Representing the “General Interests of the Defence”: Boon or Bane? – A Stocktaking of the System of ad hoc Counsel at the ICC

Jens Dieckmann*, **
Attorney at Law; Senior Partner, Becher & Dieckmann Rechtsanwälte, Bonn, Germany

Christina Kerll*, ***
Attorney at Law, Göttingen, Germany

Abstract
This article seeks to assess the impact of the system of ad hoc counsel on the fairness of proceedings before the International Criminal Court. The authors begin by outlining the legal framework governing the appointment of ad hoc counsel, and then consider in greater detail the various investigative and pre-trial stages in which ad hoc counsel have been appointed. The authors further seek to identify the various issues which have arisen as a result of individual ad hoc counsel’s conduct before the Court. Finally, they consider what impact the system of ad hoc counsel can have upon the fairness of subsequent trial proceedings, and what future developments in the system could promote the fairness of the overall proceedings before the Court.

Keywords
ad hoc counsel; defence counsel; general interests of the defence; interest of justice; OPCD; Code of Professional Conduct for counsel; ethical mechanism; International Criminal Court (ICC)

1. Introduction

Prior to the establishment of the permanent International Criminal Court (“the ICC” or “the Court”) in 2002, the participation of criminal lawyers in proceedings at international criminal tribunals and hybrid courts was limited to two different functions. Either, they were appointed as defence counsel to represent
identified persons suspected or accused of a crime within the jurisdiction of the particular court, or they were appointed as amicus curiae to assist, as required, in the proper determination of a particular case. The governing documents of the ICC created a revolutionary new framework of legal representatives, not only providing specific mechanisms for the representation of victims and witnesses, and for interventions on certain matters by counsel acting for States, but also providing for a new type of defence counsel appointed to represent the general interests of the defence at a stage in proceedings where no suspect has yet been identified or charged by the Court, or the suspect remains at large. This last category, the so-called “ad hoc counsel”, are predicted by the Court to promote the overall fairness of proceedings before the Court, and since the first appointment of an ad hoc defence counsel in April 2005, the Pre-Trial Chambers of the ICC have appointed several ad hoc counsel in a variety of investigative and pre-trial proceedings. However, in their daily practice these counsels have experienced uncertainty in exercising their individual mandates, and defining their consequent rights and duties. This is due to a combination of the rudimentary nature of the provisions relating to ad hoc counsel in the governing documents of the ICC, the lack of precedents relating to the exercise of their functions, and the potentially ambiguous formulations employed by the Chambers when appointing ad hoc counsel for the defence.

This article aims to review and assess the progress made at the ICC in developing the system of ad hoc counsel since its inception, and the impact it has had upon the fairness of proceedings before the Court. The article begins in Section 2 by summarising the legal framework governing representation by defence counsel at the Court. Section 3 addresses the appointment of ad hoc counsel at the situation stage of proceedings, identifying the different purposes for individual appointments and the major issues resulting from the conduct of the respective ad hoc counsel. Section 4 focuses on ad hoc counsel appointed at the case stage; in particular, the admissibility proceedings connected to the Kony et al. case will be examined in detail to illustrate the practical and ethical issues which ad hoc counsel are currently prone to face during their respective appointments. Finally, Section 5 considers the limits encountered in the system of ad hoc counsel within the context of the wider framework of defence representation at the ICC, their impact upon the fairness of proceedings, and whether greater fairness could be achieved by further developments in this area. This part also addresses the possibility of establishing a dedicated ethical mechanism for all counsel appearing at the ICC, and how this could promote the fairness of proceedings before the Court.

2. The Legal Framework of Representation by Defence Counsel at the ICC

One of the foundational principles of any legitimate system of criminal justice is that any individual accused of criminal conduct is entitled to a fair trial. Indeed, the ICC Appeals Chamber noted in *The Prosecutor v. Thomas Lubanga Dyilo* that “[a] fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.” Central to the fair trial guarantee is the concept of equality of arms. This requires that in criminal proceedings the defence shall never be placed at a “substantial disadvantage” relative to the prosecution, in terms of its ability to present its case. As in any other court of law, defence counsels at the ICC strive to uphold this equality of arms between the prosecution and defence, thereby ensuring the overall fairness of the proceedings. The basic texts governing the structures and procedures of the ICC provide a clear and comprehensive framework for the provision and responsibilities of defence counsel representing individuals appearing before the Court.

2.1. Defence Counsel under Articles 55(2)(c) and 67(1)(d) of the Statute

Article 55(2)(c) of the Statute guarantees to all persons who are under investigation by the Prosecutor and who are to be questioned the right “to have legal assistance of the person’s choosing, or … to have legal assistance assigned to him or her, in any case where the interests of justice so require”. Furthermore, Rule 117(2) of the Rules of Procedure and Evidence provide that “[a]t any time after arrest, the person may make a request to the Pre-Trial Chamber for the appointment of counsel to assist with proceedings before the Court”. It follows that the right to legal representation is not limited to the questioning stage but can be exercised by an individual throughout all procedural stages following arrest.

Once a person has been charged with a particular crime or crimes within the jurisdiction of the Court, and his or her status consequently shifts from that of a suspect to an accused, they possess the right under Article 67(1)(d) of the Statute

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2) *Prosecutor v. Thomas Lubanga Dyilo*, 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, 14 December 2006, ICC-01/04-01/06-772, para. 37.


5) Emphasis added.

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.

Detailed provisions relating to the assignment of legal assistance and the appointment and qualifications of defence counsel, including conditions for the performance of their duties, can be found in Rules 20-22 of the Rules of Procedure and Evidence and Regulations 74-76 of the Regulations of the Court. In particular, Regulation 74(1) provides that

[d]efence counsel shall act in proceedings before the Court either when chosen by the person entitled to legal assistance in accordance with Rule 21, sub-rule 2, or when the Chamber has appointed counsel in accordance with the Statute, Rules or these Regulations.

Rule 21(2) provides that individuals who opt for legal assistance can choose counsel from the list of counsel maintained by the Registry, or can nominate any “other counsel who meets the required criteria and is willing to be included in the list”. In the former situation, provided the chosen list counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel;7 in the latter, the Registrar must first decide on the eligibility of the nominated counsel and include him or her on the list before issuing a power of attorney, and pending this the individual is entitled to be represented by duty counsel as required and in accordance with Regulation 73 of the Regulations of the Court.8

As a general rule, any person entitled to legal assistance shall, when represented by defence counsel, act before the Court through his or her counsel.9 In the exercise of their duties, defence counsel are subject to the Statute, the Rules, the Regulations, the Code of Professional Conduct for counsel (“the Code of Conduct”) and “any other document adopted by the Court that may be relevant to the performance of their duties”.10 The rules and principles governing representation by counsel are set out in Chapter 2 of the Code of Conduct. For instance, Article 14(2) of the Code provides that, when representing a client,11 counsel shall

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7) Regulations of the Court, Reg. 75(1).
8) Ibid., Reg. 75(2). Regulation 73(2) reads as follows: “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, the counsel.”
9) Ibid., Reg. 74(2).
10) Rules of Procedure and Evidence, Rule 22(3).
11) “‘Client’ refers to all those assisted or represented by counsel”: Code of Professional Conduct for counsel, Article 2(2).
(a) Abide by the client’s decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel’s duties under the Statute, the Rules of Procedure and Evidence, and this Code; and

(b) Consult the client on the means by which the objectives of his or her representation are to be pursued.

Counsel has a duty to give the client “all explanations reasonably needed to make informed decisions regarding his or her representation.” Moreover, while exercising his or her mandate, counsel must ensure that no conflict of interest arises; where such conflict arises, Article 16(3) of the Code provides that he or she shall at once inform all potentially affected clients of the existence of the conflict and either:

(a) Withdraw from the representation of one or more clients with the prior consent of the Chamber; or

(b) Seek the full and informed consent in writing of all potentially affected clients to continue representation.

2.2. Ad hoc Counsel under Article 56(2)(d) of the Statute and Regulation 76(1) of the Regulations of the Court

However, not only do the governing documents of the ICC provide for the assignment of defence counsel to individuals, but they also empower the Pre-Trial Chambers to appoint counsel to represent the general interests of the defence in proceedings where no suspect has yet been identified or charged by the Court. The need for such representation is a consequence of the ICC’s unique and novel jurisdiction not only over individual cases, but also over so-called ‘situations’. As has been noted by Pre-Trial Chamber I, situations are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.”

