Art. 67. Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

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

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

ELISE GROULX, HÉLÈNE DRAGATSI & KENNETH S. GALLANT

1. Introduction

Article 67 of the Rome Statute is the provision which sets out specific rights of the accused once a case has left the Pre-Trial Chamber of the International Criminal Court (ICC) and gone to the Trial Chamber. However, it cannot be read in isolation. Other rights of defendants at trial may come from Articles 21(3) (general international human rights provision), 66 (presumption of innocence), and 69(7) (inadmissibility of certain evidence obtained in violation of internationally recognized human rights), and perhaps other provisions. Moreover, on appeal, the Appeal Chamber 'shall have all the powers of the Trial Chamber' (Art. 83(1)), implying that it shall apply all the human rights provisions of these Articles in its own proceedings.

2. In the Determination of any Charge, the Accused Shall be Entitled to a Public Hearing, Having Regard to the Provisions of this Statute, to a Fair Hearing Conducted Impartially, and to the Following Minimum Guarantees, in Full Equality

2.1. The Interpretation of Article 67 Based on International Human Rights Treaties

This Article is a reflection of Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR), one of the principal human rights treaties in the world (International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, cited in W.A. SCHABAS, An Introduction to the international Criminal Court, Cambridge, Cambridge University Press, 2001, p. 220). The right to a fair trial is also enshrined in the Universal Declaration of Human Rights (GA Res. 217 A (III), UN Doc. A/810 (1948). Article 10 states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. Article 11(3) states that 'Everyone charged with a penal offence has
the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence’, cited in W.A. Scharas, ibid., p. 220, n. 50), the regional human rights conventions (American Convention on Human Rights (1978) 1144 UNTS 123, Art. 8; European Convention on Human Rights, (1955) 213 UNTS 221, Art. 6; African Charter on Human and Peoples’ Rights, (1966) 1520 UNTS 15, Art. 7; Convention on the Rights of the Child (1990) 1577 UNTS 3, Art. 40, para. 2, cited in W.A. Scharas, id., p. 220, n. 51), as well as in humanitarian law instruments (Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135, Art. 84-87 and 99-108; Geneva Convention (IV) Relative to the Protection of Civilians (1949) 75 UNTS 287, Art. 5 and 64-76; Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (1979) 1125 UNTS 3, Art. 75; Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (1979) 1125 UNTS 3, Art. 6, cited in W.A. Scharas, id., p. 220, n. 52). The right to a fair hearing applies at all stages of the proceedings, and even during the investigation, when no defendant has even been identified (Situation in the Democratic Republic of the Congo, ICC-01/04, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, Pre-Trial Chamber I, p. 35, cited in W.A. Scharas, id., p. 220, n. 53).

Article 67 of the Rome Statute and Article 14(3) of the ICCPR do not limit the human rights applicable before the ICC. Article 21(3) of the Rome Statute mandates that the court apply and interpret law in a manner ‘consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’ (ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-119, Decision on Victims’ Participation, Trial Chamber, 18 January 2008, paras. 34-35; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, paras. 36-39; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-512, Decision on the Defence Challenge to the Jurisdiction of the court, pursuant to Article 19(2)(a) of the Statute, Pre-Trial Chamber I, 30 October 2006, p. 5, 9, cited V. Nerlich, ‘The Status of the ICTY and ICTR Precedent in Proceedings before the ICC – Chapter 17’ in C. Stain, G. Sluiter (eds.), The Emerging Practice of the International Criminal Court, Leiden-Boston, Martinus Nijhoff, 2009, p. 64, and W.A. Scharas & N. Bernaz, Routledge handbook of International Criminal Law, Abingdon-Oxon-New York, Routledge, 2011, p. 441). The ICC Pre-Trial Chamber I has specifically referred to Article 21(3) in its interpretation of the human rights provisions of the Rome Statute (Prosecutor v. Thomas Lubanga Dyilo, id., p. 34-35; Prosecutor v. Thomas Lubanga Dyilo, id., p. 36-39; Prosecutor v. Thomas Lubanga Dyilo, id., p. 59, cited in C. Stain and G. Sluiter, ibid., p. 64 and W.A. Scharas & N. Bernaz, id., p. 441). In the interpretation of such rights, the ICC may refer to the case law deriving from the International Criminal Tribunals for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), although it is not bound by the decisions of these courts (see analysis of Nerlich, ibid., p. 315-325). Nonetheless, since these ad hoc Tribunals were established under different statutes and Rules of Procedure and Evidence than the ICC, whenever an interpretation of the Rome Statute is based on ICTY or ICTR precedent, it has to be compatible with...international recognized human rights’ (A. Pellet, ‘Applicable Law’ in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary 2002, Vol. II, p. 1051 et seq., cited in ibid.). Nerlich has recognized that ‘[g]iven the impact that decisions of international courts have had on the development of international criminal law, this reliance [on the jurisprudence of the two ad hoc Tribunals of the United Nations] does not come as a surprise, in particular, because the tribunals are the immediate predecessors of the Court. There mere existence has had a tremendous impact on the drafting of the Rome Statute and of the subsidiary legal instruments of the ICC, notably the Court’s Rules of Procedure and Evidence, the Elements of Crimes, and the Regulations of the Court’, see ibid., p. 306-307. Nevertheless, Nerlich adds that ‘some decisions of the Chambers of the ICC have already cast doubt on the exact status of precedent of the ICTY and ICTR in proceedings before the Court. Notably, in one of its decisions, Pre-Trial Chamber II stated that: ‘(...) The law and practice of the ad hoc Tribunals, which the Prosecutor refers to, cannot per se form a sufficient basis for importing into the Court’s procedural framework remedies other than those enshrined in the Statute’ (ICC, Prosecutor v. Kony et al, ICC-02/04-01/05-60, Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual De-
The Pre-Trial Chamber has also noted that sometimes the competent Chamber will need to go beyond the terms of Article 67 itself, referring to the case law of the European Human Rights Court and the Inter-American Court of Human Rights (Le procureur v. Thomas Lubanga Dyilo, Decision Regarding the Practice Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/01/06-1049, 30 November 2007, Trial Chamber I, p. 44, in ibid., p. 307-308).

The fact that Article 67 of the Rome Statute ‘sets out the minimum yardstick of the defendant’s rights and is a reflection of those provided for in Article 14 of the International Covenant on Civil and Political Rights (ICCPR)’ (International Bar Association Human Rights Institute, Rights of the Defence at the ICC (London), online: IBA Human Rights Institute < www.ibanet.org/ArticleDetail.aspx?ArticleUid=621b2b54-6a06-4d05-a3d2-8c951d96d15c> (accessed November 21, 2011). See also M. Wladimiroff, ‘Commentary: The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda’, Leiden Journal of International Law 1999, p. 959-960) and other human rights conventions, has also been recognized as applicable to the ICTR and the ICTY. The ICTR Trial Chamber has in fact stated that, in establishing these tribunals, the Security Council ‘cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms’ (Prosecutor v. Rwamakura, Decision on Appropriate Remedy, ICTR 98-44C-1, Trial Chamber, 31 January 2007, affirmed in Prosecutor v. Rwamakura, Decision on Appeal Against Decision on Appropriate Remedy, ICTR 98-44C-T, Appeals Chamber, 13 September 2007, p. 26, in W. Schomburg, The Role of International Criminal Tribunal in Promoting Respect for Fair Trial Rights’ Northwestern Journal of International Human Rights 2009, p. 5). The interpretation of rights contained in Article 67 of the ICC Statute that follows is therefore informed by the relevant case law of the international ad hoc Tribunals and other decision-making authorities, including the Pre-Trial and Trial Chambers of the ICC that interpret applicable treaties, principles and rules of international law in their rulings.

