The costs of travel and subsistence of staff associated with any organ of the court are to be borne by the court, but the costs of local facilities for working are not listed among those to be borne by the court.

70. *See id.* art. 99(4), 37 I.L.M. at 1059.

71. *See id.* art. 57(3)(b), 37 I.L.M. at 1032.

in the Preparatory Commission and the Assembly of States Parties that the ICC Statute intended to exclude defense counsel's personal privileges and immunities. The determination to include "privileges and immunities" for defense counsel, as opposed to rights to operate as necessary, is thus a political one, which is not legally required by the ICC Statute itself.

"[S]uch treatment as is necessary for the proper functioning of the court" will be defined by a general agreement between the court (acting through the Assembly of States Parties) and the states that are parties. It will, thus, be defined in general terms by a quasi-legislative act, rather than on a case-by-case basis by the court, unless the agreement remits the decision to the court on such a basis.

The drafting of the agreement is likely to be critical for another reason. There will probably be no effective appeal by defense counsel in a given case that the agreement does not in fact provide for the treatment necessary to represent the accused adequately, and, therefore, the court should require that states provide defense counsel with greater freedom. The law to be followed in the court is that provided by the statute,⁷² which does not in so many words require any specific protections for defense counsel. Thus, it is unlikely that the court would find that a protection for defense counsel or investigators not included in the agreement would be available to them. The one argument that might be made, if the agreement were truly deficient, would be that the failure to provide for protection deprived an accused of the internationally protected right to counsel.⁷³ Given the variation in legal traditions concerning defense investigations in states that have, for example, ratified the ICCPR, it is unlikely that any negotiated agreement would fail under this standard.

Both defense counsel and the prosecution, however, need the freedom to do their jobs. To this extent, what is "necessary" for the performance of the investigative duties of prosecution, defense lawyers, and investigators is essentially similar. Realistically, states will wish to protect national security information from defense counsel as much as from the prosecutors,⁷⁴ and this desire is likely to be reflected in the agreement. This is not, however, the only way in which the prosecution and defense are likely to be restricted under the agreement.

The right of the prosecution to operate directly in states that are parties to the ICC Statute is itself limited. The investigative system established by the statute contemplates that most of the investigation will be done through the cooperation of the state involved.⁷⁵ In certain circumstances, the prosecutor may execute a request outside of the presence of the authorities of the state on whose territory the request will be fulfilled. This may be done, however, only "where it is necessary for the successful execution of a request" and where the request "can be executed without any compulsory measures."⁷⁶ Compulsory measures, such as execution of a search warrant against the will of the party being searched, may not occur without the cooperation of the state in whose territory the activity occurs.

72. *Id.* art. 21(1), 37 I.L.M. at 1015.

73. *See id.* art. 21(3), 37 I.L.M. at 1015 (application and interpretation of law must be consistent with internationally recognized human rights); ICCPR, *supra* note 5, art. 14, 999 U.N.T.S. 176.

74. *See, e.g.*, ICC Statute, *supra* note 1, art. 57(3)(b), 37 I.L.M. at 1032 (Pre-Trial Chamber may issue orders or request assistance from states to help defense preparation); arts. 72, 93(4), 99(5), 37 I.L.M. at 1043-60 (protection of national security information where assistance requested).

75. *See id.* pt. 9 (international cooperation and judicial assistance), especially arts. 86-88, 93-97, 99.

76. *Id.* art. 99(4).

Where the state is cooperating with an investigation, as it is generally supposed to do under the ICC Statute, the prosecution will be either participating in the investigative events by permission or receiving information about them. Yet this is the situation in which protection against prosecutorial overreaching is most necessary. Thus, from the defense counsel point of view, this limitation on the prosecution's power to investigate on-site is significant primarily where the state involved is actively or passively impeding the investigation. There is reason to believe that, even in this situation, the state will want to impede defense investigation, as it may well be protecting information that it does not want surfacing in the international community. If the restriction on prosecution activities does result in an equalizing of arms, it will likely be because the entire ICC system is not functioning as well as would be hoped. This is not a desirable result.