With its ability to appoint so-called ‘ad hoc counsel’ to represent the general interests of the defence from as early as the investigative stages in a situation, the ICC endeavours to ensure equality of arms throughout the proceedings under its jurisdiction, and ultimately to protect the fairness of any resulting cases against individuals.

The Statute only directly empowers the Pre-Trial Chamber to appoint ad hoc counsel in one specific set of proceedings, namely those concerned with a ‘unique
investigative opportunity’. Where the Prosecutor considers an investigation to present a unique opportunity to examine, collect or test evidence, which may not be available subsequently for the purposes of the trial, the Pre-Trial Chamber may take measures “to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.”\(^{14}\) Pursuant to Article 56(2)(d) of the Statute, such measures may include:

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\text{[a]uthorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence.} \quad \text{(emphasis added)}
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A similar provision is found in Rule 47(2) of the Rules of Procedure and Evidence, which concerns testimony under Article 15(2) of the Statute i.e. information from reliable sources sought by the Prosecutor for the purpose of determining whether there is a reasonable basis to proceed with an investigation. Again, if the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, Rule 47(2) empowers the Pre-Trial Chamber to appoint a counsel to be present during the taking of the testimony in order to protect the rights of the defence. It should be noted that Regulation 77(4) of the Regulations of the Court particularly entrusts the Office of Public Counsel for the Defence ("OPCD") with protecting the rights of the defence for the application of Article 56(2)(d) and Rule 47(2).

To date, there has only been one occasion where a Pre-Trial Chamber has appointed an ad hoc counsel to represent the interests of the defence pursuant to Article 56 of the Statute;\(^{15}\) the vast majority of ad hoc defence counsel acting in a situation and/or a case have instead been appointed under the general power provided by Regulation 76(1) of the Regulations of the Court, whereby

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\text{[a] Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require.} \quad \text{(emphasis added)}
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Whilst incorporated in the Regulations of the Court under the section heading “Defence through Counsel”, the wording of Regulation 76(1) suggests that it applies equally to the situation stage as to the case stage of proceedings before the

\(^{14}\) Rome Statute of the International Criminal Court, Article 56(1)(b).  
\(^{15}\) See 3.1.1. below.
Court.\textsuperscript{16} Counsel may not only be appointed from the list of counsel, but also from the OPCD.\textsuperscript{17}

As will be discussed later in this article,\textsuperscript{18} there has been some confusion over to what extent, if any, \textit{ad hoc} counsel are bound by the Code of Conduct in the performance of their mandate. As the Code fails to explicitly provide for its applicability to the duties and practice of \textit{ad hoc} counsel,\textsuperscript{19} the ongoing uncertainty has been a source of major insecurity to appointed \textit{ad hoc} counsel in the performance of their duties. This dilemma is not experienced by counsel acting for the OPCD, as Regulation 144(2) of the Regulations of the Registry explicitly binds members of the OPCD to the Code of Conduct in the discharge of their responsibilities.

3. Appointments of \textit{ad hoc} Counsel in a Situation

In practice, the Pre-Trial Chambers and the Registry have appointed \textit{ad hoc} counsel at the situation and case stage in proceedings; occasionally, \textit{ad hoc} counsel have been assigned in a situation and a case \textit{simultaneously}. This section looks at those situations when \textit{ad hoc} counsel have been appointed to deal with specifically situation-related matters (whether or not that counsel is concurrently assigned in a case) and provides a thematic overview of issues raised by their involvement. The specific case-related challenges encountered by \textit{ad hoc} counsel will be discussed in Section 4.

3.1. Purpose of Appointments

3.1.1. Collection of Evidence: Article 56 of the Statute

\textit{Ad hoc} counsel was appointed for the first time at the ICC in connection with the situation in the Democratic Republic of Congo (“the DRC”). The appointment procedure was triggered by the Prosecutor’s request to Pre-Trial Chamber I (“PTC I”) for the adoption of specific measures under Article 56 of the Statute in relation to a “unique investigative opportunity to carry out forensic examinations”.\textsuperscript{20}


\textsuperscript{17} Regulations of the Court, Reg. 76(2).

\textsuperscript{18} See 4.3. below.

\textsuperscript{19} Article 1 of the Code of Professional Conduct for counsel states that the Code shall apply to “defence counsel, counsel acting for States, \textit{amici curiae} and counsel or legal representatives for victims and witnesses practising at the International Criminal Court”.

\textsuperscript{20} Situation in the Democratic Republic of Congo, Decision on the Prosecutor’s request for Measures under Article 56, ICC-01/04-21, Pre-Trial Chamber I, 26 April 2005, p. 2 (summarising the Prosecutor’s request filed on 19 April 2005).
In its decision, issued on 26 April 2005, PTC I granted this request and, acting in accordance with Articles 56(1)(b) and 56(2) of the Statute, ordered the Registrar to “appoint ad hoc counsel to represent the general interests of the defence for the purpose of the forensic examinations”, given the likelihood that the items subject to these examinations would not be available at subsequent stages of the proceedings.\(^{21}\) The Registrar subsequently appointed an ad hoc counsel on 1 August 2005.\(^{22}\)

3.1.2. Responding to Victims’ Applications for Participation in the Proceedings: Rule 89(1) of the Rules of Procedure and Evidence

Even before this ad hoc counsel was officially appointed by the Registrar on 1 August 2005, PTC I ordered the appointment of another ad hoc counsel for the defence in the same situation, this time for the purpose of responding to the applications of six victims under Rule 89(1) of the Rules of Procedure and Evidence to participate at the investigation stage of the proceedings.\(^{23}\) Rule 89(1) dictates that copies of the written applications for participation submitted to the Registrar by victims shall be provided to both the Prosecutor and the defence who, in turn, are entitled to reply to these applications within a time-limit set by the Chamber. This provision does not explicitly empower the Chamber to appoint ad hoc counsel where victims have applied to participate during the situation stage of proceedings; however, Chambers have used their power to appoint ad hoc counsel pursuant to Regulation 76(1) of the Regulations of the Court.\(^{24}\) Accordingly, by its decision of 21 July 2005 PTC I appointed ad hoc counsel pursuant to Regulation 76(1), in order to “represent and protect the interests of the defence during the application proceedings provided for in Rule 89 of the Rules” in relation to the applications of the six victims.\(^{25}\) In May 2006, at a stage when investigations into the DRC situation had resulted in the arrest and charge of Thomas Lubanga Dyilo and the assignment of a defence counsel,\(^{26}\) an ad hoc counsel was appointed by PTC I for the purpose of responding to three further victims’ applications under Rule 89.\(^{27}\) The latter was similarly appointed by PTC

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21) Ibid., pp. 3-4.
22) Situation in the Democratic Republic of Congo, Appointment of Mr. Tjarda Van der Spoel as Ad Hoc Counsel for the Defence Pursuant to the Decision of Pre-Trial Chamber I Dated 26 April 2005, ICC-01/04-76, Registry, 1 August 2005.
23) Situation in the Democratic Republic of Congo, Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, ICC-01/04-73, Pre-Trial Chamber I, 21 July 2005, p. 4.
24) See 2.2. supra.
25) ICC-01/04-73, supra note 23, pp. 4-5.
27) Situation in the Democratic Republic of Congo, Decision Appointing Ad Hoc Counsel and Establishing a Deadline for the Prosecution and the Ad Hoc Counsel to Submit Observations on the Applications of Applicants a/0001/06 to a/0003/06, ICC-01/04-147, Pre-Trial Chamber I, 18 May 2006, p. 4.
I to file observations to two other sets of applications in the DRC situation in September 2006.\textsuperscript{28}

However, the practice of appointing individual list counsel as \textit{ad hoc} counsel for the purpose of responding to victims’ applications to participate at the investigation stage of the DRC situation was seemingly discontinued by PTC I in 2007. In a decision of 23 May 2007, in which reference was made to its particular duties under Regulation 77(4) of the Regulations of the Court, the OPCD was invited “to present observations on the applications for participation and on the possibility of granting the applicants the status of victims authorised to participate in the proceedings before the Chamber at the investigation stage”.\textsuperscript{29} It should be noted that in two decisions issued in the Darfur (Sudan) situation around the same period PTC I similarly assigned the task to reply to victims’ applications to participate in the investigative stage to the OPCD in accordance with Regulation 77(4).\textsuperscript{30} Again in the DRC situation, following two decisions in the case of \textit{The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui}, in which PTC I denied the procedural status of ‘victim of the case’ to eight applicants,\textsuperscript{31} the OPCD was invited by the Chamber to submit observations on whether these applicants “may be granted the procedural status of victim at the stage of the investigation in the situation of the DRC”.\textsuperscript{32}

\textsuperscript{28} \textit{Situation in the Democratic Republic of Congo}, Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06, ICC-01/04-228, Pre-Trial Chamber I, 22 September 2006, p. 7; \textit{Situation in the Democratic Republic of Congo}, Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06, ICC-01/04-241, Pre-Trial Chamber I, 29 September 2006, p. 6.