2.2. The Right to a Fair and Impartial Hearing and the Other Minimum Guarantees in Full Equality

According to the ICC Pre-Trial Chamber II, the concept of ‘equality of arms’. Equality of arms means striking a balance between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour (Prosecutor v. Joseph Kony et al., ICC-02/04-01/05, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, Pre-Trial Chamber II, 19 August 2005, p. 30. See also Le procureur v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Décision sur la demande d’autorisation d’appel de la Défense relative à la transmission des demandes de participation des victimes, 6 November 2006, Ch. P I, p. 7, cited in W.A. Schabas, ibid., p. 222, n. 59. Schabas also cites the case law of international human rights tribunals that developed the notion of ‘equality of arms’ within the concept of the right to a fair trial: The Prosecutor v. Jean-Pierre Bemba, ICC-01/05-01/08 OA, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Pre-Trial Chamber III Entitled ‘Decision on Application for Interim Release’, Appeals Chamber, 16 December 2008, p. 32, The Prosecutor v. Germain Katanga, ICC-01/04-01/07 OA, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I Entitled ‘First Declaration on the Prosecution Request for Authorization to Redact Witness Statements’, 13 May 2008, Appeals Chamber, p. 73; The Prosecutor v. Germain Katanga, ICC-01/04-01/07 OA2, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled ‘First Decision on the Prosecution Request for Authorization to Redact Witness Statements’ (13 May 2008) (Appeals Chamber), p. 63; Situation in Darfur, Sudan, ICC-02/05, Decision on the Request for Leave to Appeal to the Decision Issued on 23 September 2007 (31 October 2007) (Pre-Trial Chamber I) p. 6; The Prosecutor v. Thomas Lubanga Dyilo, ICC-
International Criminal Law and Procedure
Rome Statute of the International Criminal Court (Art. 67)

01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, 13 June 2008, Trial Chamber I, p. 79). Equality of arms includes equality of means. For example, the defence, as well as the prosecution, must have the ability to investigate the facts of the case.

According to Article 26 of the ICCPR, ‘all persons are equal before the law which means they have the right to receive the same treatment, be treated equally and have the same access to justice, and are entitled without any discrimination to the equal protection of the law’ (Art. 26, ICCPR, cited in Office of the High Commissioner & International Bar Association (Coll.), Professional Training Series No. 9/Add. 1, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. Addendum. Major Recent Developments (2003-07) (New York & Geneva: United Nations, 2008), online: OHCHR < www.ohchr.org/Documents/Publications/trainingadd1.pdf> (accessed November 18, 2011) (hereinafter, ‘MANUAL’ p. 217). In Article 2(3) of the Rome Statute, equality before the law is implemented by the provision that the ‘interpretation and application’ of law must ‘be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’


The Human Rights Committee (HRC) has observed, in relation to Article 14(1) of the ICCPR ‘... that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual’s attempts to seize the competent jurisdictions of his/

Another essential aspect of the right to equality is that women must have equal access to courts in order to be able effectively to claim their rights (Euro. Court HR, Airey Case v. Ireland, judgment of 9 October 1979, Series A. No. 32, p. 11-16, paras. 20-28, cited in Manual, ibid., p. 218).

Impartiality of the Court is also a component of fairness. The appropriate test to be applied when determining the impartiality of a judge is ‘whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that [the judge] might not bring an impartial and unprejudiced mind to the issues arising in the case’ (Hauschildt v. Denmark, Series A, No. 154, 24 December 1989, para. 46, cited in W.A. Schaub, ibid., p. 223).

While individual infringements of specific rights set out in Article 67 may not, individually, amount to a substantial impairment of the right to a fair trial, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on Article 67 (Stanford v. United Kingdom, Series A, No. 182-A, 30 August 1990, para. 24, cited in ibid.). This is particularly important to note now, because the possible consequences of breaches of Article 67 rights are not yet fully understood, given that the ICC and its procedures are still new.

2.3. The Right to a Public Hearing

The right to a public hearing reinforces judicial independence by encouraging judges to ensure their credibility to the public, while putting the issue of impartiality under scrutiny. Transparency of the process is essential to assess the fairness of the process and convey the perception of fair trials to all concerned: accused, victims and observers alike.

The right to a public hearing guarantees the protection of the defendant from secret trials, and it protects the right of the public to scrutinize the integrity of proceedings (M.C. Bassion, Introduction to International Criminal Law, New York, Transnational Publishers, 2003, p. 609, cited in W. Schomburg, ibid., p. 6). This right is also recognized in Article 14(1) of the ICCPR, Article 6(1) of the ECHR, Article 8(5) of the ACHR, Article 21(2) of the ICTY Statute and Article 20(2) of the ICTR Statute (cited in W. Schomburg, ibid., p. 6). Article 14(1) ICCPR states that ‘Everyone shall be entitled to a fair and public hearing’. No specific mention of a right to a fair hearing is mentioned in Article 8(5) of the ACHR which states simply that ‘[c]riminal proceedings shall be public’.

There are certain exceptions to the right to a public hearing. Article 14(1) ICCPR acknowledges the necessity of excluding the public from trials for reasons including order public and national security (Art. 14(1) ICCPR, cited in W. Schomburg, ibid., p. 6). Articles 21 and 20 of the respective ICTY and ICTR Statutes make the right to a public hearing subject to the protection of victims and witnesses (W. Schomburg, ibid., p. 6).

Article 21 of the ICTY Statute is complemented by Rules 69 and Rule 75 of the ICTY Rules of Procedure and Evidence. Rule 75 states that a judge or a Chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused (this includes, for example, closed sessions, private sessions, face distortion, voice distortion or testimony by video-link (W. Schomburg, ibid.)). Rule 69(C) provides for the disclosure of the identity of the victim in ‘sufficient time prior to trial’. However, since the Appeals Chamber considers the latter provision to be subject to Rule 75, critics have interpreted it to allow a ‘permanent non-disclosure of the identity of the witness at the discretion of the judge’ (C. D’Francia, ‘Due Process in International Criminal Courts: Why Procedure Matters’, 87 Valparaiso Law Review, 2001, 1412, cited in ibid.). The complete anonymity of a witness was granted only once by the ICTY Trial Chamber in Tadić (ICTY, Prosecutor v. Tadić, IT-94-1-T, Decision on the Prosecutor’s motion Requesting Protective Measures for Victims and Witnesses, p. 55-58 (Aug. 10, 1995)). However, the Trial Chamber in Brđanin indirectly rejected that ruling, stating that ‘the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one’ (ICTY, Prosecutor v. Brđanin & Talic, IT-99-36, Decision on Motion by
Prosecution on Protective Measures, p. 20, 3 July 2000; see also ICTR, Prosecutor v. Bicamumpaka, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, at 13, 12 July 2000 (stating that ‘it would be more equitable to disclose to the Defence identifying information within twenty-one (21) days of the testimony of a witness at trial’), cited in ibid.).

2.4. Other Human Rights Guarantees

Article 67(1) ensures minimum guarantees to the accused before the ICC in the determination of any charge, consistent with sub-paragraphs 67(1)(a) to (i). Since these guarantees are minimal, accused persons are also entitled to the respect of other internationally-recognized human rights, as required by Article 21(3) of the Rome Statute.

This may include, for example, the right to freedom from torture, cruel or inhuman treatment or punishments guaranteed by all the major treaties and by the Universal Declaration of Human Rights (the right to freedom from torture, cruel or inhuman treatment or punishment is guaranteed by all the major treaties and by the Universal Declaration, ibid.). For example, Art. 7 of the ICCPR, ibid.; Art. 4 of the ACHPR, ibid.; Art. 5(2) of the ACHR, ibid.; Art. 3 of the ECHR, ibid., which does not contain the term ‘cruel’; and Art. 4 of the Universal Declaration. ‘In some legal instruments, this right is reinforced, for persons deprived of their liberty, by the right to be treated with humanity and with respect for the inherent dignity of the human person’ (Art. 10(1) of the Covenant; Art. 5(2) of the American Convention). In the course of criminal investigations and judicial proceedings, the universal and non-derogable prohibition on torture and other inhuman or degrading treatment or punishment is consequently to be respected at all times, without exception even in the most dire of circumstances (see e.g. Art. 4(2) of the ICCPR; Art. 27(2) of the ACHR; Art. 15(2) of the ECHR; Art. 2(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Art. 5 of the Inter-American Convention to Prevent and Punish Torture, cited in MANUAL, ibid., p. 230)). This right is also protected at the stage of investigations in Articles 55(1)(c) the Rome Statute of the ICC. Finally, according to the Office of the High Commissioner for Human Rights (OHCHR), the duty of the Prosecutor with respect to investigations to ‘fully respect the rights of persons arising under this Statute’, stated in Article 54(1)(c) of the Rome Statute, includes, inter alia, the right specified in Article 55(1)(b) concerning the prohibition of duress and torture (see MANUAL, ibid., p. 231). According to the OHCHR, this right is not only guaranteed at the stage of investigation but also during the trial phase (ibid., p. 230).