Even where the prosecution is not operating directly in the state concerned, but is receiving cooperation from state authorities (which is conceived as a normal way for the prosecution to operate),⁷⁷ the defense needs authority and protection to conduct its own factual investigation in the relevant states. The lack of such authority is somewhat mitigated by the defense right to seek assistance through the Pre-Trial or Trial Chamber of the concerned state,⁷⁸ but this is not the same as allowing the defense a bona fide factual investigation. It is especially important to have independent defense investigations where the state concerned wishes to see prosecutions brought in the ICC against human rights violators—that is, where it is effectively acting as the prosecution's agent. It must be remembered that one of the purposes of the ICC is to create an awareness that states ought to be assisting in the prosecution of grave offenses against international humanitarian law.

There is a good argument that the defense's right to investigate in the territory of states that are parties to the statute should not be impeded by the limitations on the Office of the Prosecutor that are imposed by the principle of complementarity. Where complementarity is working properly, the defense is effectively working against both the Office of the Prosecutor and the resources of the cooperating state. True equality of arms suggests that the defense may need greater scope for investigation than the ICC Prosecutor.

It may not, however, be legally or politically possible to achieve this result in the agreement.⁷⁹ Complementarity is the result of state concerns about sovereignty. Complementarity limitations on the prosecution would, thus, be seen by states as legal limitations on actions by the court. This would prevent the court from intruding its workings, including those of defense counsel, beyond the range authorized by the ICC Statute. For example, the court "shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes."⁸⁰ One would have great difficulty arguing that this provision grants the prosecution the authority to take investigative steps on the territory of a state that were not authorized by the statute and to which the state did not

77. Compare *id.* art. 99(1–3) (execution of requests by states) with art. 99(4) (direct execution by prosecutor in certain circumstances).

78. See *id.* art. 57(3)(b) (Pre-Trial Chamber); art. 61(11) (after Confirmation hearing, functions of Pre-Trial Chamber to be performed by Trial Chamber); and art. 64(6)(d) (Trial Chamber may order "production of evidence in addition to that collected before trial").

79. One important way in which no major system of criminal procedure gives equality to the defense is seizure of evidence. While the defense may have a compulsory process to produce witnesses and evidence, no major system gives the defense the right to conduct searches and seizures in the same way as the prosecution. It is not expected that this will be different in the ICC.

80. *Id.* art. 48(1).

consent. This would be true even if such steps were necessary to complete an investigation and bring a charge for crimes within the court's jurisdiction. It is even less likely that a defense right to conduct such an investigation could be constructed.

In sum, the authority of defense counsel to operate on the territory of states, particularly in conducting investigations, remains to be specified in the Agreement on the Privileges and Immunities of the Court. Only the outer parameters of possible authority appear in the statute itself.

B. LACK OF FUNDING FOR DEFENSE INVESTIGATION

The ICC Statute does not provide the accused with a clear right to funding for defense investigation. Counsel is guaranteed, on behalf of the accused, "adequate time and facilities for the preparation of the defense," and the accused has the right to "communicate freely with counsel of the accused's choosing in confidence."⁸¹ Additionally, the accused is guaranteed interpretation and translation services.⁸² What is missing here is guaranteed funding for factual investigation by the accused, defense counsel, defense investigators, or defense experts.

The need to address funding defense investigations is demonstrated by the experience of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) and the International Criminal Tribunal for Rwanda (ICTR), which have not been immune from the problems that all criminal courts face. Defense counsel is regularly provided, as required by the tribunals' statutes and rules, but some counsel have reported being unable to get funding for appropriate legal assistance in the face of very large prosecution teams. Defense investigative services are not clearly required by their statutes and are uniformly reported by counsel to be insufficient.