\textsuperscript{29} \textit{Situation in the Democratic Republic of Congo}, Decision Authorising the Filing of Observations on Application for Participation in the Proceedings, ICC-01/04-329-tEN, Pre-Trial Chamber I, 23 May 2007, p. 4. On 24 August 2007, in a subsequent order dealing, in part, with those same applications, PTC I authorised the OPCD to respond to further information requested and received by the Registrar pursuant to Regulation 86(4); see \textit{Situation in the Democratic Republic of Congo}, Order Concerning the Transmission of Further Information on Victims’ Applications, ICC-01/04-376, Pre-Trial Chamber I, 24 August 2007, p. 6.

\textsuperscript{30} \textit{Situation in Darfur, Sudan}, Decision Authorizing the Filing of Observations on Applications for Participation in the Proceedings a/0011/06 to a/0015/06, ICC-02-05-73, Pre-Trial Chamber I, 23 May 2007, p. 3; \textit{Situation in Darfur, Sudan}, Decision Authorizing the Filing of Observation on Applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for Participation in the Proceedings, ICC-02-05-85, Pre-Trial Chamber I, 23 July 2007, pp. 3-4.

\textsuperscript{31} \textit{Situation in the Democratic Republic of Congo, In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui}, Decision on the applications for Participation in the Proceedings a/0327/07 to a/0337/07 and a/0001/08, ICC-01-04-01/07-357, Pre-Trial Chamber I, 2 April 2008; \textit{Situation in the Democratic Republic of Congo, In the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui}, Public Redacted Version of the “Decision on the 97 Applications for the Participation at the Pre-Trial Stage of the Case”, ICC-01-04-01/07-579, Pre-Trial Chamber I, 10 June 2008 (rectified by PTC’s Decision dated 13 June 2008, ICC-01-04-01/07-589).

\textsuperscript{32} \textit{Situation in the Democratic Republic of Congo}, Decision Authorizing the Submission of Observations Pursuant to Rule 89(1) of the Rules on Applications a/0332/07, a/0334/07
When these decisions were issued, no reasons were given by PTC I as to why it had seemingly abandoned its earlier practice of appointing list counsel as *ad hoc* counsel for the purpose of responding to victims’ applications under Rule 89(1), in favour of entrusting this duty to the OPCD. However, on 17 August 2007, in a landmark decision concerning the victims’ application procedure in the DRC situation, PTC I clearly found that “in light of the Court’s jurisprudence … at the situation stage, unredacted copies of [victims’] Applications will continue to be provided to the OPCD”, and further ordered the Registrar to notify applications at the situation stage to the Prosecutor and the OPCD. The effect of this decision was to give the OPCD automatic and permanent standing to respond to victims’ applications at the situation. The reason indicated by PTC I in this decision as to why it had previously appointed *ad hoc* counsel to perform a duty which it now apparently regarded to be solely the responsibility of the OPCD was because when the *ad hoc* counsel was appointed in 2005 the OPCD had not yet become fully functional. The decision of 17 August 2007 was quickly adopted by PTC I in relation to the Darfur situation, thereby extending the OPCD’s standing to all victims’ applications in this situation also.

Despite the full functionality of the OPCD, and the decision of PTC I on 17 August 2007, Pre-Trial Chamber II (“PTC II”) has opted to appoint list counsel as *ad hoc* counsel pursuant to Regulation 76(1) simultaneously in the situation in Uganda and the case of *The Prosecutor v. Joseph Kony et al.* In three instances, two *ad hoc* counsel were entrusted “with representing and protecting the interests of the defence within the context and for the purposes of the proceedings” in different sets of victims’ applications for participation under Rule 89(1). But to date,  

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53) *Situation in the Democratic Republic of Congo*, Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation, ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, para. 29 (emphasis added).


56) *Situation in Darfur, Sudan*, Decision on the Requests of the OPCD and the Legal Representatives of the Applicants Regarding the Transmission of the Report of the Registry under Rule 89 of the Rules of Evidence and Procedure, ICC-02/05-93, Pre-Trial Chamber I, 21 August 2007, p. 3.

57) *Situation in Uganda, In the Case of The Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwuja, Dominic Ongwen*, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, Pre-Trial Chamber II, 1 February 2007, p. 19. *Situation in Uganda*, Decision on legal representation, appointment of counsel for the defence, criteria for
no reasons have been provided by PTC II as to why it has favoured individual counsel over the OPCD.

In summary, while the continuous standing of the OPCD concerning victims’ applications has seemingly been recognised by PTC I in the DRC and Darfur situations, this does not appear to reflect the position taken by PTC II, which has continued to appoint individual *ad hoc* counsel in the Uganda situation and the *Kony et al.* case. It remains to be seen whether the Pre-Trial Chambers develop a coherent jurisprudence on this issue in the future.

3.1.3. **Responding to Amicus Curiae Briefs: Rule 103(2) of the Rules of Procedure and Evidence**

So far, the only appointment of *ad hoc* counsel for the purpose of responding to *amicus curiae* briefs has occurred in the context of the Darfur situation. In a decision dated 24 July 2006, PTC I invited Louise Arbour and Antonio Cassese “to submit in writing their observations on issues concerning the protection of victims and the preservation of evidence in Darfur” pursuant to Rule 103(1) of the Rules of Procedure and Evidence, in their respective capacities as High Commissioner of the Office of the United Nations High Commissioner for Human Rights and Chairperson of the International Commission of Inquiry on Darfur. These invitations, in turn, brought into play Rule 103(2), which provides that “[t]he Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1”. Accordingly, PTC I ordered the Registrar “to appoint an *ad hoc* counsel to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan during the proceedings pursuant to Rule 103”.

38) *Situation in Darfur, Sudan*, Decision Inviting Observations in Application of Rule103 of the Rules of Procedure and Evidence, ICC-02/05-10, Pre-Trial Chamber I, 24 July 2006, p. 5. Rule 103(1) reads: “At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”

39) ICC-02/05-10, *supra* note 38, p. 6. An *ad hoc* counsel was officially appointed by the Registrar on 25 August 2006, *see Situation in Darfur, Sudan*, Decision of the Registrar Appointing Mr. Hadi Shalluf as *ad hoc* Counsel for the Defence, ICC-02/05-12, Registry, 25 August 2006, p. 3.
3.1.4. Submitting Observations on a Notification by the Board of Directors of the Trust Fund for Victims: Regulation 50 of the Regulations of the Trust Fund

In the Uganda situation, PTC II was notified by the Board of Directors of the Trust Fund for Victims on 28 January 2008 of the Board’s intention to undertake specific activities in the territory of Northern Uganda for the benefit of victims in accordance with regulation 50 of the Regulations of the Trust Fund for Victims. Regulation 50(a) states that the Trust Fund may seize itself of specific activities necessary for the benefit of victims, namely to provide physical or psychological rehabilitation or material support, if the Board has formally notified the Court of its conclusion to undertake such activities and

the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Given that the Board filed its notification in the record of the situation in Uganda when there existed neither a defence team entitled to respond nor any ad hoc counsel appointed for the purpose of responding to the notification, the OPCD filed a request for authorisation to submit observations concerning whether the specified activities envisaged by the Trust Fund would pre-determine any issue to be determined by the Court. The OPCD argued, in particular, that it would be in the interest of justice if, prior to responding to the Board of Directors, the Chamber considered “observations from the parties in relation to the impact of the proposed activities on the predetermination of any issues before the Court, the fairness and impartiality of the proceedings, and the rights of the Defence.”

By its decision dated 5 March 2008, PTC II permitted the OPCD to file observations on the Board’s notification. The Chamber held that “the general component of fairness, which extends to the pre-trial proceedings, requires those concerned by the Notification to be accorded equal procedural treatment.” Following its finding that the activities proposed by the Board of Director “might

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40) Situation of Uganda, Request for Leave to file Observations in relation to the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, ICC-02/04-115, OPCD, 6 February 2008, para. 3.
41) Situation in Uganda, Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-120, Pre-Trial Chamber II, 5 March 2008, p. 5.
42) Ibid., p. 3.
have an impact on crucial issues before the Chamber”. PTC II consequently deemed it appropriate to receive the views of those who are allegedly concerned by the notification at hand in order to properly “determine the potential impact, if any, of the proposed activities on issues before the Chamber and to ensure the proper conduct of the proceedings”. The Chamber held that victims permitted to participate could make observations through their legal representatives, and that at the present stage in proceedings it was “adequate and sufficient for the general interests of the Defence to be represented by the OPCD”.