Furthermore, international human rights treaties and the Rome Statute do not provide detailed rules about the lawfulness of searches, though under Article 69(7), evidence seized in violation of the Statute should not be admitted if the violation casts doubt on its reliability or the violation is antithetical to and would seriously damage the integrity of the proceedings. The OHCHR relies on European case law on this matter, which requires that the measure was carried out ‘in accordance with the law’ and that ‘it was necessary in a democratic society’ (Eur. Court HR, Case of Chappel v. the United Kingdom, Judgment of 30 March 1989, Series A, No. 152-A, cited in ibid., p. 227).

2.4.1. To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks

This right is guaranteed in international human rights treaties, including in Article 14(3)(a) of the ICCPR (see also Organization of American States, ACHR, ibid., Art. 8(2)(b); ECHR, ibid., Art. 6 (3)(a); ICTY Statute, ibid., Art. 21(4)(a); ICTR Statute, ibid., Art. 20(4)(a) ACHPR, ibid., (no particular reference to this right is made), cited in W. SCHOMBURG, ibid., p. 11, n. 62). This Article, solely applicable to individuals who are charged or about to be charged with a criminal offense, differs from Article 9(2) of the ICCPR which applies to any detained person (W. SCHOMBURG, ibid., 11). See also MANUAL, ibid., p. 232, adding that the ACHR ‘contains no express provision guaranteeing the right to be informed of criminal charges against oneself. However, the African Commission on Human and Peoples’ Rights has held that persons arrested ‘shall be informed promptly of any charges against them’ (ACHPR, Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria, Communication No. 224/98, adopted during the 28th Session 23 October – 6 November 2000, para. 43).
2.5. The Right to be Informed Promptly and in Detail of the Nature, Cause and Content of the Charge

The statutes of the ad hoc Tribunals are silent on the right to be informed promptly of the reasons of one's arrest. W. SCHOMBURG explains however that the ICTR Appeals Chamber has confirmed the rights of a suspect at the time of detention. It states, in this regard that '[t]he right to receive the reasons of his arrest and the charges against him is a guaranteed right under the European Convention on Human Rights in Article 6 (3) (a) and the American Convention on Human Rights in Article 8 (2). In the context of the International Criminal Court, it is found in Article 14 (3) (a) of the Rome Statute, which states that the suspect has a right to be informed in detail of the charges against him prior to his being tried in camera by a military court that sentenced him to 30 years imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him (Communication No. R.14/63, R.S. 20-A, Decision (May 31, 2000) (Appeals Chamber), p. 78 and Kajelijeli v. Prosecutor, ICTR-97-19 AR72, Decision, Appeals Chamber, 3 November 1999, p. 81, confirmed in Semanza v. Prosecutor, ICTR-9-20-A, Decision (May 31, 2000) (Appeals Chamber), p. 78 and Kajelijeli v. Prosecutor, ICTR-8-44A-A, Appeals Chamber, 25 May 2005, p. 226, cited in W. SCHOMBURG, ibid., 11). Thus, '85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue' (Kajelijeli v. Prosecutor, ibid. p. 231, cited in W. SCHOMBURG, 12). Furthermore, the United Nations Human Rights Committee (HRC) confirms that the right to be informed in Article 14(3)(a) of the ICCPR applies 'to all cases of criminal charges, including those of persons not in detention', and that the term 'promptly' requires that information be given in the manner described as soon as the charge is first made by the competent authority' (General Comment No. 13 (Art. 14), in the United Nations Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7 (General Comments) (5 December 2004), p. 124, para. 8, cited in MANUAL, ibid., p. 232-233). More specifically, '[t]his right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based' (ibid. See also Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997) UN Doc. GAOR, A/52/40 (Vol. II), p. 151, para. 9.2, stating 'detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused', cited in MANUAL, ibid., p. 233).

Notwithstanding, the HRC has stated, in relation to Article 14(3)(a) of the ICCPR, similar to that of Article 6(1)(a) of the Rome Statute, that 'the requirement of prompt information... only applies once the individual has been formally charged with a criminal offence', and does not, consequently, 'apply to those remanded in custody pending the results of police investigations (Communication No. 253/1987, P. Kelly v. Jamaica (Views adopted on 8 April 1997), UN Doc. GAOR, A/52/40, Vol. II, p. 151, para. 9.2, cited in MANUAL, ibid., p. 233).

With regards to the appropriate timeframe, the HRC considered that the right to be informed had been violated 'where the victim of the violation [in this case the accused person] had not been informed of the charges against him prior to his being tried in camera by a military court that sentenced him to 30 years imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him' (Communication No. R.14/63, R.S. Antonio v. Uruguay (Views adopted on 28 October 1981), UN Doc. GAOR, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2, cited in MANUAL, ibid., p. 233).

International case law from other sources also provides more clarification on the right of an accused to be informed promptly and in detail of the nature, cause and content of a charge against him. Under Article 6 (3) (a) of the European Convention on Human Rights for example, the European Court of Human Rights (European Court or ECHR) held that 'it was sufficient in order to comply with this provision that the applicants were given a 'charge-sheet' within respectively ten hours and one hour and a quarter after their arrest; these charge-sheets contained information about the charge (breach of the peace) as well as the date and place of its commission' (ECHR, Case of Steen and Others v. the United Kingdom, judgment of 23 September 1998, Reports 1998-VII, p. 2741, para. 85, cited in MANUAL, ibid., p. 233). Furthermore, the Inter-American Court of Human Rights determined that this right was violated when the attorneys of the accused were only allowed to view the indictment record 4 days after it was filed and 'for a very brief time' only (IACHR, Castillo Petrucci et al. v. Peru, judgment, 30 May 1999, Series C, No. 52, p. 202, paras. 141-142 read in conjunction with p. 201, para. 138, cited in MANUAL, ibid., p. 233).
2.6. The Right to Be Informed of Charges in a Language one Fully Understands and Speaks

The Appeals Chamber of the ICC has stated that this Article provides a right to interpretation, which is a *sine qua non* right for holding a fair trial (ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07 OA3, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘Decision on the Defence Request Concerning Languages’, Pre-Trial Chamber I, 2 June 2008, 40). It also recognizes that as the starting point, as far as languages are concerned, *proceedings will in principle be held in English or in French, the 2 working languages of the Court, pursuant to Article 50 of the Rome Statute*. On the other hand, an accused may state ‘that he or she wishes to use another language – presumably on the basis that he or she does not fully understand and speak a working language of the Court’ (ibid., p. 58).

In light of this interpretation, it was recognized that ‘the Chamber must give credence to the accused’s claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks’ (ibid. p. 59). Nevertheless, ‘[t]he Chamber may consider that the accused is acting in bad faith, is malingering or is abusing his or her right to interpretation under Article 67. If the Chamber believes that the accused fully understands and speaks the language of the Court, the Chamber must assess the facts on a case-by-case basis, whether this is so’ (ibid. p. 60). In the final analysis, the language requested should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under Article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non-technical conversation and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused (ibid. p. 61).

Consistently, the OCHCR explains that this more general right to provide interpretation during investigation is specifically included in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which:

‘A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly, in a language
which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest (Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, UN GAOR, 43d Sess., Annex, Agenda Item 138, Principle 17 (2), p. 6, UN Doc. A/RES/43/173 (1989), cited in MANUAL, ibid., p. 231).

This duty is also included in Rule 42(A) of the Rules of Procedure and Evidence of the Rwanda and Former Yugoslavia Criminal Tribunals, which guarantee the right of a suspect ‘to have the free legal assistance of an interpreter’, if he ‘cannot understand or speak the language to be used for questioning’ (MANUAL, ibid. p. 232). The Rules of Procedure and Evidence of the ICC do not contain any similar wording but ensure in Rule 187, that the copy of the arrest warrant issued by the Pre-Trial Chamber shall be made available in a language that the person arrested at the request of the Court fully understands and speaks. Furthermore, in accordance with Article 67(1)(a) and Rule 117(1), the request of a legal representative to question a witness shall be accompanied, as appropriate, by a translation of the warrant of arrest or of the judgment of conviction and by a translation of the text of any relevant provisions of the Statute of the ICC, in a language that the person fully understands and speaks.