Lack of defense investigative funding can be addressed in the ICC budgetary process, without necessarily amending the ICC Statute. The articles on funding give the Assembly of States Parties, the nonjudicial plenary organ of the ICC, broad power over funding.⁸³ In addition to approving the overall budget for defense services, the Assembly will adopt Financial Regulations and Rules.⁸⁴ These regulations and rules may well spell out conditions and procedures for approving funding of defense investigative expenditures.

The process of obtaining adequate defense investigative funding, either by amending the ICC Statute or within the current budgetary process, will not be easy. First, prior international criminal courts have not given this issue high priority, suggesting that there is not international customary law requiring funding at adequate levels. Adequate prosecution funding is likely to be a problem as well. Defense funding is less likely to have high political priority from nations whose principal motivation in joining the ICC may be to show strong opposition to international crimes within the court's jurisdiction.

81. *Id.* art. 67(1)(b).

82. *Id.* art. 67(1)(f). This is a right of the accused, not of counsel. There is no specific guarantee of translation into a language counsel understands. Presumably this issue will be dealt with in regulations concerning use of the working languages of the Court. *See also id.* art. 50 (official and working languages) and art. 52 (Regulations of the Court may be adopted by majority of judges if consistent with Statute and Rules of Evidence and Procedure).

83. *See id.* arts. 112(2)(d), 113–14.

84. *See id.* art. 113. The Financial Regulations and Rules will initially be drafted by the Preparatory Commission. Final Act, *supra* note 3, §5(e).

Second, investigative funding is tied to the continuing discussion regarding the relationship between civil and common-law criminal procedure in the ICC. Defense investigation plays a more important role in criminal justice in the common law world. Judicial oversight of factual investigation, discussed below in the context of the ICC Statute,⁸⁵ is more important in civil law countries. As the ICC Statute stands, civil-law-type protections during the investigation process are significant to the defense, but incomplete. This is true both because of the substantial independence of the Office of the Prosecutor in the investigative process⁸⁶ and because the common-law adversary model predominates in the trial process.

Third, investigative funding is tied to the issue of the defense power to operate in states that are party to the ICC Statute. Some investigation can be done at the site of the court, such as expert examination of an accused's sanity. Nonetheless, most investigations must be done in the state where evidence exists, which is usually the state where the alleged crime was committed. Adequate funding of defense investigation is one of the prerequisites to a fully fair criminal process; in particular, that the rights of the defense are truly available "in full equality . . ."⁸⁷ But if defense counsel and investigators are not allowed to seek evidence in a state where it exists, the fairness of the prosecution against the accused may be compromised, even in the presence of adequate defense funding. Thus, funding of defense investigative services by itself will not create all the conditions necessary for fully fair proceedings.

C. POWERS AND ROLE OF DEFENSE COUNSEL IN REPRESENTING CLIENTS IN THE COURT

The parts of the ICC Statute dealing with pre-trial proceedings, trials and appeals all give counsel an appropriate role in advancing the causes of their clients in court proceedings.⁸⁸ Counsel's role in court proceedings is largely based in common-law adversary models and on the role of counsel set out in the ICCPR. Defense counsel is expected to be a trusted advisor on the decision whether to admit guilt or go to trial,⁸⁹ and a vigorous advocate for the interests of the person accused in the court. The specific way in which these powers will be exercised, however, is largely left to the Rules of Evidence and Procedure, to be drafted by the Preparatory Commission by the middle of the year 2000, for presentation to the Assembly of States Parties.⁹⁰

The accused has the right to "communicate freely with counsel of the accused's choosing in confidence . . ."⁹¹ There may be conversations between the prosecution and defense regarding what charges will be pressed, whether there will be an admission of guilt or cooperation with the prosecutor against other persons, and what the appropriate penalty in a case might be.⁹² These discussions will not bind the court and there will not necessarily be a system of plea bargaining in the court. Nonetheless, these provisions imply that defense counsel will be a negotiator as well as a litigator on behalf of an accused. Thus, counsel will necessarily be in the position of a strategist rather than merely a courtroom advocate.