The OPCD’s standing concerning Trust Fund notifications has equally been confirmed by PTC I in the DRC situation. The Chamber based its decision on the sole ground that it would benefit from the OPCD’s observations on the Trust Fund notification at issue.

3.2. Issues Raised by ad hoc Counsel for the Defence

Prior to their provision in the governing texts of the ICC, ad hoc counsel charged with representing the general interests of the defence had not existed at any international criminal tribunal; as such, the first lawyers appointed ad hoc counsel lacked the guidance of precedents and an underlying jurisprudence to define the extent of their mandate once appointed. However, as the following sections illustrate, the Pre-Trial Chambers have been quick to restrict the procedural standing of individual ad hoc counsel, rejecting submissions on issues not expressly addressed in the decision authorising his or her appointment but deemed necessary by counsel for the diligent performance of those tasks assigned to them.

3.2.1. Jurisdiction of the Court and Admissibility of a Case under Article 19(2)(a) of the Statute

Following his appointment in the DRC situation on 5 August 2005 pursuant to Article 56 of the Statute, the ad hoc counsel filed his confidential submissions with PTC I on 22 August 2005; in these submissions he challenged, inter alia, the jurisdiction of the Court and admissibility pursuant to Article 19(2) of the Statute. However, in its decision dated 10 November 2005 PTC I, referring to the wording of Article 19(2)(a), determined that

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43) Ibid., p. 4.
44) Ibid.
45) Ibid.
46) Situation in the Democratic Republic of Congo, Decision on the time limit for the filing of observations on the Notification by the Board of Directors of the Trust Fund for Victims, ICC-01/04-441, Pre-Trial Chamber I, 5 February 2008, p. 3.
47) Situation in the Democratic Republic of Congo, Decision following the Consultation held on 11 October 2005 and the Prosecution’s Submission on Jurisdiction and Admissibility filed on 31 October 2005, ICC-01/04-93, Pre-Trial Chamber I, 9 November 2005, pp. 2-3 (summarising the “Ad hoc Defence Counsel’s Submission pursuant to the Decision of Pre-Trial Chamber I on the
challenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19(2)(a) of the Statute may only be made by an accused person or a person for whom a warrant of arrest or summons to appear has been issued under article 58.\textsuperscript{48}

As at that stage of the proceedings neither a warrant of arrest nor a summons to appear had been issued, and as such no case had arisen, the Chamber concluded that the \textit{ad hoc} counsel lacked procedural standing to make a challenge under Article 19(2)(a).\textsuperscript{49}

Despite that decision, the jurisdiction and admissibility were again challenged before PTC I in relation to the situation in Darfur by another \textit{ad hoc} Counsel, and later by the OPCD. The former, appointed as \textit{ad hoc} counsel to represent the general interests of the defence during the proceedings pursuant to Rule103 of the Rules of the Court, filed a submission in which he exclusively discussed the jurisdiction of the Court and admissibility and requested PTC I to declare the Court’s lack of jurisdiction and the “inadmissibility”.\textsuperscript{50} Adopting the same reasoning it had employed in its previous finding in the DRC situation, PTC I rejected the \textit{ad hoc} counsel’s requests, reiterating that \textit{ad hoc} counsel for the defence had no standing to challenge either the Court’s jurisdiction or admissibility under Article 19(2)(a).\textsuperscript{51} In its submissions filed confidentially on 8 June 2007, the OPCD similarly attempted to challenge the jurisdiction of the Court as part of its response to a set of victims’ applications under Rule89.\textsuperscript{52} Once again, PTC I denied the request on the grounds that the OPCD does not fall within any of the categories of parties authorised to challenge or submit observations on the Court’s jurisdiction set out in Articles 19(2) and (3).\textsuperscript{53} Other than an accused or persons for whom a warrant of arrest or summons to appear have been issued, authorised parties comprise States which have jurisdiction over the crime and States whose acceptance of jurisdiction is required under Article 12 of the Statute,
as well as victims and those who referred the situation to the Court under Article 13 of the Statute.

3.2.2. Attendance of an On-site Meeting

Following the ad hoc counsel’s appointment in the situation in Darfur, the Office of the Prosecutor (OTP) filed a notification of its intention to meet with several individuals arrested and detained in Sudan. In response to this notification, the ad hoc counsel observed that any such meetings “must be conducted in the presence of the Defence”, and therefore requested that he be granted leave “to attend all criminal proceedings in the Situation in Darfur” including “questioning, interviewing witnesses and victims [and] witness confrontations”; he further requested PTC I to order the OTP to inform him of any proceedings it intended to consider pursuing, as well as to invite him to attend and participate in all proceedings in the situation in Darfur in order to safeguard the rights of the defence. In its decision dated 2 February 2007 PTC I rejected the ad hoc counsel’s requests, noting that his mandate as ad hoc counsel was strictly restricted to the proceedings pursuant to Rule 103 of the Rules of Procedure and Evidence, and that this mandate did “not extend automatically to other proceedings at the pre-trial stage set out in the Statute and Rules”. As such, PTC I held that the ad hoc counsel’s requests fell “out of the parameters of his legally assigned responsibilities”.

The ad hoc counsel subsequently requested leave to appeal the Chamber’s decision, claiming, inter alia, that the decision violated Article 56(2)(d) of the Statute by restricting his mandate as ad hoc counsel to the proceedings pursuant to Rule 103, and that such restrictions on the role of defence counsel are inconsistent with the principle of independence of counsel, and so violated Articles 5 and 6 of the Code of Professional Conduct for counsel. However, on 21 February 2007 PTC I refused leave to appeal, reiterating that the ad hoc counsel’s mandate was restricted to the specific proceedings under Rule 103 and so was “clearly not

54) Situation in Darfur, Sudan, Application Requesting the Presence and Participation of the Ad Hoc Counsel for the Defence During the Proceedings that the Office of the Prosecutor will Undertake in Sudan, ICC-02/05-41-tEN, 18 December 2006, p. 2.
55) Ibid., p. 3.
56) Ibid.
57) Situation in Darfur, Sudan, Decision on the Ad hoc Counsel for Defence Request of 18 December 2006, ICC-02/05-47, Pre-Trial Chamber I, 2 February 2007, p. 5.
58) Ibid.
59) Situation in Darfur, Sudan, Application Requesting Leave to Appeal from the Decision Rendered on 02/02/2007 on the Application filed by the Defence Requesting „the presence and participation of the Ad Hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan‟, ICC-02/05-48-tEN, 4 February 2007, pp. 4-5.
60) Ibid., p. 8. Articles 5 and 6 of the Code of Professional Conduct for counsel deal with, respectively, the solemn undertaking required of counsel before taking office, and the independence of counsel.
related” to Article 56(2)(d), and dismissing his reliance on Articles 5 and 6 of the Code of Conduct as “misconceived”.

One of the practical implications for ad hoc counsel found to have acted beyond the scope of his or her mandate is the possibility that the Registry refuses payment of counsel’s fees for the time spent working on matters regarded as falling outside the parameters of his or her legally assigned responsibilities. Such action was taken by the Registry against the ad hoc counsel following the above decisions, when he received no payment of legal fees for work carried out in December 2006 and January 2007, the Registry’s position and action were subsequently approved by PTC I.

3.2.3. Transmission of Report on Victims’ Applications Submitted to a Chamber by the Registry Pursuant to Regulations 86(5) and (6) of the Regulations of the Court
Following the effective grant of automatic standing to it by PTC I in matters relating to victims’ applications under Rule89 in the situations in the DRC and Darfur, the OPCD has contributed considerably to the discussions on the extent of the information to which it is entitled in these proceedings. It is at least arguable that, as individual ad hoc counsel were appointed by PTC I to represent the general interests of the defence in these proceedings before the OPCD became fully operational and have continued to be appointed by PTC II, they could be so appointed again in other situations, and the jurisprudence that has developed around this matter could be relevant to future ad hoc counsel as to OPCD counsel.

In July 2007, in a decision authorising the filing of observations by the OPCD on victims’ applications in the DRC situation, PTC I ordered the Registrar to provide the OPCD with a copy of a report submitted to the Chamber by the Registrar pursuant to regulations 86(5) and (6) of the Regulations of the Court.