One example of the right of the accused to be informed of the charges against him in a language that he fully understands and speaks was addressed by the European Court, which observed, with relation to Article 6(3)(a) of the ECHR that judicial authorities should take the steps to comply with an accused’s request to receive information in his mother tongue or in one of the official languages of the United Nations unless they were in a position to establish that the applicant in fact had sufficient knowledge of the language of the initial communications to understand ‘the purpose of the letter notifying him of the charges brought against him’ (ECHR, Case of Brazicek v. Italy, judgment of 19 December 1989, Series A, No. 167, p. 38, para. 41, cited in ibid. p. 233). The European Court has also referred to the need to ‘examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court’ (ECHR, ibid.).

2.6.1. To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence

These rights are contained in the other international law human rights instruments in almost identical wording including Article 14(3)(b) ICCPR, Article 8(2)(d) ACHR, Article 21(4) of the ICTY Statute and Article 20(4)(b) of the ICTR Statute (W. SCHOMBURG, ibid., 12 and n. 69).

This paragraph encompasses two elements. The first element is the right of an accused to have adequate time and facilities in full equality for the preparation of his defence during all stages of the trial. The second element is the right of an accused to communicate with counsel of his own choosing, which is particularly relevant to the preparation for trial (Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd ed., Kehl am Rhein, Engel, 2005), p. 332-333, cited in W. SCHOMBURG, ibid., 12. Both of these are necessary to the fairness of any hearing or trial.

2.6.2. To have adequate time and facilities for the preparation of the defence

The right of an accused person to have adequate time and facilities to prepare his or her defence is paramount to exercise fair trial rights and to guarantee due process. It is also a corollary of the principle of equality of arms (Communication No. 349/1989, C. Wright v. Jamaica (Views adopted on 27 July 1992) UN Doc. GAOR, A/47/40, p. 315, para. 8.4; and similar wording in Communication No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), UN Doc. GAOR, A/52/40, p. 232, para. 5.10, cited in MANUAL, ibid., p. 244). The Human Rights Committee explains that ‘the meaning of ‘adequate time’ depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused required to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer’ (General Comments ibid., at 124, para. 9, cited in MANUAL, ibid.)
Adequate time for the preparation of the defence cannot be assessed in the abstract and it depends on the circumstances of the case, including language and translation needs (Ferdinand Nahimana v. The Prosecutor, ICTR-99-52-A, Judgment, 28 November 2007, Appeals Chamber, p. 220, cited in W. Schönburg, ibid., at 12). This right may in fact conflict with the right to be tried without undue delay in Article 67(1)(c) Rome Statute, studied below (Prosecutor v. Baton Haxhiu, IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against Trial Judgment, (Sept. 4, 2008) (Appeals Chamber) at 16, cited in W. Schönburg, ibid.). In this regard, the ICTY and ICTR Appeals Chambers have expressed that ‘procedural time-limits are to be respected, and ... they are indispensable to the proper functioning of the Tribunal and to the fulfillment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated’ (ibid.).

Furthermore, if an accused claims that he did not have adequate time and facilities for the preparation of his defence, it is important for him or his counsel to request an adjournment of the proceedings. This is particularly applicable when he is not ‘represented at trial by the same counsel who had represented him at the preliminary examination’ (Communication No. 528/1993, Steedman v. Jamaica (Views adopted on 2 April 1997), UN Doc. GAOR, A/52/40 (Vol. II), p. 26, para. 10.2, cited in Manual, ibid., p. 244). It is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial, and ‘this requirement applies to all the stages of the judicial proceedings’; again, however, ‘the determination of what constitutes “adequate time” requires an assessment of the individual circumstances of each case’ (Communication No. 349/1989, ibid., p. 315, para. 8.4). For instance, even when an author claimed that ‘the attorney assigned to the case was instructed on the very day on which the trial began’, and that, therefore, ‘he had less than one day to prepare the case’ because of the arrival of a witness from the United States, the Human Rights Committee has ruled that ‘if counsel had felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial’ (ibid., p. 311, para. 3.4. See also Communication No. 702/1996, ibid., all cited in Manual, ibid., p. 244).

A few cases have discussed what this means in the context of capital punishment (not available in the ICC), but it is likely that the issues would have been treated similarly had the issues involved long prison sentences. For example, both Articles 14(3)(b) and 14(3)(d) of the ICCPR were considered to be violated where the accused had no legal representation for the first four days of his trial, at the end of which a death sentence was imposed (Communication No. 676/1996, A.S. Yaseen and N. Thomas v. Guyana (Views adopted on 30 March 1998), UN Doc. GAOR, A/53/40 (Vol. II), p. 161, para. 7.8, cited in Manual, ibid., p. 247-248). The Human Rights Committee also concluded that Article 14(3) had been violated in a capital case where the accused when one of his court-appointed lawyers asked another lawyer to replace him, and another had withdrawn the day prior to the beginning of the trial. The attorney who actually defended him was only present in court at 10 a.m. when the trial opened and asked for an adjournment until 2 p.m. ‘so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before’ (Communication No. 282/1988, L. Smith v. Jamaica (Views adopted on 31 March 1993), UN Doc. A/48/40, Vol. II, p. 35, para. 10.4, cited in Manual, ibid., p. 244-245). The request was granted and the lawyer consequently ‘had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner’ (ibid.).

It has also been recognized that ‘incommunicado’ detention that lasts for weeks or even months is a particularly serious violation of the right to prepare one’s defence. However, even brief periods of incommunicado detention may have serious adverse effects on the detained person’s rights, including his right to defend himself, and, as stated by the Human Rights Committee, provisions should therefore ‘also be made against incommunicado detention’ (General Comment No. 20 on Art. 7, ibid., p. 140, para. 11, cited in Manual, ibid., p. 247-248. See also numerous cases brought against Uruguay in the 1970s and the beginning of the 1980s where this particular provision was violated, among others, and ‘common features of these cases were that the authors had been arrested and detained on suspicion of being involved in subversive or terrorist activities, held incommunicado for long periods, subjected to torture or other ill-treatment and subsequently tried and convicted by military courts’, Manual, ibid., p. 247-248, citing Communication No. R. 13/56, L. Celiberti de Casariego v. Uruguay (Views adopted on 29 July 1981), UN Doc. GAOR, A/36/40, p. 188.

The ICC Trial Chamber further states that the right to adequate time and facilities for the preparation of the defence includes an obligation for the Prosecutor to act in a timely manner to lift confidentiality agreements related to the disclosure of evidence of exculpatory materials. In this regard, late requests by the Prosecution to lift the confidentiality bans ‘should not be allowed to endanger the accused person’s right to be tried without undue delay and to adequate time and facilities for preparation’ (The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 11 November 2007, Trial Chamber I, 19, cited in Rachel Katzman, ‘The Non Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defence System Affects the Accused’s Rights to a Fair Trial’, 8 Northwestern University Journal of International Human Rights 77 2009, p. 90). The Appeals Chamber confirms this finding by opining that the suggestion of the Prosecutor of the ICC to commence proceedings notwithstanding the absence of disclosure of exculpatory evidence overlooks that the principal aim of such disclosure is to enable the accused to prepare his defense, which is guaranteed as the right of the accused by Article 67(1)(b) of the Statute (The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the Consequences of non-disclosure of exculpatory materials covered by Art. 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues, raised at the Status Conference on 10 June 2008’ ICC-01/04-01/06 OA13, 21 October 2008, Appeals Chamber, p. 35).

2.7. The Right to Communicate Freely with the Counsel of the Accused’s Choosing in Confidence


‘... communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless:

(a) The person consents in writing to such disclosure; or

(b) The person voluntarily disclosed the content of the communication to a third party, and that third party gives evidence of the disclosure’.