85. See Part III *infra*.

86. Compare ICC Statute, *supra* note 1, arts. 54–57, with Part III, *infra*.

87. ICC Statute, *supra* note 1, art. 67(1).

88. See Parts I and II(A), *supra*.

89. See ICC Statute, *supra* note 1, arts. 64(8)(a); art. 65 (proceedings on admissions of guilt).

90. See *id.* art. 51; Final Act, *supra id.* note 3, §5(a).

91. ICC Statute, *supra* note 1.

92. See *id.* art. 65(5) (stating that such discussions shall not bind the court).

Before trial, defense counsel will also have many opportunities to advance the cause of the accused. Defense counsel may object to the court's jurisdiction or admissibility of a case in the court.⁹³ At the confirmation hearing, defense counsel may object to the charges (presumably including a claim that the charge as filed does not state a crime), challenge the prosecution's evidence, and present defense evidence.⁹⁴ Defense counsel will also be engaged in demanding and receiving from the prosecution and the court the evidence that will be used in the case.⁹⁵

At trial, the role of counsel will be to attempt to convince a majority of the judges that the prosecution failed to prove that the accused was guilty beyond a reasonable doubt.⁹⁶ This is a common-law standard of proof and arguments that it has or has not been met in a given case will likely follow common-law models. To achieve this goal, defense counsel will examine the witnesses against the accused⁹⁷ (probably on a model of common-law cross-examination), present evidence and examine witnesses on behalf of the accused,⁹⁸ raise defenses on behalf of the accused,⁹⁹ and object to evidence offered by the prosecution.¹⁰⁰

Much of the defense counsel's specific courtroom role remains to be defined in the Rules of Procedure and Evidence and the Regulations of the Court. As with the negotiations to produce the ICC Statute, one can expect that there will be negotiation, this time among delegates to the Preparatory Commission meetings, as to the extent that courtroom procedures will follow a civil or a common-law model. Nonetheless, just as much of the prosecutor's investigative role is influenced by the civil law tradition of judicial supervision,¹⁰¹ much of defense counsel's courtroom role is influenced by the common-law adversarial tradition.

III. Judicial Supervision of Investigations in the Interests of the Defense and Judicial Assistance to the Accused

One of the most interesting procedural aspects of the ICC Statute is its mixture of civil and common-law protections of individuals during the investigatory process. These may result in the use of defense counsel very early in the process in order to protect the rights of potential accuseds to a fair trial.

The ICC Statute provides some substitute for defense investigative funding and the right of defense counsel and investigators to operate freely in the states in which evidence exists.

93. *See id.* arts. 19(2)(a), 17. These challenges may be brought by any person against whom a warrant for arrest or summons to appear has been issued; there is no requirement that the person have surrendered or appeared in the Court. *Compare id.* art. 60(1&2) (indicating that requests for interim release shall be granted only where the person sought has been arrested or appeared voluntarily in the Court).

94. *See id.* art. 61(6).

95. *See id.* arts. 61(3)(b), 64(6)(d), 67(2); *but cf. id.* art. 68(5) (allowing prosecution to withhold evidence that may lead to endangering a witness or family until the commencement of trial).

96. *See id.* art. 66(3). The burden of proof beyond a reasonable doubt always remains on the prosecution. Thus the statement in the text is meant as a description of what defense counsel will be doing and not as indicating that any legal burden will be placed upon the defense.

97. *See id.* art. 67(1)(e).

98. *See id.*

99. *See id.*

100. *See id.* arts. 64(9)(a) and 69.

101. *See* Part III *infra*.