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62) Ibid., p. 7.
63) Situation in Darfur, Sudan, Letter from the Head of Division of Victims and Counsel to Mr. Hadi Shalluf, ICC-02/05-60-Anx3, 13 February 2007.
65) Situation in the Democratic Republic of the Congo, Decision authorising the filing of observations on applications for participation in the proceedings, Pre-Trial Chamber I, 17 July 2007, ICC-01/04-358-tENG, p. 4. Regulations 86(5) and (6) of the Regulations of the Court provide as follows:

5. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.
The legal representative of the victims requested, *inter alia*, that PTC I suspend the transmission of the Registrar’s report to the OPCD, in response to which the OPCD submitted that “if the Chamber is of the view that it is either necessary or useful for it to utilize to Report of the Registry in formulating its decision, it follows that it would also be necessary or useful to the parties to access this information.” This reasoning was, however, rejected by PTC I, which noted that its only obligation under Rule 89(1) is “to order the Registry to provide the Prosecution and defence with copies of the [victims’] applications, such that they may make observations on the applications within a time limit set by the Chamber”; finding that neither Rule 89, nor any other provision, directs the Chamber to order transmission of the Registrar’s report to the participants, and that “the function of the Report is to assist the Chamber in issuing only one decision on a number of applications”, PTC I reversed its earlier order for transmission of the Registrar’s report to the OPCD. In a decision issued a few days later in the situation in Darfur, PTC I reiterated its findings from the earlier decision, and consequently rejected the OPCD’s request that the Registry be ordered to transmit the report on the relevant victims’ applications to the OPCD.

3.2.4. *Access to Filings of Previous ad hoc Counsel*

In the event that *ad hoc* counsel is appointed in a situation where another *ad hoc* counsel has previously been appointed by a Chamber for similar or related purposes, the question may arise whether the newly-appointed counsel is entitled to receive those documents that have been disclosed and/or submitted by the earlier *ad hoc* counsel. In favour of this practice is the consideration that “it would be unduly repetitive and a waste of resources for [counsel] to repeat factual and legal submissions which have already been raised by either the *ad hoc* counsel

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6 Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with Rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.


68) ICC-01/04-374, supra note 33, para. 35.


71) ICC-02/05-93, supra note 36, pp. 3–4 (referring to the confidential submission received from the OPCD, i.e. *Situation in Darfur, Sudan*, Request for Access to the Report of the Registry, and an Extension of Page Limit, ICC-02/05-87-Conf, OPCD, 01 August 2007).
or the Prosecution”, 72 and access to the previous filings would help avoid such repetition. This argument was raised by the OPCD pursuant to its mandate to respond to further information requested from victim-applicants by the Registrar in the DRC situation. 73

However, noting that the scope of the OPCD’s mandate in these particular proceedings was limited by its order of 24 August 2007, 74 PTC I found that, contrary to the OPCD’s submissions, 75 this mandate did not constitute a continuation of that of the ad hoc counsel. 76 As a result, it was held that the OPCD was “not automatically entitled to receive any documents which were conveyed to the ad hoc Counsel for the defence”; 77 the Chamber further found that “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses” and that for this reason “the OPCD should abstain from directly contacting the former ad hoc Counsel for the Defence”. 78 The OPCD subsequently filed a request with PTC I for clarification of the scope of these findings as well as “the scope and correlation between the respective mandates of the ad hoc counsel for the Defence, and the OPCD”, 79 though this request was rejected because the Chamber regarded its previous statements on the matter to have been sufficiently clear. 80 That said, in the instant proceedings PTC I ultimately granted the OPCD access to several confidential filings previously made by ad hoc counsel in relation to four particular victims’ applications. 81

3.2.5. Contact between the OPCD and Former ad hoc Counsel for the Defence

On 24 December 2007, PTC I granted numerous applicants the status of victims authorised to participate in the proceedings at the investigation stage of the situation in the DRC. 82 Prior to this decision the ad hoc counsel and the OPCD had

72) See the OPCD’s submission in Situation in the Democratic Republic of Congo, Request for Access to Previous Filings, and an Extension of the Page Limit and Time Limit, ICC-01/-04-379, OPCD, 29 August 2007, para. 11.
73) Ibid. For the OPCD’s mandate, see ICC-01/04-376, supra note 29.
74) ICC-01/04-376, supra note 29.
75) Ibid., para. 21.
76) Situation in the Democratic Republic of Congo, Decision on the request by the OPCD for access to previous filings, ICC-01/04-389, Pre-Trial Chamber I, 11 September 2007, pp. 6-7.
77) Ibid.
78) Ibid., p. 7.
80) Situation in the Democratic Republic of Congo, Decision on the request for clarification by the OPCD, ICC-01/04-403, Pre-Trial Chamber I, 3 October 2007, p. 4.
81) ICC-01/04-389, supra note 76, p. 8.
82) Situation in the Democratic Republic of Congo, Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06
filed their respective observations on several of these victims’ applications. In light of PTC I’s earlier statement that the OPCD should abstain from contacting the former ad hoc Counsel without the Chamber’s permission, the OPCD requested, on an urgent basis, leave to communicate with the ad hoc counsel concerning the public legal and procedural aspects of the December 2007 decision, in order to “coordinate a prospective request for leave to appeal regarding these applications, which ensures that the general interests of the defence are protected in a consistent manner”.

Yet again, the Duty Judge declined this request on the ground that the requirements of urgency and appropriateness provided in Regulation 17(2)(b) of the Regulations of the Court for the duty judge to be responsible for dealing with the request had not been met. The urgency of the matter raised by the OPCD’s request was rejected on the grounds that the former ad hoc counsel was at that time aware of the pending deadline for filing a request for leave to appeal and that “in case of need of support and assistance, [he] may approach the OPCD”; whereas the appropriateness of the matter was dismissed for the reason that it had already been dealt with in PTC I’s decision of 24 December 2007 explaining how the OPCD should proceed in such scenario.

4. Appointments of ad hoc Counsel in a Case

In contrast to the wide remit given to the ICC in respect of situations (and more in keeping with the ‘normal’ jurisdiction of domestic criminal tribunals), cases comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified
suspects, and entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear. However, whilst the case stage of proceedings are concerned with the acts of specified individuals, the ICC has still found reason to appoint ad hoc counsel in cases where the accused have not at that time been represented by defence counsel.

4.1. Purpose of Appointments

4.1.1. Responding to Victims’ Applications for Participation in the Proceedings: Rule 89(1) of the Rules of Procedure and Evidence

As Rule 89(1) of the Rules of Procedure and Evidence invites applications for participation as a victim in the proceedings without imposing any restriction on the stage of proceedings, applications of this kind have been filed in cases as well as in situations. As previously discussed, the Pre-Trial Chambers have appointed ad hoc counsel on several occasions in situations for the purpose of responding to victims’ applications under Rule 89. Similarly, this was also done in the cases The Prosecutor v. Joseph Kony et al., The Prosecutor v. Omar Hassan Ahmad Al Bashir, and The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”).

4.1.2. Submitting Observations on the Admissibility of the Case

On 21 October 2008, following enquiries relating to the status of the execution of the arrest warrants for Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, PTC II initiated proceedings under Article 19(1) of the Statute to determine the admissibility of the case. In its decision of that date,

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89) Situation in the Democratic Republic of Congo, Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, para. 65.
90) See 3.1.2., supra.
91) See ICC-02/04-01/05-134, supra note 37; ICC-02/04-01/05-312, supra note 37; ICC-02/04-01/05-375, supra note 37.
92) The Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision ordering the parties to submit their observations on the applications for victims’ participation in the proceedings, ICC-02/05-01/09-38, Pre-Trial Chamber I, 1 September 2009. The mandate of the particular ad hoc counsel was extended to file observations on two further sets of applications: see In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision ordering the parties to submit their observations on applications a/0443/09 to a/0450/09 for participation as victims in the proceedings, ICC-02/05-01/09-50, Pre-Trial Chamber I, 9 November 2009; In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision setting a time limit for the parties’ replies to 8 applications for victims’ participation in the proceedings, ICC-02/05-01/09-85, Pre-Trial Chamber I, 26 May 2010.
94) See 4.3.1. below.
PTC II invited the Republic of Uganda, the Prosecutor and those victims who had already communicated with the Court with respect to the case (either in person or through their legal representatives) to submit their observations on the admissibility of the case.  

Furthermore, the Chamber appointed an *ad hoc* counsel and similarly invited him to submit observations on the admissibility.