Additionally, Rule 81 of the Rules of Procedure and Evidence of the ICC covers confidentiality of documents created by ‘representatives’ of parties, and thus includes documents prepared by counsel, referred to as, in some legal systems, ‘attorney work product.’
The right to privileged communications between counsel and his or her client was also successfully invoked before the ICTY (ICTY, Prosecutor v. Duško Tadić, IT-94-1-T, Decision on Prosecution Motion for Production of Defence Witness Statements, (Trial Chamber II) (27 Nov. 1996), cited in MOSK & GINSBURG, ibid.) and has also been confirmed in European Union case law (1982 E. Comm. Ct. J. Rep. 1575 (Case 155/79), cited in MOSK & GINSBURG, ibid., p. 352).

This right is generally accepted as a privilege that belongs to the client and the improper disclosure of attorney-client communications by a lawyer can be subject to sanction under professional ethical rules and requirements (e.g. American Bar Association, Model Rules of Professional Conduct Rule 1(6) and Model Code of Professional Responsibility, Canon 4 (professional rules proscribing the conduct)); Standards for Imposing Lawyer Sanctions, Standard 4.21 (describing disbarment as an appropriate sanction for knowingly improper disclosure which causes injury or potential injury), cited in MOSK & GINSBURG, ibid., n. 32).

In an effort to reduce lawyer fee-splitting practices, the ad hoc Tribunals statutes and the Rome Statute have included provisions for lawyers to advise their clients about the prohibition of this practice and to report the incident to each authority’s Registrars (Art. 18(b) of the ICTY Code of Conduct and Art. 5(b) of the ICTR Code of Conduct; Rule 97(b) Rules of Procedure and Evidence of the ICTR and the ICTY; and Article 22 of the Code of Professional Conduct for Counsel of the ICC). In an effort to preserve the sanctity of solicitor-client privilege and confidentiality, Rule 22 of the Rules of Procedure and Evidence of the ICC does not go as far as placing a positive duty on counsel to report on an attempt at fee splitting by their respective clients (ABDELRAHMN AFIFI, ‘On the Scope of Professional Secret and Confidentiality: The International Criminal Court Code of Professional Conduct for Counsel and the Lawyer’s Dilemma’, 20 Leiden Journal of International Law 2007, p. 470, explaining the negotiations which led to the adoption of Rule 22 of the Rules of Procedure and Evidence of the ICC, ASP/1/3).

The jurisprudence of the ECHR shows that the professional secret between a lawyer and his client is not absolute and is subject to certain public interests. Nevertheless, in order to interfere with the client’s rights, the Court must demonstrate that such interference is ‘in accordance with law’ (26 April 1979 (Series A No 30), 2 ECHR 245, cited in Afifi, ibid., p. 473), that it ‘serves a specific legitimate aim’ (Murray v. UK, 1994, 19 ECHR 193; Z v. Finland, 1997, 25 ECHR 371, cited in Afifi, ibid.), that it not discriminatory (Morcks v. Belgium, 1979-80, 2 ECHR 330, at para. 33, cited in ibid.), and that it is ‘necessary in a democratic society’ (Sunday Times v. UK, 26 April 1979, (Series A No 30), 2 ECHR 245 at para. 65, cited in Afifi, ibid., p. 473). However, Rule 73(1) of the Rules of Procedure and Evidence of the ICC does not admit exceptions on any grounds except those listed, and thus, these ECHR theories do not constitute additional grounds for exceptions in the ICC.

2.7.1. To be tried without undue delay

ICC practice has not yet developed on the issue of a speedy trial. The case law from other tribunals and international bodies will help the ICC establish the meaning of what undue delay means and will be established on a case by case basis.

This right is included in Article 14(3)(c) ICCPR, Article 6(1) ECHR, Article 7(1)(d) ACHPR, Article 8(1) ACHR, Article 21(4) (c) of the ICTY Statute and Article 20(4) of the ICTR Statute (W. SCHOMBURG, ibid., at 13). The ACHPR does not make a detailed reference to the above mentioned right; however, Art. 6 of the ACHPR does prohibit arbitrary detention and Art. 7(1)(d) of the ACHR refers to the right to be tried within a reasonable time (ACHPR, ibid., arts. 6, 7(1)(d), 7(5) (see W. SCHOMBURG, ibid., at 13)). According to the European Court, ‘the period to be taken into account in the assessment of the length of the proceedings starts from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the subject (Kangasluoma v. Finland, 2004 ECHR 29, 26, cited in G. SLUITER, Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law, 8 Northwestern University Journal of International Human Rights 2009, p. 249 (HeinOnline), p. 249).

Article 67(1)(c) of the Rome Statute must be read jointly with Rule 101 of the Rules of Procedure and Evidence of the ICC, which provide, with regards to time limits that:
1. In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims.

2. Taking into account the rights of the accused, in particular under Article 67, paragraph (1)(c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.

Similarly, Rule 62 of the Rules and Procedure of the ad hoc Tribunals provides that ‘[u]pon transfer of an accused to the seat of the Tribunal… [t]he accused shall be brought before a Trial Chamber or a Judge thereof without delay, and shall be formally charged’ (W. SCHOMBURG, ibid., at 13, n. 7).

Furthermore, in certain situations, the right to a trial without undue delay may conflict with other rights of the accused, such as the guarantee provided in Article 67(2) of the Rome Statute according to which ‘the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’ (see explanations on Art. 67(2) of the Rome Statute below. See also W.A. SCHABAS, p. 855–856, nn. 26–27 in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court, München/Oxford/Baden-Baden, C.H. Beck/Hart/Nomos, 2008, cited in B. ELBERLING, Art. 67, in Mark Klamborg, (ed.) ILC Database & Commentary, online: <www.iclklamborg.com/Statute.htm#_ftn1065> (accessed 28 November 2011)).

2.8. Remedies

The Appeals Chamber of the ICC notes that ‘the right of any accused person to be tried without undue delay (Art. 67(1)(c) of the Rome Statute) demands that a conditional stay [due to failure of the Prosecutor to disclose exculpatory or mitigating evidence] cannot be imposed indefinitely. A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceeding’ (Prosecutor v. Thomas Lubanga Dyilo, ibid., p. 81).

Although both the ICC and the ad hoc Tribunals provide for the guarantee to be tried without undue delay, periods within which persons indicted by all three decision-making authorities can take many years (Heikelina Verrijn Stuart notes that this first case before the ICC has already gone through a record-breaking pre-trial stage of well over 800 days from Thomas Lubanga’s first appearance on 20 March 2006, whereas the ICTY took 376 pre-trial days for its first defendant, Duško Tadić (HEIKELINA VERRJIN STUART, ‘The ICC in Trouble’, Journal of International Criminal Justice 6, 2008, p. 410). See also Sluiter (p. 249, n. 4), describing that ‘the first accused at the International Criminal Tribunal for the Former Yugoslavia (ICTY), Duško Tadić, was arrested in February 1994 in Germany, for crimes related to the Omarska camp. Prosecutor v. Tadić, IT-94-1-A and IT-94-1-Abis, 2 Judgement in Sentencing Appeals, 26 January 2000. The final judgement was issued approximately six years later. ibid. It must be mentioned, however, that the period between his arrest and his first conviction was a little over three years. Prosecutor v. Tadić, IT-94-1-T, Opinion and Judgement’, 7 May 1997, Trial Chamber) and are considerably longer than before other human rights tribunals and courts. The ICTR has already confirmed that periods of approximately eight years do not amount to an undue delay (Prosecutor v. Nahimana et al., ibid., cited in G. SLUITER, ibid., p. 249). In 2008, the ICTR Trial Chamber confirmed that accused persons who suffered from eleven and twelve years of detention until their cases were decided in first instance did not suffer from a violation of their right to be tried without undue delay (Prosecutor v. Bagosora, ICTR-98-41-T, Judgment, 18 December 2008, Trial Chamber, p. 73-97. See also G. SLUITER, ibid., p. 249-250). The Trial Chamber relied on the following factors to render its decision:

(a) the length of the delay;
(b) the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law);
(c) the conduct of the parties;
(d) the conduct of the authorities involved; and
(e) the prejudice to the accused, if any.
The Human Rights Committee and the ECHR apply fact-intensive legal standards to determine the reasonableness of delays before trial (Bunkate v. Netherlands, 248-B ECHR (ser. A) 24, 30 (1993), cited in W. Schomburg, ibid., at 13). For example, the ECHR applies four criteria to the determination of a violation of Article 6(1) of the ECHR:

i) the breadth and complexity of the case,
ii) the handling of the case by state organs,
iii) the behavior of the accused, and
iv) importance of the end of the procedure to the application

(R. Kolb, The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters from 1992 to the End of 1998, 21 Human Rights Law Journal 2000, 348, 363, cited in W. Schomburg, ibid., at 13-14). The ‘use of these fact-intensive standards led to judgments that found a violation of Article 6(1) of the ECHR in proceedings that lasted five years and two months but found no violations in proceedings that lasted eight years and six months’ (W. Schomburg, ibid., at 13-14, comparing Phili v. Greece (No. 2), 1997-IV ECHR 1074, 1086 with Hozee v. Netherlands, 1998-III ECHR 1091, 1102. See also Prosecutor v. Kanyabashi, ICTR-96-15-T, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings, 23 May 23, 2000, Trial Chamber (adopting same criteria, cited in G. Sluiter, ibid., p. 250). The determination of the reasonableness of a delay will therefore clearly depend on the circumstances of the case, having regard to ‘the complexity of the case, the conduct of the accused, and the conduct of the relevant authorities (G. Sluiter, ibid., p. 250).

2.8.1. Subject to Article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it

2.9. The Right to Be Present at Trial

Before the adoption of the Rome Statute, there were major debates about trials in absentia. It was eliminated from the final statute. International norms and standards militate for the right to be present at one’s own trial (see e.g. Prosecutor v. Simić, IT-95-9/2-S, Sentencing Judgment, 17 October 2002, Trial Chamber, cited in W. Schomburg, ibid., at 15).

The right to be tried in his or her presence is provided for in Article 63(1) and subject to restrictions to Article 63(2) of the Rome Statute. It is also a right protected by Article 14(3)(d) of the ICCPR, Article 20(1)(d) of the ICTR Statute and Article 21(1)(d) of the ICTY Statute. The ECHR, ACHPR and ACHR do not however mention this right in their respective texts (W. Schomburg, ibid., at 15).

The protections offered in Articles 63 and 67(1)(d) of the Rome Statute are much higher than the draft versions of these provisions prior to their adoption. For example, the International Law Commission’s 1994 Draft Statute of the International Criminal Court stated only a preference for the accused to attend his own trial in its Article 37 which provided that, as a general rule, the accused should be present during trial’ (1994 ICC Draft Statute) (Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute of an International Criminal Court, UN GAOR, 49th Sess., Supplement No. 10, UN Doc. A/49/10 (May 2 – July 22, 1994); see also Christopher L. Blakesley, Jurisdiction, Definition of Crimes and Triggering Mechanism, in The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications, 1997, 13 Nouvelle Études Pénales 177, 213-16 (criticizing Art. 37 of the 1994 ICC Draft Statute because trials in absentia raise serious problems in com-

On a practical level, the ICTY has provided for a two-way closed circuit video-link system to ensure the presence of an accused with poor health conditions (Prosecutor v. Simić, ibid., at 15). The ICTR Appeals Chamber has also excluded the testimony of a witness given before the Trial Chamber sitting in the Netherlands while the accused participated by video-link from Tanzania because otherwise, the integrity of the proceedings would have been seriously damaged (Zigiranyirazo v. Prosecutor, ICTR 2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, Appeals Chamber, p. 24, cited in W. SCHOMBURG, ibid., at 16), emphasizing that ‘the physical presence of an accused before the court as a general rule, is one of the most basic and common precepts of a fair criminal trial’ (Zigiranyirazo v. Prosecutor, ibid., at 11, cited in W. SCHOMBURG, ibid.).

The right of an accused to be tried in his presence is not absolute, however, pursuant to Article 63(2) of the Rome Statute. In this regard, the ICTR Appeals Chamber has previously acknowledged that ‘any restriction of a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective’ (Zigiranyirazo v. Prosecutor, ibid., at 12, cited in W. SCHOMBURG, ibid., at 16). In particular, Article 63(2) of the Rome Statute provides a specific exception to the right to be present at trial in the event that he ‘continues to disrupt the trial’ (Art. 63(2) of the Rome Statute, cited in L.M. BAUM, ibid., p. 208). The same paragraph clarifies the scope of this narrow disruption exception, indicating that removal shall only be undertaken in ‘exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required’ (ibid.). On the other hand, it is clear from the General Comments that the ICCPR has a strong preference for the attendance of the defendant and that a trial should proceed without him only in exceptional circumstances (Human Rights Committee, General Comment 13/21, para. 11 (1984) (reprinted in Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 859-60 (1993), cited in L.M. BAUM, ibid., p. 207-208). The HRC has held, in this respect, that ‘[i]t is permissible to try an accused in absentia only when he was summoned in a timely manner and informed of the proceedings against him’ (Albery v. Zaire (No. 16/1977, para. 14), 21 (1977), cited in L.M. BAUM, ibid., p. 207). Contrary to the ICCPR, Article 6(3) of the ECHR provides that any person charged with a criminal offense has the right ‘to defend himself in person or through legal assistance, to be given it free when the interests of justice so require’ (ECHR, ibid., Art. 6(3)). The structure of this wording could imply that the accused does not necessarily need to be present when he is defended through legal assistance. However, the European Commission has found that the ‘notwithstanding the lack of an express right to attend one’s own hearing, the structure of Article 6 implicitly guarantees international criminal defendants the right to be present at their own proceedings’ (Colozzo and Rubinat v. Italy, 5 May 1983, para. 111 (9024/80 and 9317/81) (Op. Com. 1983) (reprinted in Council of Europe, 2 Digest of Strasbourg CaseLaw Relating to the European Convention of Human Rights 4, para. 6.3.4.1 (1984), cited in L.M. BAUM, ibid., p. 207). Furthermore, the Commission stated that ‘the right to be present at the hearing is, especially in criminal matters, a vital ingredient of the notion of a fair trial’ (Colozzo and Rubinat v. Italy, ibid., at 112, in L.M. BAUM, id, p. 207).
2.10. The Right to Self-Representation

This right has not been fully explained in ICC jurisprudence. Other international courts and bodies have, however, considered it.

The Appeals Chamber of the ICTY has considered ‘the right to self-representation [to be] an indispensable cornerstone of justice,’ and that any restrictions on the accused person’s right to represent himself must be limited to the minimum extent necessary to protect the International Tribunal’s interest in assuring a reasonably expeditious trial (Milošević v. Prosecutor, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, at 11, 17, 1 November 2004, cited in W. Schomburg, ibid., at 18). Thus, even when the accused suffers from a poor state of health, he may represent himself, as long as he is ‘physically capable of doing so’ (ibid. at 19, cited in W. Schomburg, ibid., at 18).

The Appeals Chamber of the ICTY confirmed the full and absolute right of an accused to represent himself in 2006, by reversing the decision of the Trial Chamber to appoint a ‘standby counsel’ in response to a request in this regard due to the complexity of the case and the risk that the accused might harm the International Tribunal by using the trial as a platform for political interests (Prosecutor v. Šešelj, IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, (Dec. 8, 2006) (Appeals Chamber), p. 28-30, cited in W. Schomburg, ibid. at 19-20. Some of the responsibilities of the standby counsel initially appointed by the Trial Chamber, before the Appeals Chamber reversal of decision ‘were to assist the accused in the preparation and presentation of the case whenever he requested to participate in the proceedings and to take over the defence from the accused whenever he was to be removed from the courtroom pursuant to Rule 80(B) of the ICTY Rules (ibid. p. 30). The Trial Chamber granted him access to all court documents, including confidential materials (ICTY, Prosecutor v. Šešelj, IT-03-67-PT, Decision on Prosecution’s Motion for Order of Non-Disclosure, (Mar. 13, 2003) (Trials Chamber), p. 2-3, cited in W. Schomburg, ibid., 18). In its ruling, the Appeals Chamber decided that a standby counsel should not be appointed unless the accused ‘exhibits obstructionist behaviour’ which fully satisfies the Trial Chamber that, in order to ensure a fair and expeditious trial, such appointment is necessary (ibid.). The Appeals Chamber of the ICTY has also ruled that a convicted person can represent himself on appeal (Prosecutor v. Krajišnik, IT-00-39-A, Appeal Judgment (Appeal Chamber) (17 March 2009), at 11 (Shahabuddeen, J., concurring, cited in W. Schomburg, ibid., p. 20). A dissenting opinion however argued that ‘[t]he expeditiousness and fairness of the proceedings are intertwined. Therefore, when deciding whether the right to self-representation can be limited or qualified in appellate proceedings, it must be assessed whether such a step would benefit an appellant by ensuring his fundamental right to be the subject, not the object, of a fair and expeditious appeals process. An accused cannot waive his right to fair proceedings, under whatever circumstances’ (Prosecutor v. Krajišnik, ibid., p. 68 (W. Schomburg, J., dissenting), cited in W. Schomburg, ibid.).