This is a system of judicial oversight of the investigative and pre-trial process and the production of evidence. The court, principally through its Pre-Trial Chamber,¹⁰² is required to determine whether the prosecutor should be allowed to begin certain investigations, to preserve evidence for the defense and otherwise to protect defense interests. One can see the influence of civil law proponents in the negotiation of the ICC Statute in the judiciary's heavy involvement in the investigative stage.¹⁰³

The first such device, judicial supervision of the initiation of certain investigations, does not directly involve defense counsel. The prosecutor may initiate investigations *proprio motu*, on the basis of information received from various sources.¹⁰⁴ "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."¹⁰⁵ Victim representations may also be presented to the Pre-Trial Chamber. The ICC Statute does not specify the precise point when a case being investigated *proprio motu* must be brought to the Pre-Trial Chamber, but this is clearly intended to be done early in the investigation.¹⁰⁶ The Pre-Trial Chamber "shall authorize the commencement of the investigation" only if it finds "there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the court."¹⁰⁷ If the court does not find such cause, an investigation will not be opened, but the prosecutor may return to the Pre-Trial Chamber with more evidence to open an investigation.¹⁰⁸

This procedure is designed to check the power of the prosecutor to conduct groundless, oppressive or politically motivated investigations. It is based in the civil law tradition of judicial supervision of investigations. It does not, however, apply to cases referred to the court either by the United Nations Security Council or by a state that is a party to the ICC Statute. Nor does it envision a role for defense counsel in the decision.

Second, when the prosecutor has a "unique opportunity" to obtain or preserve evidence that may not be available at trial, he or she must inform the Pre-Trial Chamber, which shall, "upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defense."¹⁰⁹ This should not be interpreted to give the prosecutor the power to define

102. A Pre-Trial Chamber is made up of three judges (though in many instances one may act alone) chosen from the Pre-Trial Division, a group of at least six judges assigned to investigative and pre-trial matters as their principal duties. The importance given to the pre-trial stage can be seen from the fact that in the statute, both the Pre-Trial and Trial Divisions are to be assigned at least six judges. ICC Statute, *supra* note 1, arts. 39, 57.

103. Among the other indications of civil law influence in the ICC Statute is the dropping of the term "indictment" as the charging document, which was used in the ICTFY and ICTR Statutes, and in earlier drafts of the ICC Statute, and, unfortunately from a human rights perspective, the elimination of a provision from the draft statute prohibiting searches and seizures except upon adequate cause. Draft ICC Statute, art. 67(3) (bracketed provision). For an argument that privacy is nonetheless protected in the ICC Statute see Gallant, *supra* note 2, nn. 72-86 and accompanying text.

104. See ICC Statute, *supra* note 1, art. 15(1&2).

105. *Id.* art. 15(3).

106. The prosecutor does have the authority to "receive written or oral testimony at the seat of the Court" before going to the Pre-Trial Chamber. *Id.* art. 15(2). It does not appear, however, that the prosecutor may use the power of the Pre-Trial Chamber or other devices to request assistance of states before formally opening an investigation using this process. Cf. ICC Statute, pts. 5 (Investigation), 9 (Cooperation).

107. *Id.* art. 15(4).

108. *Id.* art. 15(4&5).

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

what may be necessary to protect the defense. Instead, it should be interpreted to mean that when presented with a prosecutorial request to obtain or preserve evidence because of a unique opportunity, the Pre-Trial Chamber must protect the interests of the defense as well as the prosecution. If the accused has been arrested, counsel for the accused should be able to participate in the proceeding to preserve evidence; if not, counsel should be appointed to represent the interests of the defense. Indeed, the Pre-Trial Chamber has the authority, on its own motion, to take action to "preserve evidence that it deems would be essential for the defense at trial," though it must consult with the prosecutor before doing so and such an order is subject to an immediate, expedited prosecutorial appeal.¹¹⁰ The Rules of Procedure and Evidence can, and should, be drafted to provide for these defense protections.

This judicial supervision procedure, when fully implemented, may turn out to be superior, in terms of fairness to the defense, to procedures in most common law jurisdictions where investigations are essentially performed *ex parte* by police and prosecution offices. One issue that remains to be resolved is how this provision will be reconciled with the lack of privileges and immunities of defense counsel in member states. Many unique investigative opportunities covered here will require investigation in such states. It is hoped that the statute will be interpreted to permit operation by defense counsel in those states in these circumstances.