### 4.2. Issues Raised by *ad hoc* Counsel for the Defence

As with *ad hoc* counsel appointed in a situation, those *ad hoc* counsels appointed in a case are restricted in the performance of their duties by their status and the extent of their respective mandates. However, as has been revealed in the proceedings connected to the *Joseph Kony et al.* case, further uncertainty arises at the case stage over to what extent, if any, *ad hoc* counsel’s duties derive from the client-counsel relationship, and as such are governed by the Code of Professional Conduct for Counsel.

#### 4.2.1. Transmission of Reports on Victims’ Applications Submitted to a Chamber by the Registry Pursuant to Regulations 86(5) and (6) of the Regulations of the Court

The *ad hoc* counsel appointed to respond to the first set of victims’ application to participate in the *Omar Hassan Ahmad Al Bashir* case requested, *inter alia*, the transmission of the report prepared by the Registry on the applications. On 15 December 2009 PTC I dismissed this request, noting that there was no compelling reason for it to depart from the precedent set by the Chamber on 17 August 2007 in its “Decision on the Requests of the Legal Representatives of Applications on application process for victims’ participation and legal representation” in the situation in the DRC. There being no express provision in the Statute or Rules for the Chamber to order the Registry to transmit the Report to the participants, and the function of the Report being to assist the Chamber in issuing only one decision on a number of applications, PTC I held that “the confidentiality of the Reports is to be maintained and they shall only be transmitted to the Chamber and not to the parties or participants”.

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95) In the Case of the Prosecutor v. Joseph Kony et al., Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the defence, ICC-02/04-01/05-320, Pre-Trial Chamber II, 21 October 2008, p. 8.

96) Ibid.

97) See 4.3. below.

98) In the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Observations de la Défense sur les demandes de participation en qualité de victimes des demandeurs a/0011/06, a/0013/06 et a/0015/06, ICC-02/05-01/09-45, 28 September 2009 (not available online).

99) In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for participation in the proceedings at the pre-trial stage of the case, ICC-02/05-01/09-62, Pre-Trial Chamber I, 15 December 2009, para. 17.

100) Ibid., para. 18.
4.2.2. Access to Non-redacted Versions of Applications

In the same set of proceedings, the *ad hoc* counsel twice requested access to non-redacted versions of victims’ applications, which requests were dismissed by PTC I on 15 December 2009 and 28 January 2010 respectively. In its decision of 28 January 2010, in a direct quotation from the earlier decision, PTC I noted that

the issue of redacting confidential information from the applications before transmitting them to the Prosecution and/or to the Defence necessitates the balancing of competing obligations: (i) the obligation under Article 57(3)(c) and 68(1) of the Statute to protect *inter alia* the safety, privacy, physical and psychological well-being of victims and witnesses; (ii) the general obligation to ensure fairness of the proceedings; and (iii) the requirement under Rule 89(1) of the Rules to transmit copies of the applications to the Prosecution and to the Defence, who shall be entitled to reply.

PTC I went on to say that the applicants were by that time refugees, and that they alleged that they feared for their own security and/or for that of their family members, who were still living in Sudan and who may be put at risk on account of the individual applicant’s involvement with the Court. In the circumstances, the applicants’ allegations were sufficient for PTC I to uphold the redactions and dismiss the *ad hoc* counsel’s request.

4.2.3. Authorisation to Submit Observations in Response to an Application to Participate as Amici Curiae Pursuant to Rule 103 of the Rules of Procedure and Evidence

On 15 June 2010 the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed an application with PTC I to submit observations as *amici curiae* in the *Omar Hassan Ahmad Al Bashir* case on the issue of whether there existed reasonable grounds to issue an additional warrant for charges of genocide. As her mandate is currently restricted to responding to


103) *In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the observations submitted by the *ad hoc* counsel for the defence in relation to applications a/0443/09 to a/0450/09 for participation in the proceedings, ICC-02/05-01/09-72, Pre-Trial Chamber I, 28 January 2010.


106) *In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Application under Rule 103 to participate in the proceedings before the Pre-Trial Chamber concerning the Prosecutor’s application to add genocide charges, ICC-02/05-01/09-88, 15 June 2010.
victims’ applications under Rule 89 of the Rules of Procedure and Evidence, the *adhoc* counsel recently requested permission to respond to this application pursuant to Rule 103(2).\textsuperscript{107} This motion is still pending.

4.2.4. *Challenge of Comments Made by the Prosecutor in a Newspaper Article*

On 6 August 2010, the same *adhoc* counsel brought to PTC I’s attention an article authored by the Prosecutor that had been published in the British newspaper “*The Guardian*” on 15 July 2010,\textsuperscript{108} following the issuance of an arrest warrant for Omar Hassan Ahmad Al Bashir for the crime of genocide. The *adhoc* counsel argued that the Prosecutor’s comments led the public to believe that Al Bashir was guilty of genocide, thereby denying the suspect’s presumption of innocence and making a fair trial impossible;\textsuperscript{109} she therefore requested the Chamber to condemn the Prosecutor’s declarations made in *The Guardian* and to take all the measures deemed appropriate.\textsuperscript{110} However, PTC I noted that the request did not relate to any proceedings connected to victims’ applications for participation, and declared her request inadmissible on the ground that it fell outside the scope and purpose of her mandate.\textsuperscript{111}


In the case of *The Prosecutor v. Joseph Kony et al.*, the Appeals Chamber was called for the first time to rule on issues relating to the status and practice of *adhoc* counsel. Whilst the appeals proceedings were ostensibly limited to the *adhoc* counsel’s participation in the instant admissibility proceedings, the Appeals Chamber addressed several substantive and procedural issues of central importance to the system of *adhoc* counsel at the ICC.

\textsuperscript{107} *In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Requête de la Conseil ad hoc de la Défense pour permission de répondre à la procédure intitulée: «Application under Rule 103 to Participate in the Proceedings before the Pre-Trial Chamber concerning the Prosecutor’s Application to Add Genocide Charges», ICC-02/05-01/09-92, 2 July 2010.

\textsuperscript{108} Luis Moreno-Ocampo, ‘Now end this Darfur denial - We have laid charges for genocide. The UN must seize the moment to act for the victims of Sudan’, *The Guardian*, 15 July 2010, <www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur>, 15 September 2010.

\textsuperscript{109} *In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Requête pour l’obtention d’une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010, ICC-02/05-01/09-103, 5 August 2010, paras. 7-9 and 18-21.

\textsuperscript{110} Ibid., para. 30.

4.3.1. Appointment of ad hoc Counsel for the Defence and Initial Proceedings Brought by ad hoc Counsel

On 21 October 2008, PTC II initiated proceedings under Article 19(1) of the Statute to determine the admissibility of the case The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen. In inviting the Republic of Uganda, the Prosecutor and particular victims to submit their observations on the admissibility of the case by 10 November 2008, the Chamber also appointed an ad hoc counsel, arguing that:

in the present circumstances, where none of the persons for whom an arrest warrant has been issued is yet represented by a defence counsel, appointment of a counsel for the defence to represent those persons within the context and for the purposes of the present proceedings is in the interest of justice.

On 28 October 2008, the ad hoc counsel filed an application with the Presidency to review his appointment, and incidentally to clarify his mandate as ad hoc counsel in the admissibility proceedings, under its power to review a decision of the Registrar to refuse a request for assignment of counsel; additionally, he requested an order from the Presidency for a conditional stay/suspension of the proceedings pending its decision.

That same day, the ad hoc counsel filed with PTC II a request for a stay of the admissibility proceedings pending the outcome of the Presidency’s review, with the alternative request for PTC II to reclassify several filings and transcripts from specified hearings concerning the issue of the arrest warrants, and accordingly to extend the time limit for submitting the observations on admissibility. He argued inter alia that the conditional stay was necessary to

ensure that Counsel’s actions … do not irreversibly prejudice the ability of any of the four defendants to exercise their right to effectively challenge the admissibility at a later stage of the proceedings [and] to ensure that Counsel is able to perform his functions in a manner that does not violate his obligations under the Code of Professional Conduct for Counsel at the ICC.