The ICTR on the other hand is more stringent with regards to the right to self-representation, stating that the fact that counsel is assigned, not appointed, ‘does not only entail obligations towards the client, but also implies that he represents the interest of the Tribunal to ensure that the accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings’ (Prosecutor v. Barayagwiza, ICTR-97-19-1, Decision on Defence Counsel Motion to Withdraw, Trial Chamber, 2 November 2000, p. 21, cited in W. Schomburg, ibid., p. 20-21. In a concurring opinion, Judge Gunawardana considered that Art. 20(4)(d) of the ICTR Statute also envisioned the appointment of standby counsel. ICTR Statute, Art. 20(4)(d); see also the recent report from former President of the ICTY, Patricia Wald, Tyrants at Trial: Keeping Order in the Courtroom (New York: Open Society Justice Initiative, 2009), p. 37-46, 51-58, 61-62, online: SOROS < www.soros.org/initiatives/justice/Articles_publications/publications/tyrans_20090911/tyrans_20090911.pdf>, cited in W. Schomburg, ibid.). As a result, the accused person’s ‘instructions’ not to defend him ‘should rather be seen as an attempt to obstruct judicial proceedings. In such a situation, it cannot reasonably be argued that counsel is under an obligation to follow them, and that not do so would constitute grounds for withdrawal.’ (Prosecutor v. Barayagwiza, ICTR-97-19-1, Decision on Defence Counsel Motion to Withdraw, Trial Chamber, 2 November 2000, p. 24, cited in W. Schomburg, ibid.).
Similarly, Rule 45quarter of the Rules of Evidence and Procedure of the ICTR provides that '[t]he Trial Chamber may, if it decides that it is in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused' (Cited in W. SCHOMBURG, ibid.). Given that the ICTY amended its Rules in November 2008 by repeating verbatim the wording of the ICTR’ Rules, it may be that international criminal justice tribunals are becoming more and more restrictive concerning the right of self-representation. Nonetheless, as stated above, the ICC is not necessarily bound by the treaties and jurisprudence of the ad hoc Tribunals (see fn. 8).

With regards to the application of other international human rights treaties, the terms of Article 14(3)(d) of the ICCPR stating that the accused has the right 'to defend himself or through legal assistance of his own choosing' should not be understood as a dichotomy (W. SCHOMBURG, ibid., at 17, referring to Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07, Decision on the Confirmation of Charges, Trial Chamber, 30 September 2008, p. 491, which discusses the ‘rather confusing’ use of disjunctions in international law). The ECHR has also emphasized that the right to self-representation is indeed subject to limitations and that ‘it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel, the national courts must certainly have regard to the defendant's wishes… However, they can override those wishes when there are relevant and sufficient grounds for holding that it is necessary in the interests of justice’ (Croissant v. Germany, App. No. 13611/88 (ser. A) 16 ECHR 135 (1992), at 146-147, cited in W. SCHOMBURG, ibid., at 17-18).

2.11. The Right to Be Represented by Counsel of the Accused’s Choosing and to Be Informed of this Right

The right of any accused person to be assisted by counsel is ‘paramount to the concept of due process’ (BASSIOUNI, ibid., p. 614, cited in W. SCHOMBURG, ibid., at 16. See also Art. 93 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the Committee of Ministers of the Council of Europe by resolution (73)5 on 19 January 1973, cited in Eur. Court HR, Case of S. v. Switzerland, ibid., at 15, para. 48, cited in MANUAL, ibid., p. 238-239). According to the European Court, the purpose of this right is to guarantee that proceedings against an accused ‘will not take place without an adequate representation of the case for the defence’ (ibid., citing ECHR, Pakelli v. FRG, Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, Vol. 53, Com. Rep. (1983), para. 84, p. 26). It is also to ensure that the accused is in a position to put his case in such a way that he is not at a disadvantage vis-à-vis the prosecution, thereby ensuring ‘equality of arms’ (ibid., ECHR, X. v. FRG, No. 10098/82, 8 EHRR 1984, p. 225). The provisions of Article 6(1)(d) concerning the right to counsel of one’s choosing are modeled on Articles 14 (3) (b) and (d) of the ICCPR, while international human rights treaties only grant the right to counsel at the trial stage. The Rome Statute, guarantees this right during the investigation phase of the proceedings as well, as stated in Article 55(2) (W.A. SCHABAS AND F. LATTANZI, Essays on the Rome Statute of the International Criminal Court, (Rome: Editrice il Sirente, 2000), p. 263; see also L.M. BAUM, ibid., p. 213).

When an accused person who does not wish to represent himself and wishes the assistance of counsel but is not (yet or anymore) represented by permanent counsel, the court may decide to assign the accused a duty counsel to represent him in the meantime (The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-870, Appointment of Duty Counsel, Trial Chamber, 19 April 2007) as prescribed by Regulation 73 or requests the Office of Public Counsel for the Defence (OPCD) to do so. This option should, however, only be used sparingly to avoid possible conflicts of interest within the OPCD (Prosecutor v. Katanga, ICC-01 /04-01 /06-823-T, Decision on the appointment of a duty counsel, Trial Chamber, 5 November 2007, p. 3).

It is important to note here that the right to counsel of the accused’s choosing is not unlimited before the ICC. It is subject to Rule 22(1) of the Rules of Procedure and Evidence, which state the following:

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, Prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel
for the defence may be assisted by other persons, including professors of law, with relevant expertise.

2. Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.

3. In the performance of their duties, Counsel for the defence shall be subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for Counsel adopted in accordance with rule 8 and any other document adopted by the Court that may be relevant to the performance of their duties (W.A. Schabas & F. Lattanzi, ibid., p. 264).

Legal counsel for the accused are also bound by the Regulations of the Court (ICC-BD/01-01-04, adopted by the judges of the Court on May 26, 2004), pursuant to Rule 22(3) of the Rules of Procedure and Evidence of the ICC. This includes the obligation for counsel to have ten years of necessary relevant experience in criminal proceedings, as described in Rule 22 of the Rules of Procedure and Evidence, cited above, while not having been convicted of a serious criminal or disciplinary offence, pursuant to Regulation 67 (Regulation 67, ibid.).

In certain circumstances, if an accused chooses a counsel who is not available at dates set for proceedings or who becomes unavailable due to illness, the Court may impose limits on the right to counsel, as occurred in a situation before the ICTY (Prosecutor v. Kupreskic, IT-95-16-T, Scheduling Order, (Trial Chamber (Nov. 24, 1998)).

An accused is also entitled to be informed of his or her right to counsel. The Rules of Procedure and Evidence require that questioning of suspects be recorded by video or audio equipment, which in turn will enable verification of whether the right to be informed was properly complied with (W.A. Schabas & F. Lattanzi, ibid., p. 264). Furthermore, any waiver to the right to counsel should be noted in writing, and, where possible, in audio or video recording, pursuant to Rule 112 of the Rules of Procedure and Evidence of the ICC (ibid.).