Third, the Pre-Trial Chamber may "issue such orders, including measures such as those described in article 56 [on unique investigative opportunities], or seek such cooperation pursuant to part 9 [on International Cooperation and Judicial Assistance] as may be necessary to assist the person in the preparation of his or her defense."¹¹¹ This is a significant recognition of the need of the accused to collect evidence. The power to seek such cooperation from states is given to the Pre-Trial Chamber whenever the defense request occurs before (especially in preparation for) the confirmation hearing.¹¹² After confirmation, when for most purposes the case is transferred to the Trial Chamber, the Pre-Trial Chamber may remain responsible, in at least some cases, for assisting the defense in this manner. The statute states that after confirmation, the Trial Chamber constituted for a given case "shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings,"¹¹³ but the Trial Chamber may refer preliminary issues to the Pre-Trial Chamber or another judge of the Pre-Trial Division.¹¹⁴

This mechanism for assuring fair proceedings requires that defense counsel play the major role in requesting assistance and justifying such requests. The Pre-Trial Chamber has a supervisory role here, but does not initiate requests for cooperation or issue orders *sua sponte*. The Pre-Trial Chamber's orders and requests for cooperation, however, are intended to substitute for direct defense investigation and other action in the states where evidence exists.

110. *Id.* art. 56(3).

111. *Id.* art. 57(3)(b).

112. *See id.* art. 61 (giving the Pre-Trial Chamber the duty to determine whether charges should be confirmed against a person).

113. *Id.* art. 61(11).

114. *See id.* arts. 57(3)(b), 64(4). The Pre-Trial Division assigns three of its judges to form a Pre-Trial Chamber for any given investigation. *Id.* art. 39(2).

This mechanism is not sufficient to fully protect the rights of persons accused of crimes in the ICC. First of all, there is no standard specified that would require the court to grant the defense request, even where it is reasonably likely to result in evidence that is useful to the defense. This standard may be clarified, however, in the Rules of Procedure and Evidence. Second, there is a significant question as to the extent to which this guarantee creates a right to collect evidence that is enforceable against recalcitrant states or witnesses.¹¹⁵ Additionally, states retain the right to object to production of evidence on national security grounds.¹¹⁶ These weaknesses may make either the prosecution or the defense of many cases quite difficult, especially if a state has a political agenda concerning them. Third, even if the court orders defense evidence produced and the state involved cooperates, this mechanism only permits the accused to request that the court ask states to provide identified evidence. It does not require states to allow defense counsel or investigators to do factual investigation in their territories in order to identify helpful evidence and witnesses. By contrast, the Pre-Trial Chamber may, in some circumstances, authorize the prosecutor "take specific investigative steps within the territory of a State Party," even without the state's consent.¹¹⁷ Using the court to request defense evidence from states is a legal device that will help place the prosecution and defense on more equal footing, but alone is insufficient to address all the resource needs of defense counsel.

Fourth, the procedure for pre-trial confirmation of the charges against an accused, normally in the presence of the accused, is to be done with counsel for the accused. If the accused has fled or cannot be found, then the confirmation hearing may be held in his or her absence. Even then, the Pre-Trial Chamber may appoint counsel "where the Pre-Trial Chamber determines it is in the interest of justice."¹¹⁸ Given the model of counsel developed in the ICC Statute, in which counsel may be appointed to protect the interests of an absent person, the seriousness of any charge brought in the court would suggest that the interests of justice require that counsel always be appointed when a confirmation hearing is held in the absence of the person being charged.¹¹⁹ This too can be provided for in the Rules of Procedure and Evidence.

Altogether, these provisions for judicial assistance to the accused and to defense counsel provide important protections for the rights of the defense. They go a substantial distance to substituting for a general right of defense counsel to investigate on the territory of any state where evidence may be found. They do not, however, eliminate the need for such a right, or for appropriate funding of defense investigation.