On 31 October 2008, PTC II issued its decision rejecting the request for the stay, stating that, as the current admissibility proceedings had been initiated by

112) ICC-02/04-01/05-320, supra note 95.
113) Ibid., at 8; see 4.1.2. supra.
114) In the Case of the Prosecutor v. Joseph Kony et al., Request for review of Counsel’s appointment by the Registrar in accordance with Pre-Trial Chamber’s Decision of 21 October 2008 and request for conditional stay/suspension of proceedings, ICC-02/04-01/05-326, 28 October 2008.
116) Ibid., para. 18.
the Chamber on its own motion and as such were without prejudice to the defendants’ rights under Article 19(2)(a) of the Statute, a stay was neither required or appropriate to ensure the fairness of the proceedings at that time. Instead, on the basis of the alternative requests PTC II declassified and ordered the disclosure of specified material to ad hoc counsel for the defence, and extended the deadline for all parties to submit observations in the proceedings to 18 November 2008. The ad hoc counsel filed his request for leave to appeal this decision with PTC II on 9 November 2008.

However, on 11 November 2008 the Presidency issued its decision rejecting the ad hoc counsel’s application for review. Two days later, and largely because of this decision, PTC II rejected the ad hoc counsel’s request for leave to appeal the Chamber’s decision of 31 October 2008.

4.3.2. Ad hoc Counsel’s Observations in the Admissibility Proceedings and Pre-Trial Chamber II’s Decision on the Admissibility of the Case

The ad hoc counsel subsequently filed his observations in the admissibility proceedings with PTC II on 18 November 2008. However, rather than making submissions on the substantive issue of the admissibility of the case, he expressed his interpretation of the scope of his mandate as ad hoc counsel. He stated, in particular, that:

[i]n accordance with the terms of [the decision of 21 October 2008] Counsel has been appointed to “represent” the four defendants. Thus, all defendants are in fact his clients within the meaning of Article 2(2) of the Code of Professional Conduct for counsel, which provides that “[i]n this code…'client’ refers to all assisted or represented by counsel” (emphasis added). In light of the wording of Article 12(1)(a) of the Code of Professional Conduct for counsel, Counsel therefore submitted in his Request for Review [of 28 October 2008] that the foreseeable conflict of interest resulting from the representation of four defendants in the same criminal proceedings – provokes unavoidable breaches of Articles 12, 14, 15 and 16 of the Code of Professional Conduct for counsel, and thus also endangers the rights of each of the defendants to be represented effectively under the rule of law.

118) To facilitate the handing down of this decision before the deadline for submitting observations on admissibility to PTC II had passed, no reasons were given on that day. See In the Case of the Prosecutor v. Joseph Kony et al., Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of Pre-Trial Chamber II of 21 October 2008 and the conditional stay/suspension of the proceedings, ICC-02/04-01/05-344, The Presidency, 11 November 2008.
120) In the Case of the Prosecutor v. Joseph Kony et al., Submission of observations on the admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-350, 18 November 2008.
121) Ibid., para. 34.
On 10 March 2009 PTC II issued its decision on the admissibility of the case. In relation to the ad hoc counsel’s submissions, it made the following observations:

The Chamber confirmed the Pre-Trial Chambers’ discretion to bring proprio motu review of the admissibility of a case, though appeared to accept that, in the absence of those persons sought by the Court, a crucial element in the exercise of that discretion is that the Chamber bears in mind the interests of the suspect.\(^{122}\) PTC II also stressed that the exercise of its power under Article 19(1) of the Statute to bring proprio motu review did not prejudice the suspect’s (or other entitled parties’) right to challenge the admissibility of the case under Article 19(2). Furthermore, and by its nature, “the determination of the admissibility of a case is subject to change as a consequence of a change in circumstances”,\(^{123}\) and the statutory framework clearly envisaged that the issue of admissibility may be discussed more than once in the course of proceedings. As such, the Chamber felt there was no merit in the ad hoc Counsel’s concern that the defendants would face a heightened risk of judicial pre-determination on the matter of admissibility. Finally, it observed that the appointment of the ad hoc counsel in the proceedings was a clear method of ensuring that the interests of the defendants were born in mind and safeguarded whilst the defendants remained at large. It continued that the relevance and validity of arguments raised by the ad hoc counsel in proceedings for which he or she is appointed in the interests of justice are confined to those proceedings and, accordingly, should not prejudice the arguments which the defence may put forward at a later stage.\(^{124}\)

Having dismissed the ad hoc counsel’s concerns and in light of the substantive observations of the other parties on the matter of admissibility, PTC II determined that at the current stage the case was admissible under Article 17 of the Statute.\(^{125}\)

4.3.3. The Presidency’s Reasons for its Decision of 11 November 2008 and its Request to the Registrar to Explore Institutional Mechanisms for Providing Ethical Advice to Counsel

Also on 10 March 2009, the Presidency handed down its reasons for its decision of 11 November 2008.\(^{126}\) It noted that the ad hoc counsel was appointed as ad hoc

\(^{122}\) In the Case of the Prosecutor v. Joseph Kony et al., Decision on the admissibility of the case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 March 2009, para. 22.

\(^{123}\) Ibid., para. 27.

\(^{124}\) Ibid., para. 32.

\(^{125}\) Ibid., p. 27.

\(^{126}\) In the Case of the Prosecutor v. Joseph Kony et al., Reasons for the Decision on the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as
counsel for the defence by PTC II, having been expressly named in the Chamber’s decision, and that the role played by the Registrar was simply that of executing this appointment.\(^{127}\) Also, the consultative role that the Registrar had played prior to PTC II’s decision was limited to providing the Chamber with a list of names and files of counsel matching specific criteria previously laid down by the Chamber when it had informed the Registrar that it was considering the appointment of defence counsel in the context of the situation.\(^{128}\) In the circumstances, the Presidency found that the \textit{ad hoc} counsel’s appointment was not amenable to review under Rule 21(3) of the Rules of Procedure and Evidence.

However, the Presidency also considered the \textit{ad hoc} counsel’s submission that the governing texts of the ICC do not provide for any advisory mechanism through which counsel may obtain advice or a ruling on matters of professional ethics,\(^{129}\) and noted that:

\[\text{in contrast to counsel acting at the national level who have the ability to consult their national bar associations or other relevant bodies on matters of professional ethics, no similar system is provided for at the Court. Noting the terms of rules 16 and 20 [of the Rules of Procedure and Evidence], the Registrar is required to explore institutional mechanisms whereby counsel may seek advice on questions of professional ethics and update the Presidency thereon.}^{130}\]

4.3.4. The Appeals Chamber’s Judgment of 16 September 2009

On 15 April 2009, the \textit{ad hoc} counsel filed his grounds of appeal against the PTC II’s admissibility decision of 10 March 2009,\(^{131}\) requesting that the Appeals Chamber either reversed the decision, or directed PTC II to reconsider the admissibility of the case under Article 19(1) of the Statute in a manner which properly respects the defendants’ right to effectively participate in the proceedings.

The Appeals Chamber delivered its judgment, dismissing the appeal in its entirety and upholding the PTC II’s decision, on 16 September 2009.\(^{132}\) In particular, and with regard to the first ground of appeal dealing with the nature and scope of \textit{ad hoc} counsel’s mandate, the Appeals Chamber distinguished between the mandate of counsel appointed to represent the general interests of the defence, and that of counsel appointed to represent suspects as individuals. It noted that

\[^{127}\text{Ibid.}, \text{para. 30.}\]
\[^{128}\text{Ibid.}, \text{para. 32.}\]
\[^{129}\text{See ICC-02/04-01/05-326, supra note 114, para. 20.}\]
\[^{130}\text{ICC-02/04-01/05-378, supra note 126, para. 33 (emphasis added).}\]
\[^{131}\text{In the Case of the Prosecutor v. Joseph Kony et al., Refiled document in support of “Defence Appeal against ‘Decision on the admissibility of the case under Article 19(1) of the Statute’ dated 10 March 2009”, ICC-02/04-01/05-394, 15 April 2009.}\]
\[^{132}\text{In the Case of the Prosecutor v. Joseph Kony et al., Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under 19(1) of the Statute” of 10 March 2009, ICC-02/04-01/05-408, Appeals Chamber, 16 September 2009.}\]
in circumstances where suspects are at large, counsel appointed to represent their interests generally falls into the former category. The Appeals Chamber found that in such circumstances, counsel cannot speak on the suspects’ behalf and does not act for or as agent of the suspects; thus, “a client and counsel relationship does not exist between them”. From this it follows that:

Counsel’s mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel.

In the context of the instant admissibility proceedings, the Appeals Chamber noted that, in the absence of any contact or communication between the ad hoc counsel and the defendants, PTC II could not have envisaged that the former should actually represent, or act on behalf of, the latter, and as such the ad hoc counsel’s mandate was clearly limited to representing the general interests of the defence.