In addition, pursuant to Regulation 73(2) of the Regulations of the ICC, ‘if any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by counsel’ (Regulation 73(2), cited in Prosecutor v. Katanga, ICC-01/04-01/06-823-T, Decision on the appointment of a duty counsel, Trial Chamber, 5 November 2007, p. 3). Consistently, and ‘in the interests of justice’, the ICC accepted to appoint a duty counsel, in consultation with the accused, until the latter exercised his right to choose a counsel under Article 67(1)(d) of the Rome Statute, in order to ensure the accused’s representation during the disclosure of potential exculpatory or incriminating evidence by the Prosecutor to the defence pursuant to Article 67(2) of the Rome Statute (ibid.).

2.12. The Right to Have Legal Assistance Assigned by the Court in any Case Where the Interests of Justice so Require and Without Payment if the Accused Lacks Sufficient Means to Pay for it

The right to free legal assistance for the accused when he or she lacks sufficient means to pay for it is recognized in other international human rights treaties, including Article 6(3)(c) ECHR, Article 7(1)(c) ACHR, Article 8(2)(d) ACHR, Article 21(1)(d) ICTY Statute and Article 20(1)(d) ICTR Statute (cited in W. Schomburg, ibid., at 16 (see also Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (United Nations Compilation of General Comments, ibid., p. 140, para. 11) and Paragraph 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, ibid., cited in Manual, ibid., p. 235-236; and L.M. Baun, ibid., p. 213).

According to the ICC, the right to legal assistance is inherent to the guarantee of a fair trial (Prosecutor v. Lubanga, Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, Trial Chamber, 30 August 2011, p. 53-54).

An important decision by the United States Supreme Court summarizes the importance of the right to legal representation by observing that the ‘right to be heard would be, in many cases, of
little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he [may] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence’ \(^{(1)}\)


The scope of the right to legal assistance paid by the Court is described in Regulation 83 of the ICC, which states the following:

1. Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.

3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.

4. Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance (Regulation 83 of the ICC, *ibid.*,).

The Regulations of the Registry of the Court provide additional guidance (ICC-BD/03-01-06). Regulation 130 of the Regulations of the Registry provides that the Registrar ‘shall manage the legal assistance paid by the Court with due respect to confidentiality and the professional independence of counsel’.

Regulation 133 further provides that ‘[t]he fees paid to counsel shall consist of a scheme of payment based on a fixed fee system comprising a maximum allocation of funds for each phase of the proceedings, including, where applicable, fees for assistants to counsel as referred to in regulation 68 of the Regulations of the Court and for professional investigators as referred to in regulation’ (Regulation 135 of the Regulations of the Registry of the ICC, *ibid.*, indicates that in case of disputes relating to fees, the Regulations provide that the Registrar shall take a decision concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly. Within 15 days of notification, counsel may request the Chamber to review any decision taken by the Registrar).

The ICC has recognized the duty of the Registrar, in accordance with Article 20 of the Rules of Procedure and Evidence, to promote the rights of the defence and its responsibility to the States Parties to ensure that the resources earmarked for the legal assistance scheme of the Court are used responsibly and judiciously (*Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Registration in the record of the case of the ‘Registrar’s Decision on the additional means for the trial phase sought by Mr Thomas Lubanga in his ‘Application for additional means under regulation 83(3) of the Regulations of the Court’ filed on 3 May 2007’ (Trial Chamber) (14 June 2007)). Taking these considerations into account, the ICC Trial Chamber allowed an additional budget for the defence team to enable them to conduct investigations, as well as the addition of a Legal Assistant and a Legal Advisor to the team (*ibid.*,). The ICC Trial Chamber has also recognized, in a separate decision, that the overarching consideration when deciding to offer legal assistance is the accused person’s right to a fair trial (*Prosecutor v. Thomas Lubanga Dyilo*, Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800 (30 August 2011) www.icc-cpi.int/iccdocs/doc/doc1212574.pdf, p. 53). Decisions on allocation of resources are also case specific (*ibid.*, p. 55).

Moreover, the ICC has confirmed that ‘[w]ithout prejudice to the rights of the accused during any appellate stage, at least until the end of the trial (...), he is protected by Article 67 of the Statute, and his rights thereunder should not be undermined simply because a particular stage of the trial proceedings (such as the presentation of evidence or the closing statements) has concluded’ (*Prosecutor v. Thomas Lubanga Dyilo*, *ibid.*, p. 48). The Trial Chamber of the ICC defines the ‘Trial’ as the
period which ‘commences with the assignment of the case for trial to a Trial Chamber pursuant to Article 64(3) of the Statute, and it ends with the sentence that is imposed if the accused is convicted (Art. 76 of the Statute) and any award of reparations (Art. 75 of the Statute)’ (ibid. p. 45).

Other human rights decision-making authorities have recognized that the right of access to legal assistance must be effectively available (Communication No. R.2/8, B. Weissmann Lanza v. Uruguay (Views adopted on 3 April 1980), in UN Doc. GAOR, A/35/40, p. 118, para. 16; and Communication No. R.1/6, M.A. Millan Sequeira v. Uruguay (Views adopted on 29 July 1980), p. 131, para. 16, cited in Manual, ibid., p. 237. See also UN Human Rights Committee Communications: Kelly v. Jamaica, ibid., Little v. Jamaica (No. 283/1988), Berry v. Jamaica (No. 330/1988) and Wright v. Jamaica, ibid., cited in Wladimiroff, ibid., p. 965). The Human Rights Commission decided, for example, that this provision was violated where the person concerned did not have access to any legal assistance at all during the first ten months of his detention and, in addition, was not tried in his presence (Communication No. R.7/28, L. Weinberger v. Uruguay (Views adopted on 29 October 1980), in UN Doc. GAOR, A/36/40, p. 119, para. 16, cited in Manual, ibid., p. 237).

Similarly to the ICCPR and the ECHR, the right to funded counsel for indigent accused under Article 67(1)(d) of the Rome Statute is subject to the requirement that this should apply in cases where the ‘interests of justice’ so require (W.A. Schabas & F. Lattanzii, ibid., p. 264, L.M. Baum, ibid., p. 213). In fact, previous drafts of Article 67(1)(d) removed this condition and then re-introduced it before the Preparatory Committee for the ICC (‘Decisions Taken by the Preparatory Committee at its Session Held 4 to 15 August 1997’, cited in W.A. Schabas, ibid.). The main question before the ad hoc Tribunals has been whether accused persons have the right to free legal assistance, but rather, if they continue to have the right to choose their legal representatives when they are granted legal aid.

The ICTR decided for example, in 2001, that the right to choose one’s own counsel is not an ‘unfettered right’ and that both the final decision for the assignment of counsel and that of the choice of such counsel should rest with the Registrar (ICTR, Prosecutor v. Elizephane Ntakirutimana and Gerard Ntakirutimana, ICTR-96-17-T, Decision on the Motion for the Defence for the Assignment of Co-Counsel for Elizephane Ntakirutimana, Trial Chamber I, 13 July 2001 at 12 cited in R. Hatebly, O. Kavan, and J. Nicholls, Supranational Criminal Law: A System Sui Generis, Oxford/New York, Intersentia, 2003, p. 226; and Wladimiroff, ibid., p. 961), even if the practice of the tribunal had been to offer the possibility for the accused to designate a counsel of his or her own choice from the list drawn up by the Registrar for this purpose, pursuant to Rule 45 of the Rules of Procedure and Evidence of the ICTR and Article 13 of the Directive (ibid.). It was also acknowledged that the Registrar would normally assign counsel chosen by the accused, unless it had reasonable and valid grounds not to grant the request of the accused (ibid.). In a subsequent decision, the ICTR added that ‘the Registrar should also take the resources of the Tribunal, competence and recognized experience of counsel, geographical distribution and a balance of principal legal systems of the world into consideration’, when assigning a counsel to the accused (Prosecutor v. Pauline Nyaramgabehiko & Aisène Shalom Ntahobali, ICTR-97-21-T, Requête d’extrême urgence de la défense en exception préjudicielle fondée sur le rejet d’une demande de commission d’office (ibid.) (ibid.)).

The ICTY Trial Chamber has been less rigid than that of the Arusha-based tribunal (ICTR) and has supported the practice of the Registry to permit the accused to select any available counsel from the list that it maintained, provided that such counsel met the necessary criteria. The Court under-