115. Compare *id.* art. 64(6)(b) (Trial Chamber may "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute) (emphasis added), with art. 93(1)(e) ("States Parties shall . . . comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: . . . (e) Facilitating the *voluntary* appearance of persons as witnesses or experts before the Court. . . .") (emphasis added). The resolution of this apparent inconsistency may become one of the most important issues of criminal procedure facing the ICC. Additionally, providing for payment of expenses for appearances of defense witnesses is not addressed by the ICC Statute.

116. See *id.* art. 72.

117. *Id.* art. 57(3)(d).

118. *Id.* art. 61(2)(b). Note that the confirmation hearing plays a structural role equivalent to grand jury indictment (at which the defendant is normally not present) or preliminary hearing (at which the defendant normally is present) in many common-law jurisdictions.

119. Cf. notes 11–14 and 17–19 *supra* and accompanying text.

IV. Proposal for Defense Bureau

The court's structure could be greatly strengthened by the creation of a Bureau of Defense Counsel, analogous to the Office of the Prosecutor. In the ICC Statute, there is currently no defense office of any type. This has the potential to create an institutional bias in the court towards the interests of the prosecution.

A Bureau of Defense Counsel might be made responsible for developing lists of competent defense counsel for appointment, obtaining appropriate clearances with responsible governments for defense counsel and personnel to do their work, for dealing with requests for funding of defense investigations, for education of defense counsel in the procedures of the ICC, and other tasks. Eventually, such an office might possibly become a public defender's office for those defendants who could not afford their defense, or a central resource for defense investigators. Institutionalization of support for defense services through a Bureau of Defense Counsel, though not a right of defendants by itself, would go far toward guaranteeing that the right to counsel truly means the right to adequate and effective counsel.

A Bureau of Defense Counsel would add balance to the institutional arrangements of the court. As the ICC Statute stands, the prosecutor will have an effective voice in issues such as 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. Indeed, the Presidency, the three-judge administrative organ of the court, "shall coordinate with and seek the concurrence of the Prosecutor on all [administrative] matters of mutual concern."¹²⁰ Defense counsel and others concerned with issues of fairness to the accused do not have an institutional voice in the system.

Defense counsel in past and current international criminal courts have served on a case-by-case basis. While this is a traditional means of providing defense services around the world, in both civil and common-law systems, it presents a special problem for an international criminal court. In most systems, defense counsel are geographically localized around a courthouse or in a city or town. They often develop into a "defense bar," a group that can provide education, information and an "institutional memory" for new counsel or counsel taking on a new type of case. By contrast, in the ICC, persons eligible to be defense counsel will be scattered around the world. Education about the substantive law and procedure of the court would likely be an important function of a Bureau of Defense Counsel. Education about practice and procedure will likely be particularly important, because the court practice will almost certainly include a mixture of common-law and civil-law criminal procedure, a combination unfamiliar to most lawyers.

The defense function, even more than the prosecution function, requires independence from political and other influences. Advocacy on behalf of defendants must be zealous and without fear of reprisal. Without an independent defense bureau, it is likely that administrative tasks concerning defense counsel will be assigned to the registrar. While the Registrar's Office is designed to be independent, it is also designed to be neutral. For example, it is the prosecutor, not the registrar, who manages all the functions of the Prosecutor's Office.¹²¹ The Registry is in conception a neutral service for all parties. It should not be

120. ICC Statute, *supra* note 1, art. 38(4).

121. *See id.* arts. 38(3)(a) (independence of Prosecutor from Presidency), 43(1) (Prosecutor's powers and functions not to be prejudiced by Registrar's responsibility for "non-judicial aspects of the administration and

placed in the position of having to administer much of the defense program. Yet, if no defense bureau is created, the Registry may well wind up with tasks such as maintaining the list of eligible defense counsel, creating a system for assigning particular counsel to cases where counsel has been appointed, and supervising payment of fees to and monitoring costs incurred for investigation by defense counsel.¹²²

Given the current organization of the court, the easiest path to developing a Bureau of Defense Counsel is to make it an administrative office of the Registry. Some protection could be provided for the independence of the body by ensuring that the registrar would be unable to compel disclosure of client secrets, confidential defense investigative information or defense strategy, and would not control any decisions that the office of the defense might make concerning the granting of appointed counsel, investigative services or funding (if such decisions were assigned to the office).