As to PTC II’s decision to commence proprio motu admissibility proceedings under Article 19(1) of the Statute, the Appeals Chamber noted that when reviewing the exercise of discretion by a Pre-Trial Chamber it will only interfere with a determination based upon such discretion when “it is vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.” The Chamber found that, as PTC II had given sufficient weight to the rights of the four defendants (including by the appointment of ad hoc counsel to represent the interests of the defence), and as nothing in the admissibility proceedings could be shown to impair the right of the defendants to challenge the admissibility of the case at a later stage, it had exercised its discretion in a fair and lawful manner. The Appeals Chamber went on to say that, as the purpose of the admissibility proceedings had been restricted to clarifying whether it was the ICC or national authorities who had ultimate jurisdiction to determine the admissibility of the case, and as there had been no change in circumstances from when the warrants of arrest had been issued against the defendants to the commencement of the proceedings, there was no indication that PTC II made any determination that could potentially prejudice a later challenge by any of the defendants.

133) Ibid., para. 56.
134) Ibid.
135) Ibid. (emphasis added).
136) Ibid., para. 59.
137) Ibid., para. 80.
138) Ibid., para. 86.
5. The Impact of the System of *ad hoc* Counsel on the Fairness of Proceedings

It seems clear, both from the practice at the ICC and the underlying theory, that the Pre-Trial Chambers regard the role and participation of *ad hoc* counsel as essential to ensuring that the interests of justice are served either when suspects have not yet been identified at the ‘situation’ stage of proceedings, or when identified suspects have not yet been surrendered to the Court. However, this acceptance is no guarantee that *ad hoc* counsel actually promote equality of arms through adequately and effectively serving the general interests of the defence. How well these interests have been safeguarded can only be tested once a suspect and his or her respective defence counsel come before the Court. As has already been discussed in this article, the limited mandate afforded to individual *ad hoc* counsel on appointment imposes significant restrictions on how counsel conducts him or herself before the Court. The crisis which nearly jeopardized the commencement of the *Lubanga* trial revealed that these restrictions potentially undermine the well-intentioned efforts to foster equality of arms throughout proceedings.

The proceedings in the *Lubanga* case came to a dramatic halt on 13 June 2008 when PTC I imposed a stay on the proceedings, only ten days before the scheduled start of the trial. The Chamber found “wholesale and serious abuse” by the prosecution team of evidence obtained confidentially under Article 54(3) (e) of the Statute, whilst the Prosecution is generally allowed to obtain and retain information under a confidentiality agreement with the provider of the information “solely for the purpose of generating new evidence”, the prosecution in this case had failed to disclose to the accused exculpatory materials obtained confidentially. In the subsequent Appeals Chamber decision on the matter of 21 October 2008, the Appeals Chamber upheld the principle that:

> the prosecution cannot use Article 54(3)(e) confidentiality agreements in a broad attempt to generate sweeping evidence against the accused at trial … Confidential evidence cannot serve as foundational evidence at trial and should not be the backbone of the investigation.  

It has been argued that the limited mandate afforded to *ad hoc* counsel acting in the DRC situation contributed to PTC I being compelled to impose a stay so

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139) *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.


soon before the scheduled start of trial; as *ad hoc* counsel were never appointed for
the specific purpose of addressing issues relating to Article 54(3)(e) the defence
had no opportunity to challenge the Prosecutor’s misinterpretation and misuse of
Article 54(3)(e) confidentiality agreements during the situation stage of proceed-
ings.\(^{143}\) Indeed, it was only in late 2007 (well over a year after Lubanga’s surrender
and first appearance before PTC I) that the Prosecutor first informed the Chamber
of the confidential exculpatory materials; prior to this, Lubanga’s defence counsel
was unaware of the existence of such evidence.

In addition to the issue of *ad hoc* counsel’s limited mandate, the ‘disjointed’
structure of the defence system at the ICC, with representation divided between
ad hoc and ‘true’ defence counsel, can be seen to undermine the formation of a
consistent defence strategy throughout the various stages of proceedings. For
example, in the *Joseph Kony et al.* case there have been three separate ad hoc coun-
sel appointed in three separate sets of proceedings, none of whom have had any
communication with the suspects, or with each other. What is more, if the sus-
pects are eventually brought before the Court and assigned defence counsel to
represent them, these counsel will still have to build their defence case from noth-
ing, as there is no procedure governing the transfer of previously disclosed materi-
als from ad hoc counsel to defence counsel. It is at least arguable that the conveyance
of such files is required pursuant to Article 18(5) of the Code of Conduct once
defence counsel is assigned to represent an accused,\(^{144}\) though since the Appeals
Chamber has held that the Code of Conduct is not directly applicable to ad hoc
counsel’s representation further clarification would be required to determine
whether this specific provision can be invoked in the above situation.

Perhaps a better approach would be for the Pre-Trial Chambers, in situations
where the representation of ad hoc counsel is required at either the situation or
case stage, to appoint one lead ad hoc counsel with a broader mandate to address
all issues requiring the input of the defence (such as victims’ applications to par-
ticipate, requests for OTP disclosure and admissibility proceedings), and to then
allocate to that lead ad hoc counsel funds for co-counsel, legal assistants and a case
manager to provide support as required for every potential pre-trial procedure.
Then, if the Chambers were to indicate their support for the application of Article
18(5) of the Code of Conduct to the files of ad hoc counsel, the unified file pre-
pared during the appointment of the lead ad hoc counsel could potentially
form the nucleus of any future defence case at the trial of an accused. This
approach is already possible, given the wide discretion afforded by the existing
legal framework to the Pre-Trial Chambers in relation to when and how they
appoint ad hoc counsel, and by encouraging a more consistent approach to the

\(^{143}\) *Ibid.*, paras. 71 and 89.

\(^{144}\) Article 18(5) states that, on termination of his or her representation, “counsel shall convey to
replacement counsel the entire case file, including any material or document relating to it.”
defence at the pre-trial and trial stage could more effectively safeguard the interests of the accused throughout the proceedings.

Of course, delineating the rights and duties of defence counsel at all stages of proceedings at the ICC is crucial to ensuring fearless and effective defence representation, thereby promoting equality of arms and the overall fairness of the proceedings. It is therefore heartening that the Presidency, in its reasoned decision handed down on 10 March 2009, took the initiative in addressing the lack of a professional ethical mechanism at the ICC. The Presidency recognised the conflict that the ad hoc counsel found himself in between the mandate afforded to him by PTC II in the Joseph Kony et al. admissibility proceedings and the professional ethical framework of ICC defence counsel, and acknowledged that the lack of a counsels'/Bar association at the ICC may lead to problems in the functioning of the Court in relation to fair trial-related defence matters. Hopefully, the Presidency’s ruling will soon lead to the establishment of an appropriate body, qualified to deliver authoritative rulings on ethical issues upon a counsel’s request for guidance and advice.

6. Conclusions

It has been shown in this article that, despite the lack of detailed provisions concerning ad hoc counsel in the governing texts of the ICC, the Pre-Trial Chambers have frequently appointed ad hoc counsel to represent the general interests of the defence at both the situation and case stages of proceedings. These counsel have been appointed in a variety of proceedings, ranging from responding on behalf of the defence for the purpose of forensic examinations or victims’ applications to participate in a situation or case; submitting observations on amici curiae briefs or to a notification by the Board of Directors of the Trust Fund for Victims; and making submissions in admissibility proceedings.

From the first appointment of ad hoc counsel in May 2005, numerous issues have arisen relating to the nature and scope of their practice. The Pre-Trial Chambers have been at pains to restrict ad hoc counsels’ individual mandates to the particular proceedings for which they have been appointed; furthermore, the matter of disclosure to and between individual ad hoc counsel has frequently come before the Chambers. In the admissibility proceedings connected to the Kony et al. case, the Appeals Chamber clarified that, even at the pre-trial stage when suspects have been identified, ad hoc counsel are not subject to any client-counsel relationship and consequently the provisions of the Code of Professional Conduct for counsel relating to such relationships are not directly applicable to the exercise of their mandate.

This essay has also suggested that the merits of the system of ad hoc counsel at the ICC must be judged by the impact which the system has on subsequent trial
proceedings. The scandal which led to the temporary stay in the Lubanga proceedings illustrates the negative impact which the current approach to appointing ad hoc counsel can have upon the fairness of proceedings. It remains to be seen how the Chambers will continue to develop the system of ad hoc counsel, though it is hoped that this will be done with a mind to promoting a strong and effective defence strategy throughout the proceedings before the Court.