To create it as it should be in theory, as a truly independent organ of the court, may be more difficult. The organs of the court are listed in the statute.¹²³ The ICC Statute provides that the Assembly of States Parties may "establish such subsidiary bodies as may be necessary."¹²⁴ This could be read to mean that the Assembly of States Parties may only create bodies subsidiary to itself or to the organs of the court created by the ICC Statute.¹²⁵ If this is the case, creating a truly independent Defense Bureau, the structural equivalent of the Office of the Prosecutor, will require an amendment to the ICC Statute. If, however, "subsidiary" is taken simply to mean "non-plenary," then the plenary quasi-political organ, the Assembly of States Parties, may be able to create such an office with the same connection to other offices as that of the prosecutor and the Registry.

Creating a defense office seems more likely now than it did several months ago. At the first meeting of the Preparatory Commission of the International Criminal Court, France made a proposal to create such an office.¹²⁶ The details of the proposal are complex and

servicing of the Court"), 46(2) (removal of Prosecutor to be done by Assembly of States Parties, rather than judges).

122. Many states actually use systems in which a judicial or neutral office is responsible for the assignment of counsel. It is the institutional weakness of the defense in the Statute and in prior international criminal courts that suggests that this model should not be followed when the ICC comes into being.

123. ICC Statute, *supra* note 1, art. 34 (Organs of the Court are the Presidency; Appeals, Trial and Pre-Trial Divisions; Office of the Prosecutor; and the Registry). The term "organ" is used in a somewhat more limited sense in the ICC Statute than in the general law of international organizations. In the law of international organizations, the Assembly of States Parties would be considered an "organ" of the International Criminal Court; indeed it would be considered the plenary organ. *See generally* HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* §390, at 274 (3d rev. ed. 1995).

124. ICC Statute, *supra* note 1, art. 112(4).

125. One very restrictive reading of ICC Statute, art. 112(4), would allow the Assembly of States Parties to create only subsidiary bodies of itself, not of the Organs of the Court, because the only example given in the statute, "an independent oversight mechanism for inspection, evaluation, and investigation of the Court," *id.*, appears to be subsidiary to the Assembly of States Parties rather than any organ. Placement as a subsidiary body of the Assembly of States Parties would have the advantage of making the Defense Bureau truly independent of the Organs of the Court. It would have the disadvantage of placing the Defense Bureau directly in the control of the quasi-political body of the ICC, the Assembly of States Parties, rather than as part of the operative judicial mechanism of the court. It is best not to have a political body as the direct controlling authority of a criminal defense office, lest undue pressure be brought on defense counsel for political reasons.

126. Proposal of France, U.N. Doc. PCNICC/1999/DP.3, at 10. This proposal has a complex structure for the office. The author understands that there are at least two other states interested in the proposal, but that official positions have yet to be taken.

may require considerable negotiation by delegates to the Preparatory Commission before reaching a final form.

V. Conclusion

The ICC Statute provides for defense counsel in the context of a hybrid civil law-common law system of criminal procedure. It is strong in many areas and will provide substantial rights to those who are investigated and prosecuted by the ICC. The statute as it stands, however, does not give the defense adequate authority to investigate the facts of cases in the territory of concerned states. Nor does it explicitly provide a right to adequate funding of defense investigation services for those accused who are unable to afford an adequate investigation.

Some solutions to the former problem can be addressed through the Agreement on the Privileges and Immunities of the Court, which remains to be drafted and deserves more attention than it has yet received from the academic community. The Assembly of States Parties can, through its budget mechanism, address the latter issue.

Institutionally, the court would be strengthened substantially by the addition of a Bureau of Defense Counsel. Such a bureau could have a part both in the day-to-day provision of defense services and in the overall policymaking process in the court. It could also play a major role in ensuring the court's overall fairness.